UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:
	:
v.	: 3:03cr152 (PCD)
	:
ROBERT L. KELLER, JR. and.	:
MICHAEL J. MAZZARIELLO	:

RULING ON DEFENDANT MAZZARIELLO'S MOTION TO DISMISS

Defendant Mazzariello moves to dismiss Counts Four, Five, and/or Six of the indictment on the basis that they violate his rights under the Double Jeopardy Clause. For the reasons discussed herein, Defendant's motion is **denied**.

I. Background

The indictment alleges that Defendants Robert Keller and Michael Mazzariello devised and entered a general scheme to defraud their employer New York Life Insurance Company ("New York Life"). In general the indictment alleges that Defendants had authority to approve payment of invoices submitted to New York Life by vendors, and that they arranged to have a vendor, SoftCraft Laboratories ("SoftCraft"), and a sub-contractor, James Paulsel, submit invoices for services that had not been provided. They also allegedly arranged for another New York Life employee to submit false invoices for payment.

The indictment charges Defendants with three counts of mail fraud (Counts One through Three), three counts of embezzlement from an insurance company (Counts Four through Six), and conspiracy to defraud the United States (Count Seven).

II. Discussion

Mazzariello argues that Counts Four through Six "apparently are based on the same alleged scheme that forms the basis of the mail fraud counts [Counts One through Three]," thereby violating the Double Jeopardy Clause. Def. Mem. at 2. He also alleges that the three embezzlement counts are duplicitous because they derive from "a single course of conduct." Def. Mem. at 4.

A. The Double Jeopardy Clause

The Fifth Amendment Double Jeopardy Clause protects defendants from "multiple punishments for the same offense imposed in a single proceeding." *Jones v. Thomas*, 491 U.S. 376, 381, 105 L. Ed. 2d 322, 109 S. Ct. 2522 (1989) (internal quotation omitted). "An indictment is multiplicitous if it charges the same crime in two counts." *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004). Multiplicitous indictments violate the Double Jeopardy Clause because they subject a person to punishment for a single crime more than once. *United States v. Dixon*, 509 U.S. 688, 696, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993). The determinative issue in a multiplicity analysis is not whether the same conduct underlies separate counts, but whether the offense charged in one count is the same as the offense charged in another count. *United States v. Chacko*, 169 F.3d 140, 146 (2d Cir. 1996).

B. The Mail Fraud and Embezzlement Counts

Counts One through Three allege violations of 18 U.S.C. § 1341 involving mail

fraud.[1] Counts Four through Six allege violations of 18 U.S.C. § 1033(b)(1)(A) involving embezzlement from an insurance company.[2] "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1931). Here, it is clear that each statute requires proof of a fact which the other does not. For example, 18 U.S.C. § 1341 requires proof that Mazzariello's actions involved mail services, and 18 U.S.C. § 1033(b)(1)(A) requires proof that the alleged crimes involved the business of insurance. Defendant provides no basis to conclude that the three mail fraud counts and the three

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[1] The mail fraud statute provides that

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341.

[2] This statute, entitled "Crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce," provides that

> (b) (1) Whoever--
>
> > (A) acting as, or being an officer, director, agent, or employee of, any person engaged in the business of insurance whose activities affect interstate commerce . . .
>
> willfully embezzles, abstracts, purloins, or misappropriates any of the moneys, funds, premiums, credits, or other property of such person so engaged shall be punished as provided in paragraph (2).

18 U.S.C. § 1033(b)(1)(A).

insurance embezzlement counts are multiplicitous. Accordingly, to the extent he contends that these counts violate the Double Jeopardy Clause, his motion to dismiss is **denied**.

C. The Three Embezzlement Counts

Mazzariello argues that Counts Four through Six are multiplicitous, because "these three separate counts of embezzlement, all from the same victim, [are] all apparently part of the same overall scheme . . . [and] potentially expose [Mazzariello] to multiple punishments for a single offense." Def. Mem. at 4. The Government argues that rather than alleging "a broad overarching scheme to defraud New York Life, . . . the embezzlement counts simply allege that through three separate and distinct means the defendants embezzled monies from New York Life." Gov't Opp. at 2.

When the same statutory offense is charged as multiple counts, the proper question is whether Congress intended the counts to constitute separate "units of prosecution." *Bell v. United States*, 349 U.S. 81, 82-83, 99 L. Ed. 905, 75 S. Ct. 620 (1955). Courts interpreting the bank fraud statute, 18 U.S.C. § 1344,[3] have held that "each separate execution of a scheme to defraud may be pled as a distinct count of the indictment." *United States v. Wall*, 37 F.3d 1443, 1446 (10 th Cir. 1994) (citing cases from First, Third, Fifth, Eighth, and Ninth Circuits). "[T]he plain language of § 1344

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[3] The bank fraud statute provides that

> Whoever knowingly executes, or attempts to execute, 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;
>
> shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344.

punishes each execution of a fraudulent scheme." *United States v. Harris*, 79 F.3d 223, 232 (2d Cir. 1996). Although § 1033(b)(1)(A) does not contain the "scheme or artifice" language, the plain language of the statute is directed at punishing each execution of embezzlement.

