

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

 UNITED STATES *
 *
 v. * Criminal No. 06-CR-226-04-PB
 *
 BOAZ BENMOSHE, DEFENDANT *
 *

DEFENDANT BENMOSHE’S’ MOTION TO DISMISS FOR IMPROPER VENUE

NOW COMES the Defendant, Boaz BenMoshe, and respectfully moves this Court to dismiss his Indictment for lack of proper venue.

IN SUPPORT OF THIS MOTION, Defendant states the following:

INTRODUCTION

1. The Defendant has been charged with Conspiracy to Launder Monetary Instruments contrary to [18 U.S.C. §1956](#) (h) (alleging a conspiracy to violate [18 U.S.C. §1956](#) (a)(1)(A)(I) and Conspiracy to Engage in Unlicensed Wholesale Distribution of Prescription Drugs contrary to [18 U.S.C. § 371](#) and [21 U.S.C. §§ 331\(t\)](#), 333(b)(1)(D) and 353 (e)(2)(A). See, Superceding Indictment ([Document 61](#)), Counts 28 & 29

2. In this motion the Defendant moves to dismiss both counts for lack of venue. Under the money laundering statute venue lies in any jurisdiction where an act in furtherance of the conspiracy took place. See [18 U.S.C. 1956](#) (i)(2). Relying in large part upon [United States v. Santos, 533 U.S. _____, 128 S.Ct. 2020 \(2008\)](#), the Defendant asserts that since all proceeds of the alleged money laundering scheme were diverted in New Hampshire by Co-Defendant Handy, no financial transaction as

that term must be defined *post-Santos*, began or otherwise occurred in New Hampshire.

3. In this motion the Defendant also asserts that venue over both the money laundering conspiracy count and the unlicensed wholesale distribution count is improper in New Hampshire under traditional notions of appropriate venue.

4. Finally the Defendant asserts that even if venue is legally permissible in this District, the case should nonetheless be transferred to the Central District of California as the District of New Hampshire is an inconvenient forum for the efficient administration of the matter. See, F.R. Cr. P. 21 (b).

FACTS

5. The Defendant, as well as all of the Co-Defendants with the exception of Beth Handy are residents of the State of California.

6. The Defendant has never visited the State of New Hampshire with the exception of required appearances in court in this matter.

7. According to the [Superceding Indictment](#), the Defendant provided Serostim, an injectable drug used for treatment of AIDS and HIV, to Co-Defendant Robert McFadden and to Tom Lavery in California, who would then use a bank check from a California bank to pay Defendant for the Serostim. Said payment also allegedly occurred within the state of California. All of the acts attributed to Mr. Benmoshe in the Indictment in this matter occurred in the state of California. See, [Indictment](#), ¶¶ 4, 30,31, 32, 42, 43, 47, 62, 66, 68.

8. The Defendant is charged with Conspiracy to Commit Money Laundering

between April 2002 and October 2003. The conspiracy to commit money laundering count is based on the theory that Co-Defendant Handy created and forged “pedigrees¹” for the purchased Serostim and thereafter sold the Serostim to others based upon the representation that the substances were properly pedigreed. The Indictment does not allege any knowledge of , or participation by the Defendant in the alleged fraudulent pedigreeing. Importantly the Indictment notes that the profits that Co-Defendant, Beth Handy received were retained by Handy, in New Hampshire without any financial or monetary transaction identified in the Indictment. See, [Indictment](#), ¶¶ 40-44.

9. The Indictment does not allege that the Defendant committed any act or omitted to commit any act anywhere but within the State of California. All of the acts attributed to Mr. Benmoshe in the Indictment in this matter occurred in the state of California. See, [Indictment](#), ¶¶ 4, 30,31, 32, 42, 43, 47, 62, 66, 68.

10. Nowhere within the charges contained in the Indictment is there any alleged contact directly between Defendant and the State of New Hampshire. Likewise, the Indictment does not contain an allegation of direct or indirect contact between the Defendant and any persons other than Co-Defendant, Robert McFadden or Tom Lavery, both residents of California, at the time specified in the Indictment. All contacts with McFadden or Lavery alleged in the Indictment occurred in California. The Indictment is defective as to Count 29 (Conspiracy to engage in unlicensed wholesale distribution) as it cannot illustrate that the alleged actions of Defendant began,

¹A “pedigree” is a document that the Indictment describes as a “statement identifying each prior sale, purchase, or trade of the drug, including the date of each transaction and the names and addresses of all parties to the transaction.” See Indictment ¶ 22.

continued or were completed in New Hampshire. Instead the Indictment alleges conduct that occurred exclusively in the State of California. Likewise no act in furtherance of the alleged conspiracy to commit money laundering occurred within the State of New Hampshire.

