UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES – GENERAL

Case No. CR 12-00441-MWF Date: March 25, 2013

PRESENT: HONORABLE MICHAEL W. FITZGERALD, U.S. DISTRICT JUDGE

Rita Sanchez	Rosalyn Adams	Brandon Fox
Courtroom Deputy	Court Reporter	Assistant U.S. Attorney

U.S.A. v. Kovall, et al.	Attorney(s) for Defendant(s)
1) Gary Edward Kovall (Waiver-BOND)	1) Edward M. Robinson, Retained
2) David Alan Heslop (Present on BOND)	2) Brian Hennigan, Alison Plessman, Retained
3) Paul Phillip Bardos (Waiver-BOND)	3) Ellen Barry, CJA
4) Peggy Anne Shambaugh (Waiver-Bond)	4) Matthew Horeczo, Retained s/a by Edward M. Robinson

PROCEEDINGS: ORDER DENYING DEFENDANTS' OMNIBUS MOTION TO DISMISS THE FIRST SUPERSEDING INDICTMENT [92], AND DEFENDANT BARDOS'S MOTION TO SEVER COUNTS 53 THROUGH 58 [91]

This matter is before the Court on (1) the Omnibus Motion to Dismiss the First Superseding Indictment (the "Motion to Dismiss") filed by Defendants Gary Edward Kovall, David Alan Heslop, Paul Phillip Bardos, and Peggy Anne Shambaugh (Docket No. 92), and (2) the Motion to Sever Counts 53 Through 58 (Tax Evasion and Tax Fraud Allegations) (the "Motion to Sever") filed by Mr. Bardos (Docket No. 91). The Court has read and considered the papers filed on these Motions and held a hearing on March 25, 2013. For the reasons stated at the hearing and below, the Motion to Dismiss and the Motion to Sever are DENIED.

The First Superseding Indictment ("Indictment") was filed on September 5, 2012. (Docket No. 63). According to the government, the Indictment alleges that, from September 2006 to August 2008, Mr. Kovall and Dr. Heslop were "agents" of the Twenty-Nine Palms Band of Mission Indians (the "Tribe"), acting as the Tribe's attorney and manager, respectively.

Mr. Kovall and Dr. Heslop allegedly persuaded the Tribe to contract with Mr. Bardos, a licensed general contractor, to act as its "owner's representative" in connection with a number of construction contracts. Mr. Kovall allegedly advised the Tribe to accept proposals for Mr. Bardos to perform work when additional construction and oversight became necessary. Mr. Bardos subcontracted virtually all of the work he was awarded and then paid kickbacks to Dr. Heslop, who then paid further kickbacks to Mr. Kovall through Mr. Kovall's then-girlfriend, Ms. Shambaugh. (*See* Opp. at 1).

The Indictment alleges the following fifty-eight charges: (a) all Defendants with conspiring under 18 U.S.C. § 371 to violate 18 U.S.C. § 666 by corruptly accepting payments as agents of the Tribe and making payments to agents of the Tribe (Count 1); (b) Mr. Bardos with corruptly making payments to Dr. Heslop in violation of 18 U.S.C. § 666 (Counts 2 to 9); (c) Dr. Heslop with corruptly accepting payments from Mr. Bardos in violation of 18 U.S.C. § 666 (Counts 10 to 17); (d) Dr. Heslop with corruptly making payments to Mr. Kovall in violation of 18 U.S.C. § 666 (Counts 18 to 24); (e) Mr. Kovall with corruptly accepting payments, and Ms. Shambaugh with aiding and abetting that crime, in violation of 18 U.S.C. § 666 (Counts 25 to 31); (f) Mr. Kovall with committing wire fraud in violation of 18 U.S.C. § 1343 (Counts 32 to 33); (g) Ms. Shambaugh with corruptly making payments to Dr. Heslop in violation of 18 U.S.C. § 666 (Count 34); (h) Dr. Heslop with corruptly accepting payments from Ms. Shambaugh in violation of 18 U.S.C. § 666 (Count 35); (i) Mr. Bardos, Dr. Heslop and Ms. Shambaugh with money laundering in violation of 18 U.S.C. § 1957 (Counts 36 to 52); (j) Mr. Bardos with tax evasion in violation of 26 U.S.C. § 7201 (Counts 53 and 56); and (k) Mr. Bardos with making a false tax return in violation of 26 U.S.C. § 7206(1) (Counts 54, 55, 57, and 58).

The Court addresses each Motion in turn below.

MOTION TO DISMISS (Docket No. 92)

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. Federal Rule of Criminal Procedure 7 requires that an indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1).

A "court may hear a claim that the indictment . . . fails to invoke the court's jurisdiction or to state an offense." Fed. R. Crim. P. 12(b)(3)(B). A motion to dismiss an indictment raises a question of law. *United States v. Williams*, 791 F.2d 1383, 1386 (9th Cir. 1986).

At the outset, the Court notes that the Motion to Dismiss does not address Counts 32 and 33(18 U.S.C. § 1343) or Counts 53 through 58 (26 U.S.C. § 7201 and 26 U.S.C. § 7206). (*See* Mot. at 1 n.1).

Counts 2-31, 34, and 35 (18 U.S.C. § 666)

Under Section 666,

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an ***agent*** of an organization, or of a State, local, or ***Indian tribal government***, or any ***agency*** thereof –

. . .

