IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-02-CR-W-FJG
	)	
CYNTHIA S. MARTIN,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT MARTIN'S MOTION TO DISMISS COUNTS TWO AND TWENTY-ONE THROUGH TWENTY-FOUR FOR FAILURE TO STATE AN OFFENSE [DOC. 57]

The United States of America, by and through its undersigned counsel, hereby responds to Defendant Cynthia S. Martin's Motion to Dismiss Counts Two and Twenty-One through Twenty-Four of the Indictment for Failure to State an Offense[1] (document number 57). For the reasons set forth below, the motion should be dismissed.

I. Summary of the Argument

In her pretrial motion, Defendant Cynthia S. Martin makes two arguments: (1) that Counts Two, and Twenty-One through Twenty-Four in the indictment fail to allege in a sufficient manner that she acted with an intent to conceal, and (2) that the indictment does not allege an offense because the indictment fails to allege that the money referenced in Count Two constitutes profits, relying on the recently decided case of *United States v. Santos*, 128 S. Ct. 2020 (2008) in which an evenly divided Supreme Court ruled the term "proceeds," as used in the domestic

[1] Defendant Troy S. Solomon in his Motion to Quash the Indictment (document number 65) and Defendant Delmon L. Johnson in his Motion to Quash the Indictment (document number 64) incorporated Defendant Martin's Motion to Dismiss the Money Laundering Counts (document number 57) into their motions to quash the indictment.

money laundering statute, 18 U.S.C. § 1956, to mean "profits" derived from illegal activities. These arguments are unavailing. Defendant Martin's concealment argument and her profits-are-proceeds argument do not challenge the sufficiency of the indictment, but rather the sufficiency of the "evidence of concealment of a financial transaction" and evidence of "profits." As such, it is improper to use a Rule 12 motion to dismiss counts in an indictment based on matters of evidence and fact. With regard to Defendant Martin's argument that *Santos* changed the law regarding the definition of proceeds, there is no controlling opinion of the Supreme Court requiring a profits versus receipts analysis in any money laundering case, and that the pre-Santos case law defining proceeds in the Eighth Circuit continues to apply, except in cases involving the payment of gambling expenses.

II. Background

Defendant Cynthia S. Martin is charged with one count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), 841(b)(2), 841(b)(3), and 846; one count of conspiracy to commit promotional and concealment money laundering, in violation of 18 U.S.C. § 1956(h); and four counts of aiding and abetting money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2.

Count Two of the Indictment charges a conspiracy to commit promotional and concealment money laundering, in violation of 18 U.S.C. § 1956(h). That count reads as follows:

The Grand Jury re-alleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 20 of the Indictment,[2] and further alleges:

From at least in or about August 2004, the exact date being unknown to the Grand Jury, and continuing through October 2005, said dates being approximate, in the Western District of Missouri, and elsewhere, MARY LYNN ROSTIE, a/k/a Lynn Rostie, CYNTHIA S. MARTIN, TROY R. SOLOMON, and DELMON L. JOHNSON, defendants herein, did knowingly and intentionally combine, conspire, confederate and agree with each other and other persons known and unknown to the Grand Jury, to conduct financial transactions affecting interstate commerce in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i) and (B)(i), which transactions involved the proceeds of specified unlawful activity, that is, conspiracy to illegally distribute and dispense controlled substances in violation of Title 21, United States Code, Section 846, with the intent to promote the carrying on of the specified unlawful activity and knowing that the transactions were designed in whole and in part to conceal and disguise the activity and that while conducting and attempting to conduct such financial transactions, the defendants knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity.

During the course of the conspiracy to distribute hydrocodone, alprazolam, and promethazine with codeine, defendant ROSTIE, made gross sales of at least $991,114 from filling the unlawful and invalid prescriptions and distributing these controlled substances.

