UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. SHELDON SILVER, Defendant.	No. 15 Cr. 93 (VEC) **ORAL ARGUMENT REQUESTED**

DEFENDANT'S REPLY IN SUPPORT OF
MOTION TO DISMISS SUPERSEDING INDICTMENT

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INTRODUCTION

The Government struggled to correct the defects in the original indictment. But it came up short. The Government simply cannot avoid the Supreme Court's decisions in *Sekhar v. United States*, 133 S. Ct. 2720 (2013), and *Skilling v. United States*, 561 U.S. 358 (2010). Both cases require dismissal of the charges here.

The superseding indictment does not allege that Mr. Silver deprived anyone of a *transferable property right* under color of official authority, as required to prove extortion under *Sekhar*. That is no less true merely because the superseding indictment now relabels Doctor-1's patient referrals as "Mesothelioma Leads." Likewise, the superseding indictment does not allege any paradigmatic bribery or kickback scheme as required by *Skilling*. At best, the allegations might show a theoretical conflict of interest that does not violate the statute.

The Government's remaining arguments fare no better. Its offer to provide Mr. Silver with an ever-expanding list of mailings and wire transmissions on a rolling basis as the case proceeds plainly does not give Mr. Silver the notice he needs to prepare his defense. Even if it did, it would not show that the ***grand jury*** found probable cause to indict Mr. Silver for those particular charges. Section 1957 is unconstitutionally vague because it leaves prosecutors with essentially unfettered discretion to decide which defendants accused of significant financial crimes should also be targeted for additional penalties. And the Government fails to offer any legitimate justification for the gratuitous surplusage in the superseding indictment.

Mr. Silver's motion should be granted.

ARGUMENT

I. THE SUPERSEDING INDICTMENT FAILS TO ALLEGE EXTORTION

The Government acknowledges that "the 'obtaining' property element of the Hobbs Act requires proof that an object of the charged crime is 'not only the deprivation but also the acquisition of property.'" Gov't Opp. at 11 (quoting *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 404 (2003)). And it admits that, under *Sekhar*, a scheme to coerce someone into making a "recommendation" – in that case, a pension fund general counsel's recommendation about where to invest the fund's money – is not sufficient to meet that standard. *Id.* at 12 (citing *Sekhar*, 133 S. Ct. at 2724). Those principles are fatal to the Government's charges.

A. The Asbestos Patient Referrals

In an effort to shore up the original indictment, the Government has now replaced all references to patient referrals with a newly concocted species of property known as "Mesothelioma Leads" (gratuitously capitalized as if to suggest that the term has some well-accepted lineage in the annals of property law). The Government claims that Mr. Silver is guilty of extortion because "Doctor-1 *transferred the Mesothelioma Leads . . . to Silver* as a result of Silver's use of his official influence." Gov't Opp. at 15 (emphasis added).

The sheer awkwardness of that phrasing is enough to cast doubt on its validity. But regardless, the theory simply cannot be squared with *Sekhar*. Whether labeled "referrals" or "leads," Doctor-1's recommendations about where patients should go for legal help were simply that: recommendations. Doctor-1 did not *transfer property* to Mr. Silver by making the recommendations, any more than the general counsel in *Sekhar* transferred property by recommending particular investments. If Doctor-1 had telephoned one of the patients he had previously referred to Weitz & Luxenberg and told the patient he had changed his mind about which firm to recommend, Mr. Silver could hardly accuse Doctor-1 of theft for stealing his

newly acquired "Mesothelioma Leads." Doctor-1's recommendations were not transferable property. They were simply recommendations.