In analyzing multiplicity challenges in bank fraud context, courts consider "whether a jury could plausibly find that the actions described in the [disputed] counts of the indictment, objectively viewed, constituted separate executions of the [bank fraud] scheme." *United States v. Brandon*, 17 F.3d 409, 422 (1st Cir. 1994). Relevant factors to consider include "the ultimate goal of the scheme, the nature of the scheme, the benefits intended, the interdependence of the acts, and the number of parties involved," *United States v. De La Mata*, 266 F.3d 1275, 1288 (11th Cir. 2001), as well as "whether the acts were chronologically and substantively independent from the overall scheme," *United States v. Harris*, 79 F.3d 223, 232 (2d Cir. 1996).

Defendant argues that *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002) precludes the Government from charging three separate embezzlement counts. In that case, one count charged the defendant with knowing and intentionally structuring transactions exceeding $100,000 to evade tax reporting requirements from May 1996 through May 1997, and another count charged him with the same offense from May 1997 through May 1998. *Handakas*, 286 F.3d at 98. 31 U.S.C. § 5324 "forbids structuring transactions with a purpose of evading certain statutory reporting requirements." *Id.* (quotation omitted). The defendant argued that "the indictment charged that [he] engaged in structuring over two consecutive 12-month intervals, without alleging that he engaged

in two separate structuring schemes." *Id.* at 95. The court rejected the government's argument that the two counts were "separate units of prosecution because the structuring occurred over a 24-month period and involved the concealment of more than $100,000 within each 12-month period," noting that "no provision of the statute indicates that a single course of structuring can be segmented based on 12-month intervals." *Id.* at 98. In such structuring schemes, "the structuring itself, and not the individual [transaction], is the unit of crime." *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991).

Here, the Government charged three distinct embezzlement schemes (three separate violations of 18 U.S.C. § 1033(b)(1)(A)) as the units of crime. Defendant's argument that his alleged actions constitute a single, ongoing transaction and therefore only a single count of embezzlement may be charged is not convincing. The unit of prosecution is determined by the distinct scheme of embezzlement involving channeling invoices through three different conduits, each of which constitutes a separate act of embezzlement as contemplated by 18 U.S.C. § 1033(b)(1)(A). Although Counts Four, Five, and Six each allege embezzlement from New York Life, the facts and unit of prosecution are significantly different in each Count.

Count Four alleges that Defendants embezzled over $318,000 from New York Life by submitting false invoices through William Hoyt and SoftCraft. It also alleges that "Keller direct[ed] William Hoyt to submit Softcraft invoices to New York Life for consulting services which were not performed," that "Keller and Mzzzariello approv[ed] such invoices by New York Life to Softcraft," and that Keller and Mazzariello direct[ed]

William Hoyt of Softcraft to disburse the proceeds in the forms of cash, checks, money orders, or other items of value to Keller, Mazzariello, and others."

Count Five alleges that Defendants embezzled approximately $11,000 by submitting false invoices through James Paulsel, and that "Paulsel, at Keller's direction, submitted false invoices to make up for the anticipated shortfall in Paulsel's desired sign-on bonus, and Keller directed Paulsel to divide the funds three ways between Keller, Mazzariello, and Paulsel."

Count Six alleges that Defendants embezzled approximately $9,000 by submitting false invoices through a New York Life employee. This Count alleges that the embezzled funds were

> paid to Direct TV for the benefit of Keller, Mazzariello, and another New York Life employee, through the process of directing a New York Life employee to create and submit false invoices, through which Keller forwarded to New York Life for payment, thereby causing New York Life to pay for approximately three years' worth of Direct TV service in the homes of Keller, Mazzierello, and a New York Life employee.

Counts Four, Five, and Six each allege a distinct execution plan of an embezzlement scheme, and thus properly stand as separate indictable offenses. *See United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992) ("each execution of a scheme to defraud constitutes a separate indictable offense"); *see also United States v. Long*, 787 F.2d 538, 539 (10th Cir. 1986) (considering the overall circumstances of each alleged act and concluding that "if defendant was charged with possession of various items of stolen mail [in violation of 18 U.S.C. § 1708] which allegedly were in her possession as a result of one set of circumstances, then she can be convicted of only one offense") (internal quotations omitted). Each Count will require the Government to prove

different facts. Each series of allegedly fraudulent invoices submitted through a different party (Hoyt/SoftCraft, Paulsel, and the New York Life employee) under different circumstances for a different end means and with no apparent connection to each other constitutes a separate execution of embezzlement, and it was therefore not multiplicitous to include the three executions in separate counts. "If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." *Blockburger*, 284 U.S. at 302. Each scheme of embezzlement, standing alone, subjected New York Life to a risk of loss of money. Although Keller and Mazzariello may have concocted a general scheme to embezzle funds from New York Life, that does not collapse the three distinct schemes of execution involving different circumstances (the first through Hoyt/SoftCraft, the second through Paulsel, and the third through a New York Life employee) into one indictable offense.[4] The fact that a single insurance company was the victim does not dictate the conclusion that only a single embezzlement was executed. *See Wall*, 37 F.3d at 1446-47. Defendant's motion to dismiss Counts Four, Five, and/or Six is **denied**.

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[4] The Government did *not* charge a separate count of embezzlement for each individual invoice submitted by Hoyt/SoftCraft, Paulsel, or the New York Life employee. *See Handakas*, 286 F.3d at 99 (in the context of structuring transactions the number of units of prosecution "is not determined by the number of fractional, sub-liminal transactions made for concealment").

III. Conclusion

For the reasons discussed herein, Defendant's motion to dismiss [Doc. No. 35] is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, August ___, 2004.

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Peter C. Dorsey
United States District Judge