During the course and in furtherance of the conspiracy, in addition to other acts, the defendants MARY LYNN ROSTIE, a/k/a Lynn Rostie, CYNTHIA S. MARTIN, TROY R. SOLOMON, and DELMON L. JOHNSON, with others known and unknown to the Grand Jury with the intent to promote the carrying on of the specified activity, and for the purpose to conceal and disguise the nature and source of the proceeds of the specified unlawful activity:

a. From on or about September 2, 2004, through October 31, 2005, approximately 70 packages were shipped via United Parcel Service from Houston, Texas to defendant MARTIN in Belton, Missouri. The invoices for these packages were sent using the address of 5833 Sunforest Dr., Houston, Texas. This address was the residence of defendant JOHNSON, and was owned by defendant SOLOMON. These packages are the only connection known between SOLOMON and MARTIN. In addition,

[2] Paragraphs 1 through 20 of the Indictment are introductory paragraphs, providing general background information.

defendant MARTIN was the only known financial connection between defendants SOLOMON and ROSTIE.

b. The proceeds of this conspiracy are generated in Texas by defendants SOLOMON and JOHNSON through the sale of the filled prescriptions that are filled by defendant ROSTIE. A portion of these proceeds are then provided to defendant MARTIN as payment, both towards her own benefit, as well as to provide payments for the filled prescriptions as a continuance of the conspiracy. It is therefore believed that the proceeds are provided to defendant MARTIN in the packages sent via United Parcel Service in order to pay for additional prescriptions.

c. From October 8, 2004 through October 17, 2005, defendant MARTIN deposited miscellaneous United States currency into her personal checking account with the account number 003477654976 at Bank of America on 29 separate occasions totaling approximately $71,666.80.

d. From on or about September 2, 2004, through October 31, 2005, defendant MARTIN entered the business of defendant ROSTIE, at ROSTIE ENTERPRISES, LLC, d/b/a The Medicine Shoppe, and provided currency to defendant ROSTIE for payment on the account of South Texas Wellness Center. This currency represents proceeds of the illegal sale of hydrocodone, alprazolam, and promethazine with codeine.

e. From at least in or about August 2004, and continuing through on or about October 29, 2005, defendant ROSTIE, deposited into the business checking account of ROSTIE ENTERPRISES LLC, d/b/a The Medicine Shoppe with the account number 3501673 at Allen Bank and Trust Company gross sales of $991,114, which includes proceeds of the illegal sale of hydrocodone, alprazolam, and promethazine with codeine.

f. Defendant ROSTIE, using the mail services provided by Federal Express, then mailed the filled prescriptions to defendants SOLOMON and JOHNSON at the business locations of South Texas Wellness Center and Ascensia Nutritional Pharmacy in Houston, Texas.

Counts Twenty-One through Twenty-Four of the Indictment, which are four substantive concealment money laundering charges, are as follows:

The allegations contained in Paragraphs 1 through 20 are realleged and incorporated by reference.

From in or about August 2004 through at least October 2005, the defendant, CYNTHIA S. MARTIN, maintained a bank account with the account number 003477654976 at Bank of America which account was used to receive funds from sales of illegally distributed and dispensed controlled substances.

From in or about August 2004 through at least October 2005, funds from this bank account were used to conceal or disguise the source of the illegal drug scheme.

On or about April 18, 2005, defendant CYNTHIA S. MARTIN deposited $1,800 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about April 28, 2005, defendant CYNTHIA S. MARTIN deposited $2,800 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about May 3, 2005, defendant CYNTHIA S. MARTIN deposited $1,240 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about May 16, 2005, defendant CYNTHIA S. MARTIN deposited $2,500 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about June 10, 2005, defendant CYNTHIA S. MARTIN made three deposits – one cash deposit of $3,325, one cash deposit of $3,000, and one cash deposit of $2,075 – totaling $8,400 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about the dates set forth below as to each count, in the Western District of Missouri, and elsewhere, CYNTHIA S. MARTIN, defendant herein, did knowingly conduct and attempt to conduct financial transactions affecting interstate commerce, in the approximate amounts set forth below, which involved proceeds of a specified unlawful activity, that is illegal distributing and dispensing of controlled substances in violation of Title 21, United States Code, Sections 841(a) and 846, knowing that the transactions were designed in whole and in part to conceal and disguise, the nature, location, source, ownership and control of the proceeds of the specified unlawful activity and that while conducting and attempting to conduct such financial transactions knew the property involved in the financial transactions, that is monetary instruments in the amounts set forth below:

Count	Date Listed on Check	Date Check Clears Bank	Type	Payee	Financial Transaction
21	04/11/05	4/18/05	Payment	Alenco	Check No. 2702 in the amount of $1,200 from Bank of America account of CYNTHIA S. MARTIN
22	05/24/05	5/31/05	Payment	Alenco	Check No. 2710 in the amount of $5,167 from Bank of America account of CYNTHIA S. MARTIN
23	06/27/05	6/03/05	Payment	Alenco	Check No. 2711 in the amount of $6,458 from Bank of America account of CYNTHIA S. MARTIN
24	06/10/05	6/13/05	Payment	MTS Automall	Check No. 2714 in the amount of $9,980 from Bank of America account of CYNTHIA S. MARTIN