The Government emphasizes that leads are valuable because law firms "pay large sums of money" to generate them and there are "companies that are in the business" of helping firms do so. Gov't Opp. at 14. But that does not distinguish *Sekhar* either. Investment managers no doubt "pay large sums of money" to persuade pension funds to invest with them, and there are "companies that are in the business" of helping them drum up that business (marketing consultants and the like). People pay for recommendations because they are valuable. That does not make them *transferable property rights*. *See Sekhar*, 133 S. Ct. at 2726-27 n.5 (rejecting the argument that the mere fact that a recommendation is "valuable" makes it the "object of extortion under the statute").[1]

Apparently recognizing the defects in its "Mesothelioma Leads" theory, the Government also offers an alternative one: It accuses Mr. Silver of extorting the "valuable legal claims" connected to the leads and the "fees derived therefrom." Gov't Opp. at 14. That theory likewise fails, because Mr. Silver did not *deprive* anyone of those legal claims or fees. *See Scheidler*, 537 U.S. at 404 (extortion requires "not only the deprivation but also the acquisition of property"). Mr. Silver could not have deprived *Doctor-1* of the legal claims or fees because they were never Doctor-1's to begin with: A *lawyer* might acquire a stake in a legal claim by pursuing it on a contingency basis, Gov't Opp. at 15, but Doctor-1 did not acquire a stake in his patients' legal claims merely by treating them for cancer. Nor did Mr. Silver deprive Doctor-1's *patients* of any legal claims or fees. The patients kept their claims, litigated them, and recovered millions of

[1] The Government urges that a property interest's "precise ultimate value" need not be determinable. Gov't Opp. 17. That is a red herring. The problem here is not that the Mesothelioma Leads are difficult to value. The problem is that they are not transferable property interests ***at all***.

dollars doing so. That a share of any resulting damages award was retained by counsel was an inherent aspect of any contingency fee arrangement – it did not "deprive" the patients of any property that was rightfully theirs.

Even if Mr. Silver could be said to have deprived Doctor-1's patients of legal claims or fees, that still would not amount to extortion: Mr. Silver did not obtain those claims or fees from patients "under color of official right," as the Hobbs Act requires. 18 U.S.C. § 1951(b)(2). That language requires that a defendant obtain property "in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). That did not happen here. The superseding indictment does not allege that Doctor-1's patients parted with their legal claims and fees "in return for official acts" by Mr. Silver. It does not allege that the patients even knew about Mr. Silver's purported official acts. Indeed, the Government's complaint stated that the patients had never contacted or been contacted by Mr. Silver. Complaint ¶ 23(a). The Government does not attempt to explain how Mr. Silver could have deprived patients of their legal claims and fees "in return for official acts" when the patients were not even aware of those acts.

The Government points to a footnote in *Sekhar* stating that "[i]t may well be proper under the Hobbs Act for the Government to charge a person who obtains money by threatening a third party." 133 S. Ct. at 2725 n.2; *see* Gov't Opp. at 19. But the Government misinterprets that statement. If a thug demands that a victim pay him $1,000 or he will harm the victim's family members, that may well constitute extortion: The money was obtained under compulsion of threats, even though the threats related to third parties. Likewise, if a politician demands that a victim pay him $1,000 or he will deny business licenses sought by the victim's family members, that may well constitute extortion because the money was obtained "under color of official right." 18 U.S.C. § 1951(b)(2). But here, Mr. Silver did not obtain ***anything*** from Doctor-1's

patients "under color of official right." As alleged, the patients were not even aware of Mr. Silver's official acts.

The Government's other cases provide no more support. The only other binding authority the Government cites is *United States v. Guang*, 511 F.3d 110 (2d Cir. 2007), in which a gift shop owner and his henchmen tried to obtain business from tourists by threatening their tour guides. Govt' Opp. at 20-21. But *Guang* did not address the legal standards for extortion at all. The defendants there did not challenge the sufficiency of the evidence. Rather, they claimed that their trial counsel was ineffective for not challenging the admission of a tape recording of some of their threats. The court of appeals rejected that argument for lack of prejudice, noting that there was plenty of other evidence the defendants had made the threats. 511 F.3d at 120. That is all the court meant when it described the evidence as "'overwhelming.'" *Id.* Nothing in the court's opinion expresses any view on the ***legal*** sufficiency of the Government's case.

United States v. McDonough, 727 F.3d 143 (1st Cir. 2013), is similarly unhelpful. The court's entire analysis of the extortion charge in that case consists of two paragraphs that do not mention *Sekhar* even once. 727 F.3d at 155-56. And the court specifically noted that, "[t]o secure a conviction, the government must prove 'that a public official has obtained a payment to which he was not entitled, knowing that the payment was made *in return for official acts*.'" *Id.* at 155 (quoting circuit precedent applying *Evans*) (emphasis added). The court simply did not address the legal arguments that Mr. Silver makes here.