(B) corruptly solicits or demands for the benefit of any person, or ***accepts or agrees to accept***, anything of value from any person, intending to be ***influenced or rewarded*** in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly ***gives, offers, or agrees to give*** anything of value to any person, with intent to ***influence or reward*** an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or ***agency*** receives, in any one year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of federal assistance.

(c) This section does not apply to ***bona fide*** salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section –

(1) the term "***agent***" means a person authorized to act on behalf of another person or a government ***and***, in the case of an organization or government,

> includes a servant or employee, and a partner, director, officer, manager, and representative; . . . .

Id. (emphasis added)

The Motion to Dismiss argues that Counts 2-31, 34, and 35 (the "Section 666 Counts") should be dismissed for a variety of reasons: (1) the Indictment does not adequately allege that Dr. Heslop is an "agent" of the Tribe; (2) the Indictment does not adequately allege that Mr. Kovall is an "agent" of the Tribe; (3) the Section 666 Counts do not allege "quid pro quo" bribery; (4) the Section 666 Counts fail to allege that the Tribe's awarding of construction-related contracts did not relate to "bona fide" transactions; and (5) the Section 666 Counts are multiplicitous.

Dr. Heslop – Agency

As an initial matter, the Court agrees with the government that the Indictment need not include the word "agent" if the allegations are otherwise sufficient to charge "agency." *See, e.g.*, *United States v. Fleming*, 215 F.3d 930, 935 (9th Cir. 2000) ("[C]hallenges to minor or technical deficiencies, even where the errors are related to an element of the offense charged and even where the challenges are timely, are amenable to harmless error review." (citation and internal quotation marks omitted)). For example, in *United States v. Pemberton*, 121 F.3d 1157 (8th Cir. 1997), the defendant argued that the Section 666 counts alleged against him "contain[ed] no language expressly informing him that the government would be required to prove that he was an agent" of the relevant tribe. *Id.* at 1169. The Eighth Circuit denied this challenge to the indictment, at least in part, "because of other relevant allegations made by the grand jury." *Id.* In any event, the Indictment does refer to Dr. Heslop and Mr. Kovall as "acting in their respective capacities as agents of the Tribe." (Indictment ¶ 10).

Here, the government argues that the Indictment "sufficiently alleges that Dr. Heslop was an agent of the Tribe while acting as a manager for Echo Trail Holdings[, LLC]." (Opp. at 8). According to the Indictment, "the Tribe created Echo Trial Holdings, LLC, a California limited liability company of which the Tribe was the sole member, to purchase real estate on behalf of the Tribe." (Indictment ¶ 3). The Indictment also alleges that the Tribe named Dr. Heslop the manager of Echo Trail Holdings, and that pursuant to the relevant Operating Agreement Dr. Heslop was authorized to conduct business operations on behalf of "the company." (Indictment ¶ 5). According to the government, Echo Trail Holdings is an "agency" of the Tribe for purposes of Section 666.

This argument fails. Under Section 666, the "term 'government agency' means a subdivision of the executive, legislative, judicial, or other branch of government . . . and a corporation or other legal entity established, and subject to control, by a government or

governments for the execution of a governmental or intergovernmental program." 18 U.S.C. § 666(d)(2). The Indictment does not allege that Echo Trail Holdings is a subdivision of a branch of government or an entity created for the execution of a governmental or intergovernmental program. Nor is there any allegation that Echo Trail Holdings (the purported agency) itself receives federal funds. *See United States v. Wyncoop*, 11 F.3d 119, 121(9th Cir. 1993) (concluding with respect to Section 666 that "Congress did not intend . . . to make misappropriations of money from every organization that receives *indirect* benefits from a federal program a federal crime." (emphasis in original)).

However, even if Echo Trail Holdings is not an agency for purposes of Section 666, Dr. Heslop still can be an agent of the Tribe (for purposes of Section 666) based on his authority to act on behalf of the Tribe. Stated differently, while Dr. Heslop's title as "manager" of Echo Trail Holdings does not automatically make him an agent of the Tribe, his alleged authority to act in that role – and on behalf of the Tribe – may, in fact, make him an agent of the Tribe.

For example, the Indictment alleges that Dr. Heslop was authorized to manage assets, borrow money, sign contracts, and employ individuals. (Indictment ¶ 5). Although the Indictment alleges that this authority arose with respect to "the company" pursuant to the Operating Agreement of Echo Trail Holdings, the Tribe was the sole member of the company, which was created to purchase real estate on behalf of the Tribe. (Indictment ¶¶ 3, 5). Indeed, the Tribe allegedly paid Dr. Heslop to manage Echo Trail Holdings. (Indictment ¶ 5).

Practically speaking, the Indictment alleges that Dr. Heslop was the Tribe's agent with respect to its purchase of real estate – irrespective of the allegation that this agency relationship arose through his role as manager of Echo Trail Holdings. In this regard, the allegations in the Indictment are sufficient.

At the hearing, counsel for Dr. Heslop argued that each count must stand on its own. But all of the Section 666 Counts incorporate by reference the "Introductory Allegations" – specifically, paragraphs 1 through 8 – which include the allegations discussed above (*i.e.*, paragraphs 3 and 5).