III. Legal Argument

A. Rule 12 is the Wrong Vehicle to Attack the Sufficiency of the Evidence of the Money Laundering Counts in the Indictment

Defendant Martin first alleges that Counts Two, and Twenty-One through Twenty-Four fail to allege in a sufficient manner that the defendant acted with an intent to "conceal" the nature, location, source, ownership, or control of the proceeds. She argues that the money laundering counts in the indictment do not allege "evidence of a financial transaction." (Defendant Martin's Motion to Dismiss Money Laundering Counts, at 7.) Defendant Martin also argues that the money laundering counts fail to allege proceeds to be profits. Essentially, she is challenging the sufficiency of the evidence on the elements of the charged offenses.

Defendant Martin's motion is made pursuant to Rule 12 of the Federal Rules of Criminal Procedure. That rule provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue."

"Federal Rule of Criminal Procedure 12(b)(2) authorizes dismissal of an indictment if its allegations do not suffice to charge an offense, but such dismissals may not be predicated upon the insufficiency of the evidence to prove the indictment's charges." *United States v. DeLaurentis*, 230 F.3d 659, 661 (3d Cir. 2000). In the present case, Defendant Martin misapplies Rule 12. Defendant Martin's concealment argument is that the transactions are not unlawful, as evidenced by a deposit of a check written by her mother in the amount of $11,000, which provided the financial means for the transactions in Counts Twenty-One through Twenty-Three, as well as the laundering conspiracy count. Six exhibits are proffered by Defendant Martin in support of her argument that she did not intend to conceal the illegal proceeds. Based on this evidence, Defendant Martin contends, the government fails to allege an offense. This Court's assessment, however, is limited to the "four corners" of the indictment, and this Court should studiously avoid the consideration of evidence from sources beyond the indictment. *United States v. Hughson*, 488 F. Supp.2d 835, 841 (D. Minn., 2007). The source of funds in her account is an issue of fact for the jury to decide.

As part of her profits-are-proceeds argument, Defendant Martin contends that there are no allegations that: (1) "the payments are profits;" and (2) "the money referenced in Count Two constitutes profits." (Defendant Martin's Motion to Dismiss Money Laundering Counts, at 10, 11.) Again, she is making a sufficiency of the evidence argument before any evidence has been presented. *See United States v. Thompson*, 2008 WL 2514090, at *2 (E.D. Tenn. June 19, 2008)

(district court denied motion to dismiss conspiracy to commit a money laundering count, in which it was argued that Santos applied and that the government could not prove that any funds sent to the defendant were "profits" as opposed to "proceeds," because the government did not have an opportunity to meet its burden of proof). The issues of whether there is evidence of an intent to conceal, or whether the proceeds are profits, should be left to the province of the jury. *See United States v. Percan*, 1999 WL 13040, at *3 (S.D.N.Y. Jan. 13, 1999) (motion to dismiss denied where money laundering count alleged all essential elements; court not concerned with the government's ability to prove the charges); *United States v. Weidner*, 2003 WL 21183177, at *10 (D. Kan. May 16, 2003) (whether government can prove money is proceeds of an SUA is a matter for trial, not the subject of a motion to dismiss); *United States v. Huber*, 2002 WL 257851, at *3 (D.N.D. Jan. 3, 2002) (whether government has sufficient evidence to satisfy its burden of proof with respect to either of the properly alleged specific intents in a money laundering count is a question for trial, not a matter to be resolved on a motion to dismiss); *United States v. Velastegui*, 199 F.3d 590, 595 n. 4 (2d Cir. 1999)(whether defendant had requisite mens rea must be determined at trial, not on motion to dismiss).

Furthermore, Defendant Martin's reliance on *United States v. Rockelman*, 49 F.3d 418 (8th Cir. 1995), is misplaced. In that case, the Eighth Circuit reversed a money laundering conviction because the evidence was insufficient to establish an intent to conceal. *Id*. at 422. There, our Circuit reviewed a trial record after trial, not an indictment before trial. "At the pretrial stage, the indictment ordinarily should be tested solely by its sufficiency to charge an offense, regardless of the strength or weakness of the government's case." *United States v. Fiske*, 2006WL2682174, at *1 (E.D. Ark. Sept. 18, 2006) (citing *United States v. Sampson*, 83

S. Ct. 173, 174-75 (1962)). The government declines Defendant Martin's invitation to argue its theory of the case before trial.

Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The standard for judging the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it "first contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Buffington*, 578 F.2d 213, 214-25 (8th Cir. 1978) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). "An indictment is normally sufficient if its language tracks the statutory language." *United States v. Sewell*, 513 F.3d 820, 821 (8th Cir. 2008); *see also Hamling*, 418 U.S. at 117 ("It is generally sufficient that the indictment set forth the offense in the words of the statute itself").

Section 1956(a)(1) reads, in 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;...
> >
> > (B) knowing that the transaction is designed in whole or in part-
> >
> > > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

> (h) any person who conspires to commit any offense defined in [section 1956] or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Id.

In the present case, the indictment is a clear and concise statement of the money laundering charges in Counts Two, and Twenty-One through Twenty-Four. The indictment is sufficient in its purpose to give general notice to the Defendant Martin of the charges filed against her so as to allow her to prepare a defense. Each of money laundering counts fully apprises her of the nature of the charges against her. The Government "need not allege its theory of the case or supporting evidence." *See United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982).

Count Two charges Defendant Martin and others with conspiracy to commit money laundering under 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(a)(1)(B)(i). That count alleges that the illegal proceeds were used with the intent to promote the carrying on of the specified unlawful activity and to conceal and disguise the activity. Therefore, the conspiracy count cannot be dismissed where there is an alternative manner in which the defendant violated the statute.

Furthermore, Count Two, the laundering conspiracy count, does not require "evidence of concealment of a financial transaction." (Defendant Martin's Motion to dismiss Money Laundering Counts, at 7.) The Court of Appeals for this Circuit has held that "Section 1956(h) does not require [an overt] act be charged or proven. *United States v. Huber*, 404 F.3d 1047, 1056 (8th Cir. 2005) (citing *Whitfield v. United States*, 543 U.S. 209 (2005)). Thus, the

government does not have to allege any specific act in furtherance of the laundering conspiracy or prove them at trial.

With regard to the substantive money laundering charges (Counts 21 through 24), the indictment clearly states that from August 2004 through at least October 2005, Defendant Martin maintained a bank account which was used to receive illegal funds. (*See* Indictment, at 19.) During that time, the illegal "funds from this bank account were used to conceal or disguise the source of the illegal drug scheme." The indictment then describes seven cash deposits in various amounts within a two-month period. (*See* Indictment, at 19-20.) The indictment further provides that the financial transactions "were designed in whole and in part to conceal and disguise, the nature, location, source, ownership and control of the proceeds of the specified unlawful activity and that while conducting and attempting to conduct such financial transactions knew the property involved in the financial transactions." Each count charges a specific transaction that was designed, at least in part, to conceal the proceeds of unlawful activity.

Defendant Martin further argues that the laundering conspiracy count and the substantive counts should be dismissed based on the Supreme Court's holding in *Cuellar v. United States*, 128 S. Ct. 1994 (2008). (Defendant Martin's Motion to Dismiss Money Laundering Counts, at 1, 11.) This is a specious argument. In *Cuellar*, the Supreme Court held that a conviction under the concealment prong of the international money laundering statute, 18 U.S.C. § 1956(a)(2)(B)(i), requires proof that a purpose of transporting the funds across the border was to conceal or disguise a listed attribute of the funds; it is not enough to show that the funds were transported in a secretive or clandestine manner. *Id*. at 2005. The Court explains that "in many cases, a criminal defendant's knowledge or purpose is not established by direct evidence but instead is

shown circumstantially based on inferences drawn from evidence of effect. Specifically, where the consequences of an action are commonly known, a trier of fact will often infer that the person taking the action knew what the consequences would be and acted with the purpose of bringing them about." *Id*. at 2005 n. 8. In short, a criminal defendant's intent is often inferred. The *Cuellar* decision does not advance her argument.

B. *United States v. Santos* Does Not Have Any Effect on Non-Gambling SUA Cases

Defendant Martin's second argument is that the indictment does not allege an offense because the indictment fails to allege that the money referenced in Count Two constitutes profits, relying upon the recent United States Supreme Court decision in *United States v. Santos*, 128 S. Ct. 2020 (2008).