The only case that even arguably supports the Government's theory is *Re v. United States*, 736 F.3d 1121 (7th Cir. 2013). There, the Seventh Circuit rejected the argument that "'obtaining' property requires getting it directly from the person threatened," and held that the Hobbs Act "speaks of obtaining property 'from another'; it does not say that the 'another' must

be the threat's recipient." *Id.* at 1123. The court cited no authority for that proposition and made no effort to reconcile it with *Evans*. The Hobbs Act defines extortion as "the obtaining of property from another . . . *induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right*." 18 U.S.C. § 1951(b)(2) (emphasis added). That language plainly refers to threats or exercises of official authority directed to *the party deprived of his property*. That is why *Evans* held that the defendant must obtain property "in return for official acts." 504 U.S. at 268. The Seventh Circuit ignored that binding authority.

B. The Real Estate Referrals

The real estate referral counts fail for essentially the same reasons. Mr. Silver did not *deprive* the Developers of their "Tax Certiorari Business" or "tax certiorari legal claims." Superseding Indictment ¶¶ 8(a), 43. Rather, the Developers kept their claims, litigated them, and obtained hefty reductions in their tax bills. At most, Mr. Silver may have provided the Developers with information about which law firm to retain to help them prosecute those claims. That is not a deprivation of property under the Hobbs Act.

Nor does it matter that the Real Estate Law Firm may have retained a share of any property tax reduction in connection with those legal claims. The Superseding Indictment admits that such contingency arrangements are standard in the industry. Superseding Indictment ¶ 11. The Developers thus were not "deprived" of anything.

II. THE SUPERSEDING INDICTMENT FAILS TO ALLEGE HONEST SERVICES FRAUD

The honest services fraud charges are equally flawed. The Government does not dispute that *Skilling v. United States*, 561 U.S. 358 (2010), limits the honest services statute to "the paradigmatic cases of bribes and kickbacks." *Id.* at 409-11. Nor does it dispute that *Skilling* specifically refused to extend the statute to mere conflicts of interest – "'*i.e.*, the taking of

official action by [an] employee that furthers his own undisclosed financial interests.'" *Id.* at 409. The Government thus does not and cannot deny that, if a lawmaker takes official acts to steer state business to a firm in which he has an ownership interest, that conduct at most constitutes a conflict of interest, not bribery or kickbacks – even though the state official derives a financial benefit by virtue of his ownership stake. *See* Def. Mot. at 16.

The Government's efforts to fit this case into the "bribes and kickbacks" bucket rather than the "conflicts of interest" bucket fail. The Government insists that "self-dealing or conflicts of interest become bribes and kickbacks when a public official receives something of value in exchange" for his actions. Gov't Opp. at 25. But an official receives "something of value in exchange" any time he steers business to a firm in which he has a financial interest. The only difference between the allegations here and the ownership hypothetical described above is that the "something of value" Mr. Silver received was referral fees rather than dividends or other ownership payments. That difference does not transform a conflict of interest into a bribe or kickback. Either way, the payments are simply the natural consequence of the official's financial interest in the company.

There is nothing in the indictment that alleges that the referral fees Mr. Silver received were anything other than the normal consequence of his bringing business into the law firms – no different from the referral fees that many other firms pay their lawyers. Indeed, the Government's complaint specifically alleged that Weitz & Luxenberg gave Mr. Silver the same "opportunity to obtain additional income through referral fees" that it "provided to other non-partner attorneys." Complaint ¶38(e). Moreover, the superseding indictment alleges that Mr. Silver "*[k]ept secret* from attorneys at Weitz & Luxenberg that he had directed State funding to Doctor-1's research." Superseding Indictment ¶26(d)(i) (emphasis added). If Weitz &

Luxenberg did not even know about the alleged official actions, it could not have been paying Mr. Silver anything other than *bona fide* referral fees for bringing in business. Ultimately, what the Government is complaining about is the alleged circumstances in which Mr. Silver brought business into the firms. The Government cannot dispute that the referral fees Mr. Silver received were compensation for bringing in that business pursuant to Mr. Silver's preexisting financial relationships with the firms – consistent with industry practice. That is not a bribe or kickback.