Finally, Defendants argue that, even if the Indictment adequately alleges that Dr. Heslop was an agent of the Tribe for purposes of Section 666, the Indictment fails to allege that he was acting within his "agency power" when accepting or giving the purported bribes. But, it is not clear to the Court that the statute or the relevant case law requires any such allegations. Indeed, the Indictment alleges that, in exchange for kickbacks, Dr. Heslop persuaded the Tribe to contract with Mr. Bardos to act as the Tribe's "owner's representative" in connection with a number of construction projects. (Indictment ¶ 6). This sufficiently alleges the elements of (1) bribes (2) "in connection with any business, transaction, or series of transactions" – regardless

of the ambit of Dr. Heslop's authority to act on behalf of the Tribe with respect to the purchase of real estate. 18 U.S.C. § 666(a)(1)(B), (a)(2).

Accordingly, the Motion to Dismiss is DENIED on this basis.

Mr. Kovall – Agency

With respect to Mr. Kovall, the government argues that the Indictment alleges that he was the Tribe's attorney, and that it is "self-evident that an attorney is an agent of his client." (Opp. at 13). According to the government, the "mere allegation that Mr. Kovall represented the Tribe is sufficient at this stage." (*Id.*); *Comm'r v. Banks*, 543 U.S. 426, 436, 125 S. Ct. 826, 160 L. Ed. 2d 859 (2005) ("The attorney is an agent who is dutybound to act only in the interests of the principal . . . ."); *United States v. Mosberg*, 866 F. Supp. 2d 275, 308 (D.N.J. 2011) (concluding for purposes of Section 666 that the indictment "sufficiently alleges that [the defendant attorney] was an agent, who through his advice and actions, affected Township funds. Nothing more is required.").

The Indictment alleges that Mr. Kovall represented the Tribe as its legal counsel and worked for the Tribe on virtually a daily basis. (Indictment ¶ 3). Among other things, Mr. Kovall allegedly attended Tribal Council meetings, negotiated and drafted contracts on behalf of the Tribe, and advised the Tribal Council to enter certain contracts. (*Id.*); *see also* 18 U.S.C. § 666(d)(1) ("'agent' . . . includes a servant or employee, . . . and representative").

Defendants argue that Mr. Kovall's relationship with the Tribe was solely advisory, relying on *United States v. Sunia*, 643 F. Supp. 2d 51 (D.D.C. 2009), and *United States v. Ferber*, 966 F. Supp. 90 (D. Mass. 1997). However, *Sunia* analyzed the agency question for purposes of alleged embezzlement under Section 666(a)(1)(A), which is not at issue in this case. *See* 643 F. Supp. 2d at 67 ("[I]n this case the government does not allege that the defendants 'used any official authority conferred [upon them] by their [l]egislative [b]ranch positions to commit a violation of § 666(a)(1)(A), or even that either had the ability to use any such authority.'" (citation omitted)); *see also* 18 U.S.C. § 666(a)(1)(A) (criminalizing conduct of one who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property . . . .").

In *Ferber*, the district court dismissed the Section 666 counts at the completion of the government's case on a Rule 29 motion for judgment of acquittal. *See* 966 F. Supp. at 100. According to the district court, "because [the defendant] was neither a servant, employee, partner, director, officer, manager nor representative of any of the Public Entity Clients, the

government had to prove that he was 'a person authorized to act on [their] behalf.'" *Id.* The district court concluded that the government failed to introduce evidence sufficient to do so.

At this stage, and at the very least, the Indictment adequately alleges that Mr. Kovall was a servant and/or representative – and therefore an agent – of the Tribe. *See* 18 U.S.C. § 666(d)(1). This is true even if Mr. Kovall was not authorized to act on the Tribe's behalf.

Accordingly, the Motion to Dismiss is DENIED on this basis.

Quid Pro Quo Bribery

Defendants argue that in a case alleging "bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999) (discussing 18 U.S.C. § 201(b)). Defendants argue further that the alleged corrupt payments are unconnected to any particular projects or official act – *i.e.*, the Indictment does not allege quid pro quo bribery. (*See* Mot. at 20).

The government argues that Section 666 covers both bribes and gratuities. (*See* Opp. at 13). Defendants counter that, even if Section 666 reaches illegal gratuities, there must be a "link" between such alleged gratuities and governmental contracts or acts. (*See* Reply at 21).

It appears that the Ninth Circuit has not ruled on this question, and that the Circuit Courts of Appeals are split. (Opp. at 16 ("Courts of appeals have consistently agreed that Section 666 covers both bribes and gratuities."); Reply at 13 ("There is currently a genuine Circuit split regarding whether a quid pro quo is a necessary element of a § 666 violations.")).

The Seventh Circuit "long ago held that a specific quid pro quo is not an element of § 666(a)(2). And more recently [the Seventh Circuit] held a quid pro quo of money is sufficient but not necessary to violate § 666(a)(1)(B), the parallel provision criminalizing the solicitation and acceptance of bribes and rewards." *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011) (citing *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005)) ("From these cases, it is clear that our circuit, like most others, does not require a specific quid pro quo . . . ."). *Cf. United States v. Bordallo*, 857 F.2d 519, 521(9th Cir. 1988) (stating that the defendant was charged with "four counts of bribery ***or gratuity*** under 18 U.S.C. § 666(b)" (emphasis added)).