In *Santos*, the transaction alleged as money laundering was an illegal lottery operator's payments to his winners and runners using the receipts from his illegal lottery operation, which violated 18 U.S.C. § 1955.

Relying on the rule of lenity, the Supreme Court, in a split opinion that divided the Court 4-1-4, ruled that the term "proceeds" as used in the domestic money laundering statute (§ 1956(a)(1)) means "profits" of the specified unlawful activity and not, as the government had argued, gross receipts. *Santos*, 128 S. Ct. at 2023-2025 (plurality opinion). The plurality bolstered its view by noting that, absent a "profits" definition, the government could charge promotion money laundering in cases, like *Santos*, in which the alleged money laundering transaction was a "normal part" of the underlying SUA. *Id*. at 2026-2028. In such cases, according to the plurality, the money laundering charge may be said to "merge" with the

proceeds-generating crime, so that a separate conviction for money laundering would be tantamount to a second conviction for the same offense. *Id*. at 2026-2027. In the plurality's view, a "profits" definition of "proceeds" eliminates this problem, because by definition profits consist of what remains after expenses are paid. *Id*. at 2027. Four other Justices dissented from the plurality's view, taking the position that the word "proceeds" in the money laundering statute means "the total amount brought in"– *i.e.*, the gross receipts of the underlying offense. *Id.* at 2035-2045 (Alito, J., dissenting).

The plurality and dissenting opinions left the Court evenly divided between the view that "proceeds" means profits in all cases and the view that it means gross receipts in all cases. Justice Stevens' opinion concurring in the judgment provided the tie-breaking vote. Disagreeing with both the plurality and the dissent, Justice Stevens took the view that "proceeds" may mean profits as applied to some SUAs and gross receipts as applied to others. 128 S. Ct. at 2031-2032 (Steven, J., concurring). For example, based on the legislative history of the money laundering statute, Justice Stevens concluded that Congress intended "proceeds" to include "gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id*. at 2031-2032. On the other hand, Justice Stevens concluded that the revenue generated by a gambling business that is used to pay "the essential expenses" of operating the business, such as winnings and salaries, is not "proceeds" within the meaning of the money laundering statute. *Id*. at 2033. In so concluding, Justice Stevens relied on (1) the absence of legislative history bearing on the definition of "proceeds" in the gambling context, and (2) the "merger problem" identified in the plurality opinion. In his view, Congress could not have intended "the perverse result," *id*. at 2033, whereby a defendant's sentence is "radically

increase[d]" for engaging in a transaction that is a normal part of a crime that Congress had appropriately punished elsewhere in the Criminal Code. *Ibid*. (quoting *id*. at 2027 (plurality opinion)).

1. The Holding of Santos

The government's position is that *Santos* holds that "proceeds," as used in Section 1956(a)(1), means "profits" only when the SUA charged as the predicate offense is the operation of an illegal gambling business, in violation of Section 1955.

The general rule for ascertaining the holding of a case in which there is no majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). As the Court has recognized, however, this test is frequently "more easily stated than applied." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *accord Nichols v. United States*, 511 U.S. 738, 745 (1994). In some cases, there may be "no lowest common denominator or 'narrowest grounds' that represents the Court's holding." *Ibid*. (concluding that it was "not useful to pursue the *Marks* inquiry" when it had "baffled and divided the lower courts" for that reason).

When there is no "one opinion [that] can meaningfully be regarded as 'narrower' than another" in the sense that it is a "logical subset of other, broader opinions," the courts of appeals have generally concluded that *Marks* is inapplicable. *United States v. Alcan Aluminum Corp*., 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). *See Anker Energy Corp. v. Consolidated Coal Co.*, 177 F.3d 161, 170 (3d Cir. 1999) ("[T]he *Marks* rule is applicable only where one opinion can be meaningfully regarded as

narrower than another and can represent a common denominator of the Court's reasoning.") (internal quotation marks and citation omitted). "In such a case, the only binding aspect of a splintered decision is its specific result." *Id.*