Those facts fundamentally distinguish the cases on which the Government relies. Gov't Opp. at 26-27. In *United States v. McDonough*, 727 F.3d 143 (1st Cir. 2013), for example, the court found that the legal services contract used to funnel money to the defendant was a "sham" and that the lawyer was "paid . . . for doing no work." *Id.* at 154. And in *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), the court sustained the convictions only because the payments were at least in part *not* "compensation for legal services rendered by the law firm." *Id.* at 683. This case is different: Whatever other complaints the Government may have, it cannot deny that the referral fees paid to Mr. Silver were precisely what they purported be: compensation for bringing in business to the firms.

III. THE SUPERSEDING INDICTMENT FAILS TO ALLEGE SPECIFIC MAILINGS OR WIRE TRANSMISSIONS

The superseding indictment should also be dismissed for failing to identify the specific mailings and wire transmissions that form the basis for the fraud charges. The Government claims it is "well settled . . . that lack of specificity regarding the mailings or wire transactions in a mail or wire fraud indictment does not warrant dismissal of the indictment." Gov't Opp. at 30-31. But the three district court cases it cites for that supposedly "well settled" rule do not support its position. In *United States v. Reale*, No. 96 Cr. 1069, 1997 WL 580778 (S.D.N.Y. Sept. 17, 1997), the court expressly held that the indictment was "insufficient" because it "fail[ed] to

identify any specific mailing [or wire transmission] or the approximate date on which it occurred." *Id.* at *14. The court declined to dismiss the indictment only because it believed (erroneously, as explained below) that the defect could be remedied through a bill of particulars. *Id.* The Government's other two cases both involve more specificity than the superseding indictment provides here. *See United States v. Zandstra*, No. 00 Cr. 209, 2000 WL 1368050, at *2-3 (S.D.N.Y. Sept. 20, 2000) (indictment alleged that "fraudulent promotional materials concerning [defendant's business] [were] delivered by Federal Express" and identified two specific instances by date and address); *United States v. Upton*, 856 F. Supp. 727, 738-40 (E.D.N.Y. 1994) (indictment alleged transmissions between an airport and airline headquarters, along with similar transmissions, limited to a specific two-year period).

The Government also relies on its April 17, 2015 letter listing 39 specific mailings and wire transmissions. Gov't Opp. at 32. But the Government candidly admits that it "will supplement the . . . April 27 Letter" if it later decides to charge additional mailings or wire transmissions based on its "continued investigation and/or receipt of subpoena responses." *Id.* That totally open-ended commitment to identify new charges on a rolling basis as the case proceeds cannot conceivably provide Mr. Silver with the notice he needs to prepare his defense.

Even if the Government had limited its charges to the items in the letter, that still would not remedy the defects in the indictment. One of the basic purposes of requiring specificity is to "serve[ ] the Fifth Amendment protection against prosecution for crimes based on evidence not presented to the grand jury." *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999). That is why "it is a settled rule that a bill of particulars cannot save an invalid indictment" – much less an informal letter the Government plans to supplement as it sees fit. *Russell v. United States*, 369 U.S. 749, 770 (1962). Even if the Government now provided notice of the charges it intends

to pursue, that would not ensure that the ***grand jury*** found probable cause to prosecute Mr. Silver for those allegations. The only way to cure a defective indictment is to dismiss it and leave it to the Government to seek the grand jury's consent to a constitutionally sufficient one.

IV. SECTION 1957 IS UNCONSTITUTIONALLY VAGUE

The Government does not deny that, if the other counts fail, the Section 1957 count must fail as well. Def. Mot. at 20-21. But it opposes Mr. Silver's constitutional vagueness challenge. According to the Government, Section 1957 is constitutional because it "specifically defines each of its key phrases" and thus leaves "nothing indeterminate" about what conduct it covers. Gov't Opp. at 35-36. That argument ignores the basis for Mr. Silver's challenge.