11. A great leap from the allegations set forth in the Indictment is required to even infer that Defendant was aware of Tom Lavery's or Robert McFadden's associations with the other named Co-Defendants, let alone that Defendant was aware of the wire transactions, falsified pedigrees, or other actions allegedly occurring within the State of New Hampshire.

LEGAL AUTHORITY

The Effect of *United States v. Santos*

12. The money laundering statute states in pertinent part:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity. . . (A)(I) with the intent to promote the carrying on of specified unlawful activity ... shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

See, [18 U.S.C. §1956](#) (a)(1(A)(I)).

13. In order to properly determine venue the court must first address the

elements of the offense of money laundering in the light of the Supreme Court's recent interpretation in [United States v. Santos, 533 U.S. _____, 128 S.Ct. 2020 \(2008\)](#). In *Santos* the Court interpreted the definition of the term proceeds in the money laundering statute to mean "profits" as opposed to "receipts." In doing so the Court applied the rule of lenity to define the ambiguous nature of the term "proceeds." The Court recognized that the purpose of the statute could be viewed as "aimed at the distinctive danger that arises from leaving in criminal hands the yield of a crime". *Santos*, at [128 S.Ct. at 2026](#) . The Court also opined that its interpretation would ensure that "the severe money-laundering penalties will be imposed only for the removal of profits from criminal activity, which permit the leveraging of one criminal activity into the next." *Santos*, at [128 S.Ct. at 2028](#).

14. In this case the Indictment asserts that Co-Defendant Handy received criminally derived funds from which she retained the "proceeds" or "profits" in the state of New Hampshire. She *thereafter* engaged in wire transfers of funds to Co-Defendant McFadden. Because this transfer did not involve "proceeds" it is not a financial transaction for the purpose of the money laundering statute. Thus, no act in furtherance of a money laundering transaction occurred in New Hampshire². Because there was no act in furtherance of a money laundering conspiracy in New Hampshire venue is inappropriate here.

² It is also notable that the Indictment alleges that Co-Defendant McFadden and Thomas Lavery retained their share of the profits and paid Defendant's Benmoshe, Lupovitz and Hatch from the rest of the receipts.

Constitutional Requirement of Venue

15. This matter should also be dismissed in consideration of the traditional constitutional venue requirements. The Sixth Amendment to the United States Constitution provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” U.S. Const. amend. VI.

16. Furthermore, Rule 18 of the Federal Rules of Criminal Procedure states that unless a statute or the rules of procedure themselves permit otherwise, the government must prosecute an offense in the district where the offense was committed. F.R.Cr.P. 18.

17. In the instant matter, venue with the New Hampshire District Court is improper as Defendant is not a resident of New Hampshire, has never visited New Hampshire (with the exception of required court appearances) and the government has alleged no overt acts by the Defendant with any connection to the State of New Hampshire.

18. A defendant in a criminal case has a constitutional right to be tried in a proper venue. See [U.S. v. Johnson, 323 U.S. 273, 275 \(1944\)](#)(noting that two constitutional provisions, Article III, § 2, cl. 3 and the Sixth Amendment both provide a right to trial in the state where the crime is committed); [U.S. v. Uribe, 890 F.2d 554, 558 \(1st Cir.1989\)](#); see also [Fed.R.Crim.P. 18](#). The government bears the burden of proof on the issue of venue. [U.S. v. Lanoue, 137 F.3d 656, 661\(1st Cir. 1998\)](#).

19. “[I]t is readily apparent that venue requirements promote both fairness and public confidence in the criminal justice system.” [U.S. v. Johnson, 323 U.S. at 276.](#)

20. Venue must be determined by the nature of the crime alleged, by analyzing the conduct constituting the offense and the location of the criminal act. [U.S. v. Scott, 270 F.3d 30, 35 \(1st Cir. 2001\).](#) More than a *de minimis* connection to the district is required. [U.S. v. Uribe, 890 F.2d at 559.](#)

21. With respect to a charge of conspiracy, as in the instant matter, venue is only proper if an overt act in furtherance of the conspiracy, or the conspiracy itself, was committed within the district. [U.S. v. Uribe, 890 F.2d at 558](#) citing [United States v. Cordero, 668 F.2d 32 \(1st Cir. 1981\).](#)

22. The alleged facts of the instant matter are similar to those presented in [United States v. Salinas, 373 F.3d 161 \(1st Cir. 2004\)](#), in that all of the elements of the crime alleged occurred outside of New Hampshire. The Defendant in [United States v. Salinas](#) was prosecuted for passport fraud not in New York, where the Defendant applied for the passport at the post office, but in New Hampshire, where the fraud was discovered. The Court dismissed the Indictment for lack of venue finding that the all of the criminal conduct, the elements of the offense, occurred in New York. [Id. at 165 - 170.](#) Similarly, in the case at bar, there is simply no justification for laying venue in New Hampshire as all the alleged criminal conduct of the Defendant occurred within California. Likewise, as indicated above, the elements of the offense of conspiracy to commit money laundering did not occur in New Hampshire as the Indictment does not allege a monetary transaction that includes proceeds as defined by *Santos*.

