

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF NEW HAMPSHIRE

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 UNITED STATES \*  
 \*  
 v. \* Criminal No. 06-CR-226-04-PB  
 \*  
 BOAZ BENMOSHE, Defendant \*  
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**MOTION TO DISMISS SUPERCEDING INDICTMENT COUNT 28  
(AND COUNT 33 OF THE ORIGINAL INDICTMENT)**

The Defendant, Boaz Benmoshe, by his counsel, Michael J. Iacopino and Brennan Caron Lenehan & Iacopino respectfully moves this Court to dismiss count 28 of the superceding indictment (Document 61) and count 33 of the original Indictment (Document 1) because each count fails to charge the Defendant with a crime.

In support of this motion the Defendant submits:

1. On November 29, 2006, the Government filed an [Indictment \(Document 1\)](#) charging the Defendant with Conspiracy to Commit Money Laundering in violation of [18 USC 1956\(h\)](#) (Count 33) and Conspiracy to Engage in Unlicensed Wholesale Drug Distribution in violation of [18 USC 371](#) and [21 USC 331\(t\)](#), 333(b)(1)(D) and 353(e)(2)(A) (Count 34).

2. On September 26, 2007, the Government filed a [Superceding Indictment \(Document 61\)](#) charging the Defendant with the same charges in Counts 28 (Money Laundering) and 29 (Conspiracy to Commit Unlicensed wholesale drug Distribution.)

3. On June 2, 2008, the United States Supreme Court issued its opinion in [United States v. Santos, 533 US \\_\\_\\_\\_\\_, 128 S.Ct. 2020, 170 L.Ed.2d 912](#). In *Santos* the Court held that the term “proceeds” as used in the money laundering statute was ambiguous. The Court found that the term could be reasonably read to mean either “receipts” or “profits.” Applying the rule of lenity, the Court held that the term “proceeds” within the money laundering statute means “profits.”

4. The indictment in this case alleges a scheme whereby Co-Defendant Handy received funds derived from alleged wire fraud, retained her profits, and forwarded the balance of the funds to Co-Defendants and others. The indictment is clearly based on a “receipts” theory of proceeds as opposed to the “profits” theory required by the Supreme Court in [United States v. Santos, 533 U.S. \\_\\_\\_\\_\\_, 128 S.Ct. 2020, 170 L.Ed.2d 912 \(2008\)](#) The alleged conspiracy occurred between April, 2002 and October, 2003. See, Superceding Indictment ¶ 61.

5. Count 28 of the Superceding Indictment must be dismissed because it fails to allege the essential elements of the crime of conspiracy to launder monetary instruments in the light of the Supreme Court’s interpretation of the elements of money laundering in [United States v. Santos, 533 US \\_\\_\\_\\_\\_, 128 S.Ct. 2020, 170 L.Ed.2d 912](#). See, United States Constitution, Amendment VI; [F.R.Cr.P. 7\(c\)\(1\)](#)

6. Count 28 of the Superceding Indictment must be dismissed because it is clear that the grand jury that issued the indictment was not aware of the correct elements of the offense in th light of the Supreme Court’s interpretation of the elements of money laundering in *Santos*. Neither the Government nor the Court may broaden

amend the terms of an indictment issued by the grand jury nor may a defendant be tried on charges that were not made in the indictment against him. To do so violates the Defendant's Fifth Amendment Right to be tried only upon indictment by the grand jury. See, [Stirone v. United States, 361 U.S. 212, 216 - 217 80 S.Ct. 270, 272 - 273, 4 L.Ed.2d 252 \(1960\)](#)

7. Count 28 of the Superceding Indictment must be dismissed because it fails to establish that the specified unlawful activity - wire fraud and conspiracy to commit wire fraud, actually occurred. The wire fraud statute is "limited in scope to the protection of property rights." See, [McNally v. United States, 483 U.S. 350, 360 \(1987\)](#). The Superceding Indictment fails to identify that any person's property rights were affected by the alleged scheme. The scheme set forth in the indictment fails to demonstrate that any person's property or money was obtained via fraud. There is no claim that the Serostim alleged in the indictment was fraudulent, adulterated or otherwise lacking in safety or quality. The purchasers of the Serostim set forth in the indictment got exactly what they bargained for: discount priced serostim. The Superceding Indictment fails to demonstrate that any person lost money or property rights. Should the Government attempt to argue that the United States is the victim of the alleged wire fraud the indictment must still be dismissed. See, [Cleveland v. United States, 531 U.S. 12 \(2000\)](#).

8. The Defendant has filed contemporaneously herewith a Memorandum of Law with legal authority supporting the relief requested herein.

9. This motion is dispositive and therefore undersigned counsel did not seek the concurrence of the Government.

Wherefore the Defendant respectfully moves this Court to grant the following relief:

- A. Grant this Motion and Dismiss Superceding Indictment Count 28; or,
- B. Grant such alternative relief as may be requested in the accompanying Memorandum of Law; and,
- C. Grant such further relief as may be just.

Date: September 28, 2008

Respectfully submitted,  
Boaz BenMoshe, Defendant  
By his Attorneys,  
BRENNAN CARON LENEHAN & IACOPINO  
By:           /s/ Michael J. Iacopino            
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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss Superceding Indictment Count 28 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)