Under the Supreme Court's precedents, a statute can be unconstitutionally vague for two different reasons. A statute must define the criminal offense ***both*** "'[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited ***and*** [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling*, 561 U.S. at 402-03 (emphasis added). For that reason, "[v]agueness may invalidate a criminal law for either of two independent reasons." *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999) (plurality opinion). The "more important" of the two is the second requirement: The legislature must "'establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

The Government's arguments address only the first of the two requirements. But that is not the one at issue. Section 1957 is unconstitutionally vague, not because of its imprecision, but because of its totally indiscriminate sweep. The statute applies to literally ***anyone*** who knowingly engages in ***any*** monetary transaction with more than $10,000 of proceeds from a sprawling array of other offenses. As a practical matter, in any case where the defendant is charged with a financial offense of any real substance, the statute allows prosecutors to tack on

money laundering charges based on the mere fact that the defendant put the money in a bank or investment account. The statute leaves it entirely up to prosecutors to decide which unlucky defendants get singled out for those additional bonus charges. The statute therefore fails to "'establish minimal guidelines to govern law enforcement'" and is accordingly invalid. *Kolender*, 461 U.S. at 357-58.

V. THE COURT SHOULD STRIKE THE SUPERSEDING INDICTMENT'S IRRELEVANT AND PREJUDICIAL SURPLUSAGE

Finally, the Court should strike the superseding indictment's gratuitous surplusage accusing Mr. Silver of (1) "t[aking] certain official actions as requested by Investor-1" while not paying him for investment services or disclosing the source of the funds; (2) investing in "private, high-yield investment opportunities . . . not available to the general public"; and (3) "transferr[ing] more than $340,000 of his investment . . . into the name of a family member" to avoid disclosure. Def. Mot. at 23-25. The Government acknowledges that this Court can strike surplusage where "'the challenged allegations are not relevant to the crime charged and are inflammatory or prejudicial.'" Gov't Opp. at 39. Its arguments that these allegations "are in fact relevant to each of the crimes charged" (*id.* at 41) border on incoherent.

First, the Government asserts that the surplusage "will help to establish the defendant's knowledge . . . that the funds were 'criminally derived property' under Section 1957." Gov't Opp. at 41. That makes no sense. Whether Mr. Silver knew the funds were "criminally derived property" depends on whether the Government can prove its charges on the other counts. The extraneous allegations shed no light on that issue at all.

Second, the Government claims that the challenged allegations help establish the "defendant's consciousness of his own guilt." Gov't Opp. at 41. That theory does not even purport to explain the relevance of the first two categories of surplusage. And as to the third, the

challenged paragraph does not allege that the funds transferred to Mr. Silver's wife were proceeds of the other offenses – only that they came from his investment account. Superseding Indictment ¶32. The Government does not explain how that allegation could possibly establish consciousness of guilt.

Finally, the Government asserts that the surplusage "describe[s] the background, nature, and circumstances of the financial transactions" and thereby "help[s] explain to the jury how the defendant committed the crime charged in Count Seven," the money laundering count. Gov't Opp. at 41-42 (emphasis added). That theory stretches the concept of relevance beyond its breaking point. "[H]ow the defendant committed the crime charged in Count Seven," according to the Government, was simply by depositing more than $10,000 of proceeds into an investment account. It does not matter one bit whether Mr. Silver also performed official actions for the investment manager, paid the investment manager for his services, disclosed the source of funds, had access to high-yield investments not available to the general public, or later transferred a portion of the account balance to his wife.

The Government essentially wants to have it both ways. It wants to charge Mr. Silver under an absurdly overbroad statute that requires no actual elements of wrongdoing in any conventional sense. But then it also wants to lard up the charges with all sorts of derogatory details that are totally irrelevant to the offense charged. The Government's surplusage is irrelevant and prejudicial and should be struck.

CONCLUSION

For the foregoing reasons and those in Mr. Silver's original memorandum, the superseding indictment should be dismissed and the irrelevant portions struck as surplusage.[2]

Dated: June 19, 2015
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[2] Yet again, the Government produced thousands of pages of additional discovery materials last night, the day before Mr. Silver's reply was due. Mr. Silver reserves his right to supplement his arguments for dismissal in the event that any of those disclosures proves relevant.