There is no dispute that bribery, for purposes of Section 201(b), requires a quid pro quo. The government, relying on the apparent weight of authority, argues that Section 666 covers quid pro quo bribery (payments "to influence"), as well as illegal gifts (payments "to reward"). This is the better reading of Section 666. Indeed, the dichotomy between Section 201(b) and

Section 201(c) itself supports this interpretation. As the United States Supreme Court stated in *Sun-Diamond Growers*,

> The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is ***bribery***, which requires a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, inter alia, "to influence any official act" (giver) or in return for "being influenced in the performance of any official act" (recipient). The second crime, defined in § 201(c)(1)(A) as to the giver, and in § 201(c)(1)(B) as to the recipient, is ***illegal gratuity***, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), "for or because of any official act performed or to be performed by such public official."
>
> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act. ***An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken***.

526 U.S. at 404-05 (emphasis added). Defendants have failed to demonstrate that a comparable dichotomy should not likewise inform Section 666. The Court agrees with the case law holding that Section 666 reaches illegal gratuities in addition to quid pro quo bribery.

With respect to whether Section 666 requires a "link" between an alleged gratuity and any business, transaction, or series of transactions, Defendants again rely on *Sun-Diamond Growers*. There, the Supreme Court held that "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a ***link*** between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." 526 U.S. at 414 (emphasis added).

According to Defendants, the Indictment alleges only that a series of payments were intended to "reward" – proceeding on a gratuity theory – Mr. Kovall and/or Dr. Heslop "in connection with a transaction and series of transactions of the Tribe . . . , namely, the awarding of the Tribe's construction-related contracts." (*See, e.g.*, Indictment ¶¶ 14, 16, 18, 20). (The

Court notes that the Indictment's paragraph-numbering appears to go awry between pages 6 and 16.)

Essentially, the Indictment alleges a series of construction-related contracts and a series of illegal gratuities related to the award of these contracts. The Indictment alleges that, as Mr. Bardos received and continued to receive funds from the Tribe, he allegedly made kickback payments in step to Dr. Heslop, who then allegedly made further kickback payments in step to Mr. Kovall/Ms. Shambaugh. Therefore, the Indictment sufficiently alleges that corrupt payments were made and/or accepted "in connection with [the Tribe's] business, transaction, or series of transactions."

At the hearing, counsel for Defendants argued that, even if the Indictment alleges a link between the payments and the construction-related contracts, the Indictment still does not allege a link between the payments and any "official acts." But Section 666 does not require as much. Indeed, Section 666 does not even include the words "official act." Instead, as discussed above, that is a requirement under Section 201. *See, e.g.*, 18 U.S.C. § 201(b)(1)(A) ("to influence any official act"); *Id.* § 201(c)(1)(A) ("for or because of any official act").

Accordingly, the Motion is DENIED on this basis.

Bona Fide Transactions

Defendants next argue that the Section 666 Counts should be dismissed because the Indictment fails to allege that the relevant construction-related contracts and land purchase were not "bona fide" transactions. (*See* Mot. at 21). Defendants note that Section 666 "does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c).

Stated simply, the Court interprets this provision to mean that Section 666 does not apply to certain, bona fide transfers of money (*e.g.*, salary, wages, fees, or other compensation paid, or expenses paid or reimbursed), in the usual course of business. Defendants have offered no legal support for the proposition that Section 666 does not apply to bona fide transactions, such as the resulting construction-related contracts in this case.

United States v. Mills, 140 F.3d 630 (6th Cir. 1998), on which Defendants primarily rely, is instructive. In *Mills*, the defendant Alton Ray Mills was the Chief Deputy Sheriff of the Shelby County Sheriff's Department in Memphis, Tennessee. The defendant Stephen Toarmina was employed during that same period as a "Staff Special Deputy." The indictment against Mills and Toarmina alleged that Toarmina approached various individuals and obtained between $3,500 and $3,930 from them in exchange for a promise that Mills would hire them to fill open employment slots as full-time, commissioned deputy sheriffs. Mills then hired these individuals, who served as fully compensated employees of the Shelby County government. *Id.*

at 631. The defendants moved to dismiss certain counts on the basis of Subsection 666(c), and the district court granted the motion. *Id.* at 631-32 ("In this case, the district court concluded that a statutory exception to the federal bribery statute precluded prosecution of the defendants for their alleged misdeeds.").

According to the Sixth Circuit, Section 666 "contains three separate valuation requirements. First, the statute applies only if a local government or agency receives at least $10,000 in federal assistance in any one-year period. Second, in order to be subject to the proscriptions of subsection (a)(1)(B) of the statute, a defendant must solicit, demand, accept, or agree to accept 'anything of value' from another person. Finally, the acceptance of 'anything of value' must itself be shown to be connected with a transaction 'involving anything of value of $5,000 or more.'" *Id.* at 632 (citations omitted). The Sixth Circuit agreed with the district court's conclusion that the "subsection (c) exception reaches to all three valuation elements of § 666 offenses." *Id.*

On appeal, the defendants in *Mills* conceded that both the $10,000 federal assistance and "anything of value" prongs of Section 666 were satisfied. *Id.* at 633. "Instead, the defendants focus[ed] their attacks solely upon the government's contention that the co-conspirators' receipt of the deputy sheriff jobs paying more than $5,000 per year establish that the transactions involved something valued at $5,000 or more." *Id.* ("the bona fide salary exception of subsection (c) must be read to apply to all of § 666").