23. The government, no doubt, will argue that Defendant's alleged conduct was part of a conspiracy reaching into New Hampshire and as such, venue is proper in any district where any act in furtherance of the conspiracy has occurred, in accordance with [U.S. v. Uribe, 890 F.2d 554, 558 \(1st Cir.1989\)](#). Even according to *U.S. v. Uribe*, however, venue in New Hampshire is improper. First, the elements of the offenses alleged did not occur in New Hampshire. Second, it is plain from the Indictment that the conspiracy which the Defendant is alleged to have been involved in is a separate and distinct conspiracy which began, continued and ended exclusively in California. Any contact alleged between Co-Defendants Beth Handy, Robert McFadden, and Tom Lavery, was unbeknownst to Defendant and, as such, was a new, distinct conspiracy between those parties and those parties only.

24. Consequently, the indictment should be dismissed as the District of New Hampshire is an improper venue. There is no alleged contact whatsoever between Defendant and the State of New Hampshire. Thus, continuing this matter in the District Court of New Hampshire is a violation of both the Federal Rules of Criminal Procedure and the safeguards provided by the Constitution of the United States.

Alternative Relief - F.R.Cr.P. 21(b)

25. Even if this Court finds that the Indictment need not be dismissed the Court should transfer the matter to the Central District of California pursuant to [F.R.Cr.P. 21\(b\)](#). Few, if any, of the likely witnesses in this matter reside in New Hampshire. In fact most of the witnesses, including the Government's cooperating witness, Thomas

Lavery, reside in California³. New Hampshire is an inconvenient forum that will require witnesses and Defendants to travel thousands of miles to appear in this matter. The Central District of California, on the other hand is far closer to the area where most of the witnesses and defendants reside.

26. In exercising its discretion in considering a Rule 21(b) transfer the Court must consider a number of factors identified in [Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 \(1964\)](#) The factors include: 1) the location of the defendant; 2) the location of possible witnesses; 3) the location of the events likely to be in issue; 4) the location of the documents and records likely to be involved; 5) the disruption of the defendant's business if the case is not transferred; 6) The expense to the parties; 7) the location of counsel; 8) the relative accessibility of the place of trial; 9) the docket condition of each district involved; 10) any special considerations relating to the requested transfer. [Id. At 243-244](#). No single factor is likely to be dispositive and the Court should consider as many of the factors as apply under the circumstances. [United States v. Muratoski, 413 F. Supp 2d 8, 9-10 \(D.N.H., 2005\)](#).

27. In this case the balance of the factors militate in favor of transfer. All of the defendant's , save one, reside in California. The vast majority of the likely witnesses are not from New Hampshire but reside either in or close to California. Most of the activities that form the basis of the charges in the indictment did not occur in New Hampshire but occurred in California or locales that are closer to California than to New Hampshire. The Defendant is employed in California and will be required to travel to New

³The Government's other cooperating witness Thomas Martino resides in Florida.

Hampshire well in advance of trial in order to prepare for trial thus disrupting his capacity to earn a living. The vast majority of the documents involved in this case appear to have originated, not in New Hampshire, but rather in places closer to California than New Hampshire. Therefore the matter should be transferred to the Central District of California if not dismissed.

Dispositive Motion LR 7.1(c)

28. Because this Motion seeks dispositive relief it is assumed that the Government objects.

No Further Memorandum LR 7.1 (a)(2)

29. This Motion contains citation to the supporting points and authorities and further memorandum is unnecessary.

WHEREFORE, the Defendant respectfully moves this Court grant the following relief:

- A. Grant this Motion and Dismiss the indictment; or
- B. Alternatively and without waiving the relief requested in Paragraph A transfer this case to the Central District of California; and,
- B. Grant such further relief as may be just.

Date: September 10, 2008

Respectfully submitted,
Boaz BenMoshe, Defendant
By his Attorneys,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Amend Conditions of Release was served on the following person, even date herewith, and in the manner specified herein: electronically served through ECF: Assistant United States Attorney Mark Irish, United States Attorney's Office, James C. Cleveland Federal Bldg., 55 Pleasant St., Room 352, Concord, NH 03301-3941 and to all counsel of record.

/s/Michael J. Iacopino
Michael J. Iacopino, Esq. (N.H. Bar No. 1233)