IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES, Plaintiff, v. GENE BORTNICK, Defendant.	: : : : : : :	CRIMINAL ACTION NO. 03-CR-0414

MEMORANDUM AND ORDER

Presently before the Court is the Motion to Dismiss Count One for Failure to State a Criminal Offense filed by Defendant Gene Bortnick on October 17, 2004 (Doc. No. 88). For the reasons that follow, Defendant's Motion is GRANTED.

I. STANDARD OF LAW

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that "[t]he indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). The indictment "shall state the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." Id. A valid indictment must contain all the elements of the crime alleged. United States v. Spinner, 180 F.3d 514 (3d. Cir. 1999). The indictment must contain specific facts that satisfy all the elements of the alleged violation; a recitation "in general terms the essential elements of the offense" is insufficient. United States v. Panarella, 277 F.3d 678, 684-85 (3d Cir. 2002). Moreover, the district court may review the facts in the indictment to see whether, as a matter of law, they reflect a proper interpretation of criminal activity under the relevant criminal statute. Id.

In considering a motion to dismiss an indictment, the Court must accept as true all factual

allegations set forth in the indictment. United States v. Besmajian, 910 F.2d 1153, 1154 (3d Cir. 1990). Although Rule 47 of the Federal Rules of Criminal Procedure permits affidavits in support of motions generally, a district court may not consider evidence outside the indictment when the indictment's sufficiency is challenged. **Fed. R. Crim. P. 47 advisory committee's note 3; Wright, Fed. Prac. & Proc. § 194, 364-67; United States v. Ginzburg, 338 F.2d 12, 17 (3d Cir. 1964) (upholding district court's striking of affidavit and exhibits in support of a motion to dismiss and stating that the court's analysis was "correctly limited . . . to the face of the indictment").** Such a rule prevents a motion for dismissal from being converted into a determination of factual issues, a task which is properly reserved for the jury.

II. DISCUSSION

Count One of the Second Superceding Indictment ("Indictment") alleges that Defendant violated 18 U.S.C. § 1344, the Bank Fraud Statute, which states 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. Defendant's Motion to Dismiss Count One turns on the United States' alleged failure to assert that Defendant defrauded a financial institution, as statutorily defined. "Financial institution" is defined at 18 U.S.C. § 20 and includes, among other things, a bank insured by the Federal Deposit Insurance Corporation ("FDIC"). 18 U.S.C. § 20(1). The purpose of § 1344 then, 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). Thus, to survive a motion to dismiss for failing

to state a criminal offense, an indictment under § 1344 must contain proof that the victim is a federally-insured financial institution. In addition to being an essential element of a criminal charge under § 1344, proof of FDIC insurance is the basis for federal jurisdiction in bank fraud cases. United States v. Schultz, 17 F.3d 723, 725 (5th Cir. 1994).

Both parties agree that Congress Financial Corporation ("Congress"), the entity to which Defendant allegedly made fraudulent statements, is not a federally-insured financial institution. Government's Opp. at 2; Def's. Mot. to Dismiss at 1. Congress, however, is a wholly-owned subsidiary of First Union National Bank ("First Union"), which is a financial institution. United States v. McGlothin, 2002 WL 717080, *2 (3d Cir. 2002) (taking judicial notice that First Union is a "financial institution" under 18 U.S.C. § 1344). Defendant reads Count One to be premised on the theory that Congress was the "sole victim" of the bank fraud scheme and states that there are no factual allegations present in the indictment that Defendant engaged in any fraudulent activity with respect to First Union. Def's. Mot. to Dismiss at 1-2. Defendant thus contends that the United States has not alleged facts that satisfy all the elements necessary for an indictment under § 1344. Id. at 2.

For its part, the United States claims that Congress' status as a non-financial institution should not mandate dismissal because the money or funds obtained by Defendant through his allegedly fraudulent scheme were actually owned or under the custody and control of First Union and because the close business and monetary relationship between Congress and First Union leads to the conclusion that a fraud on Congress is a fraud on First Union. Government's Opp. at 3. In support of these contentions, the government offers the affidavit of Andrew Robin, the Executive Vice President of Congress. In his affidavit, Mr. Robin states that Congress is a

wholly-owned subsidiary of First Union; that the two entities file consolidated financial statements; that First Union provides Congress with its operating capital; and that First Union determines what kind of loan products Congress will offer. Government's Opp., Ex. A, Robin Aff. at ¶ 5-11. In its Memorandum of Law in Opposition to Defendant's Motion to Dismiss and at the November 1, 2004 hearing on that Motion, the United States relied almost solely on the facts contained in the affidavit of Mr. Robin. Though this information would have been useful to the grand jury in fashioning its indictment, well-established federal procedure and Third Circuit case law discussed above deem it improper for this Court to consider factual allegations in an affidavit when considering the instant motion to dismiss.