The Sixth Circuit reasoned that the "value of the yearly salary of a deputy sheriff's job, if bona fide, should not be considered in establishing the $5,000 transactional valuation. In such a case, ***the values of the allegedly illegal transactions*** are not the salaries to be paid to deputy sheriffs for actual performance of necessary governmental duties. ***Rather, the only guide to determining the true values of the transactions is the money required to secure the positions in the first place***." *Id.* (emphasis added). Consequently, the Sixth Circuit concluded that the indictment "returned against the defendants clearly and specifically assigns values ranging from $3,500 to $3,930 to those jobs. Because those amounts are below the $5,000 statutory floor, the district court correctly dismissed those counts premised upon alleged violations of 18 U.S.C. § 666." *Id.*

Here, Defendants do not dispute that the value of the alleged bribes/gratuities may be used to meet the $5,000 requirement. (*See* Reply at 26). Defendants likewise concede that the $10,000 federal assistance threshold is satisfied and that Defendants allegedly gave or received "anything of value." As alleged, the values of the allegedly illegal transactions exceed $5,000 based on the amounts of the illegal payments – all of which are greater than $5,000. (*See, e.g.*, Indictment ¶ 14).

Therefore, it is irrelevant whether the construction-related contracts were, in some sense, "bona fide." Illustratively, if the individuals in *Mills* allegedly had paid bribes exceeding $5,000, rather than sums ranging from $3,500 to $3,930, the district court presumably would not have dismissed the Section 666 counts in that case. In this case, the Indictment alleges precisely that: illegal payments, and as a result transaction values, exceeding $5,000.

Accordingly, the Motion to Dismiss is DENIED on this basis.

Multiplicity

Finally, Defendants argue that the Section 666 Counts are multiplicitous. According to Defendants, the Indictment alleges thirty-two counts under Section 666 – a separate violation for each payment made or received by any Defendant – notwithstanding the allegations that all of these charges arise from a single kickback scheme in connection with a "series of transactions" of a single Tribe during a single year (2007). (*See* Mot. at 23-24).

Defendants note that the Ninth Circuit has not yet considered the appropriate "unit of prosecution" under Section 666. (Mot. at 24). Rather, Defendants rely on case law from other Circuits for the proposition that under Section 666 there should not be more than one count alleged against any one defendant involving a single qualifying organization for any one-year period – a so-called "scheme-based" unit of prosecution. (Mot. at 24-27 (citing cases)).

Alternatively, Defendants "urge" the Court, "at the very least," to adopt a "transaction-based" unit of prosecution – *i.e.*, one based on each construction-related contract or other transaction as to which any Defendant allegedly engaged in bribe/gratuity activity. However, Defendants do not cite any authority for this proposed rule.

The government argues that "each payment related to a separate transaction." (Opp. at 25). But, that is not what is alleged – more often than not, several alleged corrupt payments relate to any one construction project or transaction. The government also notes that "each of the corresponding corrupt payments occurred after specific payments by the Tribe." (*Id.*) But this likewise seems irrelevant to the unit of prosecution issue.

Consequently, the Court returns to the Indictment: Counts 2 through 9 allege that Mr. Bardos made corrupt payments to Dr. Heslop; and, correspondingly, Counts 10 through 17 allege that Dr. Heslop accepted these same corrupt payments from Mr. Bardos. In addition, Counts 18 through 24 allege that Dr. Heslop made corrupt payments to Mr. Kovall (through Ms. Shambaugh); and, correspondingly, Counts 25 through 31 allege that Mr. Kovall (through Ms. Shambaugh) accepted these same corrupt payments from Dr. Heslop. Finally, Count 34 alleges that Ms. Shambaugh made corrupt payments to Dr. Heslop; and, correspondingly, Count 35 alleges that Dr. Heslop accepted these same corrupt payments from Ms. Shambaugh.

Defendants rely primarily on *United States v. Urlacher*, 784 F. Supp. 61 (W.D.N.Y. 1992). This case is wholly inapposite. *Urlacher* dealt with a charge of conversion under Section 666(a)(1)(A) and not bribery/gratuity under Section 666(a)(1)(B) and/or Section 666(a)(2). *See* 784 F. Supp. at 63. The defendant in *Urlacher* allegedly had embezzled or misapplied money from different sources. *Id.*

Indeed, the question at issue was specific to that subsection: "[T]his court must look to the statute to determine whether it is 'source-specific,' that is, whether it permits the government to charge the defendant with a separate violation based upon the source of the funds he is alleged to have embezzled. I conclude that it does not." *Id.* In particular, the district court reasoned as follows:

> the government urges this court to accept an interpretation of this statute which would permit aggregation of the value of property stolen in multiple conversions each involving less than $5,000. Support for this interpretation of the statute is found in [*United States v. Webb*, 691 F. Supp. 1164, 1168 (N.D. Ill. 1988)]. In *Webb*, the court ruled that the government may consolidate or aggregate the value of property stolen in multiple conversions of less than $5,000 in order to reach section 666's minimum of $5,000, as long as the conversions were part of a single plan or scheme, the intent of which was to convert or steal more than $5,000.

Id. at 64 (citation omitted).