Santos is a case in which no one opinion is a "logical subset" of any other opinion that can represent a "common denominator of the Court's reasoning." Although the plurality opinion suggests that Justice Stevens' concurring opinion rests on a narrower ground, 128 S. Ct. at 2031 (plurality opinion), there is a reasonable argument that the rationales of the two opinions are inconsistent. The plurality opinion is based on the rationale that "proceeds" has *a single meaning* for all specified unlawful activities and that that meaning is "profits." *See id.* at 2025, 2029-2030. Justice Stevens' concurring opinion is based on the rationale that "proceeds" has *a different meaning* for different SUAs and that "proceeds" means "profits" only when there is "both a lack of legislative history speaking to the definition of 'proceeds'" for the relevant SUA and "Congress could not have intended the perverse result that would obtain" by applying a "gross receipts" definition to that SUA. *Id*. at 2033 (Stevens, J., concurring); *see id.* at 2031-2032 (indicating that a "gross receipts" definition would apply for SUAs involving "the sale of contraband and the operation of organized crime syndicates involving such sales"); *id*. at 2034 n.7 (indicating that a "gross receipts" definition would also apply for other "applications of the statute not involving" a "perverse result"). Neither rationale is a logical subset of the other or can provide a common denominator because the rationales start with conflicting premises. The plurality opinion starts with the premise that "proceeds" must have a common meaning for all SUAs and Justice Stevens' concurring opinion starts with the inconsistent premise that "proceeds" has different meanings for different SUAs. Likewise, Justice Stevens' rationale is

irreconcilable with the rationale of the principal dissent, which also rejects his premise that "proceeds" has different meanings for different SUAs. *Id*. at 2044 (Alito, J., dissenting). Accordingly, "the only binding aspect of" the "decision is its specific result." *Anker Energy Corp.*, 177 F.3d at 170.

2. The Government Need Only Show Gross Receipts in Drug Offenses

As stated earlier, Justice Stevens cautions that such a narrow definition of the term proceeds would not apply to any of those offenses enumerated in § 1956(c)(7), which includes "the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act)." Instead, Justice Stevens argues that Congress, while generally seeking a narrow reading of § 1956, sought to "carve out" controlled substance violations and all others listed in the aforementioned statute from the reading. "That statute is somewhat unique," Justice Stevens said, "because it applies to the proceeds of a varied and lengthy list of specified unlawful of activities . . . to include controlled substance violations." *Santos*, 128 S. Ct. at 2031. He goes on to say that "Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id.* at 2032. Clearly, this means drug offenses and prescription drug rings.

The Eighth Circuit's pre-Santos definition of "proceeds" as "gross receipts" is still viable, except in those cases in which the predicate SUA consists of a gambling offense under Section 1955. In *United States v. Hively*, 437 F.3d 752, 763 (8th Cir. 2006), the Eighth explained that "[r]eading the word 'proceeds' broadly has the benefit of punishing ... all convicted criminals who receive income from illegal activity, and not merely those whose criminal activity

turns a profit." *Id*. at 771. In *United States v. Simmons*, 154 F.3d 765, 770 (8th Cir. 1998), the Eighth Circuit held, although in the context of RICO, "the better view is one that defines proceeds as the gross receipts of the illegal activity."

Therefore, because the Eighth Circuit before the Santos decision recognized "proceeds" to mean "gross receipts," and because of the caveat in Justice Stevens' concurring opinion, the government need only show gross receipts in drug offenses.

3. Dismissal on *Santos* Grounds Under Rule 12 Is Not Warranted

As previously stated, the language used in the challenged money laundering counts tracks the statutory language of § 1956(a)(1). The elements of the charged offenses are delineated and accompanied by allegations of fact. Nowhere in the domestic money laundering statute can the word *profits* be found. The statutory language uses the term *proceeds*, not *profits*. Since both the statute and the indictment use the same term – i.e., proceeds – that is all the indictment needs. Indeed, "[a]n indictment is not required to take a particular form and should not be read in a hyper-technical fashion." *United States v. Covey*, 232 F.3d 641, 645 (8th Cir. 2000) (internal quotation marks and citation omitted). Whether proceeds means profits in this Circuit, or, whether the Santos case is distinguishable from the instant case, are issues to be decided at trial, not at this juncture. Thus, the indictment does not fail to allege an essential element of the crimes charged. Therefore, Defendant Martin's motion to dismiss money laundering counts should be denied.

IV. Conclusion

Accordingly, for the foregoing reasons, the United States requests that this Court deny Defendant Martin's motion to dismiss Count Two and Counts Twenty-One through Twenty-Four of the indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on July 14, 2008, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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