As legal support for its position, the Government alleges in its brief that United States v. Walsh, 75 F.3d 1 (1st Cir. 1996) is directly on point, as a case in which the First Circuit held that the Bank Fraud Statute does not require the immediate victim of the fraud to be a financial institution. In Walsh, the defendant was convicted under § 1344 for offenses related to a scheme to fraudulently obtain mortgages from a wholly-owned subsidiary of Dime Savings Bank of New York. The subsidiary was not federally insured. Noting that it limited its holding to the facts in that case, the Court upheld the conviction, finding that the subsidiary was essentially the alter ego of the federally-insured parent and that holding defendant liable for defrauding that institution best served the purposes underlying § 1344. Id. at 9. The First Circuit cited the following facts as relevant to its decision in Walsh: 1) that the subsidiary was wholly-owned, 2) that the parent provided all the subsidiary's operating capital, 3) that the parent dictated what loan products the subsidiary would offer, and 4) that the parent was assigned and serviced all mortgages entered into by the subsidiary. Id.

The Government also cites United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992), as support for its contention that a fraud on Congress is a fraud upon its parent, First Union. In Pelullo, the Third Circuit was confronted with whether a defendant convicted of wire fraud under 18 U.S.C. § 1343 was subject to the extended 10 year statute of limitations provided for in 18 U.S.C. § 3293(2). The extended statute of limitations in § 3293(2) is only applicable to wire fraud offenses that "affect a financial institution." 18 U.S.C. § 3293(2). The defendant claimed that the ten year statute of limitations was inapplicable, as the party to the loan at issue was not a financial institution, but rather a wholly-owned subsidiary of one. Pelullo, 964 F.2d, at 214. The Third Circuit found that the ten year statute of limitations did apply, stating that "the statute. . . broadly applies to any act of wire fraud 'that affects a financial institution'" and noting that "[defendant's] argument would have more force if the statute provided for an extended limitations period where the financial institution was the *object* of fraud." Id. at 216.

The Court agrees with the Government that Walsh is on point in this instance, but cannot concur that Pelullo provides any guidance in this circumstance. While the Third Circuit held in Pelullo that the showing of a parent-subsidiary relationship between a financial institution and a defrauded entity may be sufficient to trigger the extended statute of limitations under the wire fraud statute, this Court does not believe that its holding in that case is binding on the question of whether the showing of such a relationship is sufficient to support an indictment for bank fraud. The extended statute of limitations requirement in the wire fraud statute is written more broadly than are the essential elements of the bank fraud statute. The former requires only that the defendant's activity "affect" a financial institution, while the latter require that the defendant fraudulently obtain the monies or other property of a financial institution. The financial

institution element of the bank fraud statute is much closer to requiring a showing that the federally-insured entity was the "*object* of fraud."

As the statements in Mr. Robin's affidavit are outside the scope of the Court's inquiry, the question for this Court is whether the indictment itself contains factual allegations, such as the ones cited in Walsh, sufficient to satisfy the "financial institution" requirement of § 1344. The factual references to First Union in Count One of the Indictment are as follows:

1. Paragraph 6 of Count One states that "Congress Financial Corporation . . . was a wholly-owned subsidiary of First Union National Bank, which was a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation." Second Superceding Indictment Count 1, ¶ 6.
2. Paragraph 10 of Count One states that "defendant Gene Bortnick knowingly executed and attempted to execute a scheme to defraud Congress and First Union National Bank, and to obtain monies owned by and under the care, custody, and control of Congress and First Union National Bank . . . ." Second Superceding Indictment Count 1, ¶ 10.

The remainder of Count One details a variety of allegedly fraudulent activities engaged in by Defendant with respect to Congress.

Taking both statements in the Indictment with respect to First Union as true, the Court finds that the United States has not sufficiently alleged a bank fraud claim against Defendant. To begin, the reference to First Union in paragraph 10 is a recitation of the elements of the offense, which does not satisfy the United States' burden of alleging specific facts demonstrating harm to a financial institution. As for paragraph 6, it establishes only that Congress is a wholly-owned

subsidiary of First Union. As discussed above, the Third Circuit's holding in Pellulo does not require this Court to find that this fact is sufficient to support the financial institution element of § 1344. While this Court might conclude that First Union was naturally affected by defendant's alleged fraud on one of its wholly-owned subsidiaries, it cannot leap to the conclusion that defendant's alleged fraud deprived First Union of its monies or other property without more information than the bare assertion that a parent-subsidiary relationship existed between the two. Moreover, applying the principles of Walsh, the Court finds that the factual allegations of the indictment are insufficient to establish that Congress is the equivalent of a financial institution under the bank fraud statute. Unlike in Walsh, the indictment establishes no connection between First Union's federally-insured funds and those extended to Defendant by Congress.

The indictment contains no factual allegations that would support an indictment of Defendant for fraudulent activities directed at First Union, the only financial institution mentioned in Count One. The indictment does contain factual allegations that would support an indictment of Defendant for fraudulent activities directed at Congress. However, this Court can locate no binding case law that would support a finding that the United States' assertion that Congress is a subsidiary of First Union is a specific enough factual basis to satisfy the "financial institution" requirement of § 1344. At the very least, the United States would need to allege facts establishing some connection between Defendant's activities and the federally-insured funds. As it has not done so, Defendant's Motion to Dismiss is granted for failure to state criminal offense.

An appropriate Order follows.

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ORDER

AND NOW, this 29th day of November, 2004, it is hereby ORDERED that the Motion to Dismiss Count One for Failure to State a Criminal Offense filed by Defendant Gene Bortnick on October 17, 2004 (Doc. No. 88), is GRANTED.

BY THE COURT:

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Legrome D. Davis, J.