The district court concluded that "[t]o permit the government to aggregate multiple conversions to reach the $5,000 minimum, and then to start over again in a separate and distinct count is illogical and certainly unfair. Thus, I hold that the 'unit of prosecution' in this case is '$5,000 or more,' from whatever source." *Id.* at 64.

Even ignoring the reality that the case is limited to conversion or embezzlement, the reasoning is irrelevant here. As discussed above, the Indictment does not rely on aggregation to reach the statutory threshold as to any one transaction or payment. Both the conclusion and the analysis of *Urlacher* miss the mark in this case. *United States v. Swan*, No. 1:12-cr-00027-JAW-1, 2012 WL 7219008 (D. Me. Nov. 26, 2012), which Defendants also cite, likewise is limited to the aggregation of multiple transactions to reach the $5,000 statutory threshold under Section 666(a)(1)(A).

Defendants have failed to demonstrate that the "payment-based" unit of prosecution alleged in the Indictment is impermissible – particular where, as here, each alleged corrupt payment exceeds the jurisdictional threshold of $5,000. Accordingly, the Motion to Dismiss is DENIED on this basis.

Counts 36 Through 52 (18 U.S.C. § 1957)

Pursuant to 18 U.S.C. § 1957, "Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished." *Id.* Defendants argue that the Indictment fails to adequately allege that the property at issue in the alleged monetary transactions was derived from "specified unlawful activity." (*See* Mot. at 27).

The government argues that, as alleged in the Indictment, the specified unlawful activity is "commercial bribery, in violation of California Penal Code Section 641.3." (Indictment ¶ 30). Under Section 1957(f)(3), the specified unlawful activities that can serve as a predicate offense are specified in 18 U.S.C. § 1956(c)(7). Defendants, however, nowhere contend that commercial bribery under Section 641.3 cannot serve as the predicate offense to a money laundering charge under Section 1957.

Instead, the Motion to Dismiss argues that Counts 36-52 (the "Section 1957 Counts") should be dismissed because the Indictment fails to allege the essential elements of a violation of Section 641.3. (*See* Mot. at 27). For its part, the government contends that the mere citation to Section 641.3 – without more – is sufficient based on the other allegations in the Indictment.

As a preliminary matter, and as noted above, the "Supreme Court and the Ninth Circuit have long held that each count in an indictment . . . is regarded as if it were a separate indictment and must be sufficient in itself. Further, each count must stand or fall on its own allegations without reference to other counts not expressly incorporated by reference." *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1159 (9th Cir. 2004) (citations and internal quotation marks omitted) ("Many of this court's sister circuits have cited this long-standing rule requiring specificity with approval. We now reaffirm this longstanding rule's validity.").

Significantly, the Section 1957 Counts do not incorporate by reference any other paragraph in the Indictment. Nor do the Section 1957 Counts otherwise refer to any other information in the Indictment. In relevant part, the Indictment alleges simply that the "property, in fact, was derived from specified unlawful activity, that is, commercial bribery, in violation of California Penal Code section 641.3." (Indictment ¶ 30).

Nevertheless, "when bringing charges of money laundering, the government need not allege all the elements of the 'specified unlawful activity,' i.e., the underlying offense." *United States v. Lazarenko*, 564 F.3d 1026, 1033 (9th Cir. 2009) (citing *United States v. Lomow*, 266 F.3d 1013, 1017 (9th Cir. 2001); *United States v. Golb*, 69 F.3d 1417, 1429 (9th Cir. 1995)) ("[The defendant] argues that the indictment must be dismissed because it failed to allege that his conduct violated Ukrainian law. . . . Here, the violation of Ukrainian law is the specified unlawful activity.")).

As in *Lazarenko*, the Indictment "tracks the statutory language in charging money laundering." *Id.* at 1033. In that case, the Ninth Circuit rejected the very argument that Defendants make here. *See id.* ("[The defendant] seeks to import an additional element into these offenses, claiming that the Ukrainian law at issue is also an essential element because the government must prove a violation of Ukrainian law to sustain a conviction."). While that case was decided under 18 U.S.C. § 1956, the enumerated specified unlawful activities are the same for both Section 1956 and 1957, *see* 18 U.S.C. § 1956(c)(7), and Defendants have articulated no reason why Section 1957 commands a different standard.

Defendants are correct that, at trial, "it is incumbent on the government ***to prove*** that an underlying unlawful act was committed by someone that resulted in the proceeds used in the later transaction in order to satisfy the statutory requirement that the financial transaction, in fact, involved those proceeds." *See United States v. Harmon*, No. CR 08-00938 JW, 2011 WL 7937876, at *8 (N.D. Cal. Aug. 18, 2011) (emphasis added); (Mot. at 28); *see also Lazarenko*, 564 F.3d at 1034 ("Significantly, the jury was instructed that it had to find a violation of Ukrainian law and ***was provided with the elements of the relevant Ukrainian statutes***." (emphasis added)). But, at this stage, the allegations in the Indictment are sufficient.

Accordingly, the Motion to Dismiss is DENIED on this basis.

Count 1 (18 U.S.C. § 371)

Defendants argue that Count 1 of the Indictment (the "Section 371 Count") is duplicitous because it improperly alleges two distinct conspiracies in a single count: (1) a conspiracy to give or accept bribes/gratuities in connection with Tribal construction contracts in violation of 18 U.S.C. § 666, and (2) a conspiracy related to the allegation that Mr. Bardos overcharged in connection with a specific purchase of granite for the Tribe. (*See* Mot. at 29).

The government argues that the Indictment alleges one conspiracy with more than one object, and that the Indictment therefore is not duplicitous. (*See* Opp. at 30); *Braverman v. United States*, 317 U.S. 49, 54, 63 S. Ct. 99, 87 L. Ed. 23 (1942) ("The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for [t]he conspiracy is the crime, and that is one, however diverse its objects." (citations and internal quotation marks omitted)).

On reply, Defendants rely on *United States v. Gordon*, 844 F.2d 1397 (9th Cir. 1988). There, the Ninth Circuit stated that, "[t]o determine whether Count I charged one or two conspiracies, we look at whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy." *Id.* at 1401 (citations and internal quotation marks omitted). "The relevant factors in determining the existence of such an 'overall agreement' are the nature of the scheme, the identity of the

participants, the quality, frequency and duration of each conspirator's transactions, and the commonality of times and goals." *Id.* (citation omitted).

Here, and as discussed above, the Section 371 Count alleges a kickback scheme. Mr. Kovall and Dr. Heslop allegedly persuaded the Tribe to contract with Mr. Bardos, a licensed general contractor, to act as its "owner's representative" in connection with a number of construction projects. In addition, Mr. Kovall allegedly advised the Tribe to accept proposals for Mr. Bardos to perform work when additional construction and oversight became necessary. In this respect, Mr. Bardos subcontracted virtually all of the work he was awarded and then paid kickbacks to Dr. Heslop, who then paid further kickbacks to Mr. Kovall through Mr. Kovall's then-girlfriend, Ms. Shambaugh. (*See* Opp. at 1).

Pages 12 and 13 of the Indictment (paragraphs 14 and 15) allege that in November 2007 Mr. Bardos informed the Tribe that, as part of its planned casino bathroom renovation work, it should purchase granite as soon as possible and that the cost of granite was $500,000. (Indictment ¶ 14). Mr. Bardos also allegedly informed the Tribe that a 50% deposit was required to place the order. (*Id.*) According to the Indictment, however, the vendor was charging only $200,000 for granite and did not require a 50% deposit. (*Id.*) On December 10, 2007, Mr. Bardos received a check for $281,500, of which $250,000 represented the supposed deposit for granite. (Indictment ¶ 15). Thereafter, Mr. Bardos allegedly made a payment to Dr. Heslop in the amount of $125,000. (*Id.* at (2)).

Defendants are correct that this alleged payment from Mr. Bardos to Dr. Heslop is not charged as an illegal bribe/gratuity under Section 666. Defendants are likewise correct that the Indictment does not allege that Mr. Kovall (through Ms. Shambaugh) received any payment stemming from the Tribe's check for the granite deposit.

Nevertheless, the nature of the alleged conduct is comparable, if not identical. According to the Indictment, Mr. Bardos, having been referred to the Tribe by Mr. Kovall and Dr. Heslop, received funds from the Tribe as part of a construction project and made a kickback payment to Dr. Heslop.

Furthermore, the participants are the same even though Mr. Kovall/Ms. Shambaugh allegedly did not receive a payment relating to this project. Mr. Bardos would not have been in a position to receive the check for the granite deposit had Mr. Kovall (and Dr. Heslop) not referred Mr. Bardos to the Tribe. The Court notes that there are other alleged payments that flowed from Mr. Bardos to Dr. Heslop without a corresponding alleged payment from Dr. Heslop to Mr. Kovall/Ms. Shambaugh. (*See, e.g.*, Indictment at 11 ("October 2007 Oversight Payment") & Counts 7, 15 (payment from Mr. Bardos to Dr. Heslop only, no alleged payment from Dr. Heslop to Mr. Kovall/Ms. Shambaugh); *see also* Indictment at 8-9 at (7), (8) ("Mr. Bardos received a $38,450 check from the Tribe as payment to construct the temporary parking

lot and access road.") & Counts 22, 29 (payment from Dr. Heslop to Ms. Shambaugh only, no alleged payment from Mr. Bardos to Dr. Heslop).

Therefore, as alleged, money continually was transferred from the Tribe to Mr. Bardos and then shared among Mr. Bardos, Dr. Heslop and Mr. Kovall/Ms. Shambaugh. This was the common goal of the conspiracy. All of the payments that allegedly violated Section 666 occurred in 2007. The conduct alleged with respect to the granite purchase purportedly occurred during November and December 2007.

Under the standard articulated in *Gordon*, Defendants have failed to demonstrate that the alleged payments related to the Tribe's purchase of granite represent a separate object of the alleged scheme, let alone a separate conspiracy.

As discussed at the hearing, the Court notes that the issue of multiple conspiracies, *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), can potentially be raised later in the case, including as a jury issue. *See* Ninth Circuit Criminal Jury Instruction 8.22.

Accordingly, the Motion to Dismiss is DENIED on this basis.

Forfeiture Allegations

Because the Motion to Dismiss is DENIED as to all Counts, as discussed above, the Motion likewise is DENIED with respect to the dependent "Forfeiture Allegations."

Conclusion

In sum, the Motion to Dismiss (Docket No. 92) is DENIED.

MOTION TO SEVER (Docket No. 91)

The Indictment also charges Mr. Bardos with tax evasion in violation of 26 U.S.C. § 7201 (Counts 53 and 56) and tax fraud in violation of 26 U.S.C. § 7206 (Counts 54, 55, 57 and 58). In the Motion to Sever, Mr. Bardos argues that these "Tax Counts" should be severed from the remainder of the Indictment.

Initial Joinder (Rule 8)

Under Rule 8(a), an indictment "may charge a defendant in separate counts with 2 or more offenses if the offenses charged . . . are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." *Id.*; *see United States v. Jawara*, 474 F.3d 565, 573 (9th Cir. 2007) ("[T]he established

rule in this circuit is that a valid basis for joinder should be discernible from the face of the indictment . . . .").

The government argues that the Tax Counts properly are joined under Rule 8 because they are based on the same acts and transactions as the remainder of the Indictment. (*See* Opp. at 5, 8 n.4); *Jawara*, 474 F.3d at 573 ("Rule 8 has been broadly construed in favor of initial joinder." (citation and internal quotation marks omitted)).

The Tax Counts essentially allege two types of wrongful conduct: (1) that Mr. Bardos claimed the purportedly illegal payments made to Dr. Heslop, discussed above, as deductible business expenses; and (2) that Mr. Bardos concealed certain revenue earned by his company, Bardos Construction, Inc. ("BCI"), by asking certain BCI clients to make checks payable to Mr. Bardos himself instead of to BCI. (*See, e.g.*, Indictment ¶¶ 34, 40).

"When the joined counts are logically related, and there is a large area of overlapping proof, joinder is appropriate." *United States v. Anderson*, 642 F.2d 281, 284 (9th Cir. 1981) (citation omitted). Under this standard, it is difficult to understand Mr. Bardos's argument that the first type of allegations (*i.e.*, those relating to his claiming payments to Dr. Heslop as business expenses) are not properly joined in the Indictment.

Indeed, Mr. Bardos appears to acknowledge as much, retreating to the argument that, "[b]ecause the government conflated the tax-avoidance activity which arguably relates to the overall bribery conspiracy with the unrelated tax-avoidance activity which has no relationship to those counts, Counts 53 through 58 should be severed." (Mot. at 8). Practically speaking, Mr. Bardos argues that the Tax Counts should be severed on account of the second type of allegations (*i.e.*, those relating to his asking certain BCI clients to make checks payable to Mr. Bardos himself instead of to BCI).

However, the government is correct that proper joinder requires only that the proof at trial be overlapping, not coextensive. *Anderson*, 642 F.2d at 284 ("[When] there is a large area of overlapping proof, joinder is appropriate.").

The Seventh Circuit's decision in *United States v. Anderson*, 809 F.2d 1281 (7th Cir. 1987), is instructive. In that case, the defendant similarly argued that a count charging him with tax evasion was joined improperly with other counts. *Id.* at 1288. The tax evasion count was based on the defendant's failure to report income from a bribe, as well as income from "payments he received indirectly from a traffic school, and from rents paid by tenants at a small motel he owned." *Id.* The alleged bribe was the "foundation" of certain other counts and also "was one of three sources of unreported income for the tax evasion count." *Id.*

The Seventh Circuit concluded that "[j]oinder of a tax evasion count is appropriate when it is based upon unreported income flowing directly from the activities which are the subject of

the other counts." *Id.* (citations omitted). The Seventh Circuit reasoned that the "fact that the bribe was only one of three sources of income in the tax count does not alter the fact that the tax count was based in part on the same transaction which was a basis" for the other counts. *Id.*

Here, it is clear that the Tax Counts are based in part on the same transactions that were the basis for the other counts in the Indictment. Accordingly, the Tax Counts properly were joined in the Indictment.

Prejudicial Joinder (Rule 14)

"If the joinder of offenses . . . in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a).

Mr. Bardos argues that the Court should exercise its discretion to sever the Tax Counts from the remainder of the Indictment and permit Mr. Bardos to answer the Tax Counts following trial on the other Counts. (*See* Mot. at 9). According to the Motion to Sever, the government essentially is attempting to introduce bad character evidence (*i.e.*, Mr. Bardos cheats on his taxes) to bolster its case that Mr. Bardos participated in the alleged bribery conspiracy, as to which the government must prove Mr. Bardos's corrupt intent. (*Id.*)

"Joinder remains the rule rather than the exception in criminal cases." *United States v. Nolan*, 700 F.2d 479, 482 (9th Cir. 1983). The test is whether joinder is "so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever." *Id.* (citation and internal quotation marks omitted); *United States v. Brashier*, 548 F.2d 1315, 1323 (9th Cir. 1976) ("The trial court's denial of [a defendant]'s Rule 14 motion to sever is a determination well within its discretion.").

For now, Mr. Bardos has failed to demonstrate the requisite "manifest prejudice." As discussed above, the proof relating to the Tax Counts overlaps with that relating to the remainder of the Indictment. In addition, the Court declines to exercise its broad discretion to sever the Tax Counts from the remainder of the Indictment because, at present, it appears to the Court that the evidence of the alleged kickback scheme would outweigh the evidence of personal checks.

Conclusion

In sum, the Motion to Sever (Docket No. 91) is DENIED ***without prejudice*** to Mr. Bardos's renewing this Motion at a date closer to trial.

IT IS SO ORDERED.