IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA, Plaintiff v. LIU, Jun Wei, also known as "A-Wei," *et al.*, Defendants	Criminal Case No. 00-00028-001 ORDER DENYING DEFENDANT HUANG'S MOTION TO DISMISS EITHER COUNT I OR III AND MOTION TO DISMISS COUNTS III AND IV OF THE SUPERSEDING INDICTMENT

THIS MATTER came before the court on Tuesday, November 21, 2000, for hearing of pre-trial motions by defendants Huang and Liu. Plaintiff appeared by and through Assistant U.S. Attorney David T. Wood; defendant Huang appeared personally and by and through his attorney, Linn H. Asper; defendant Liu appeared by and through his attorney, G. Anthony Long;

defendant Chen, Cheng Zhan appeared personally and by and through his attorney, Bruce L. Berline; defendant Cai appeared personally and by and through his attorney Jose A. Bermudes; and, defendant Tam appeared personally and by and through his attorney, Perry B. Inos.

At the beginning of the hearing, G. Anthony Long, attorney for defendant Liu, stated that he was withdrawing his motion as moot, due to the continuance of the trial date and the court's order denying his previous motion to dismiss on the ground that 18 U.S.C. § 1955 should be found to be unconstitutional. It was so ordered.

THE COURT, having considered the written and oral argument of defendant Huang, rules as follows on the remaining motions:

Defendant moved to dismiss counts III and IV of the superseding indictment on grounds of duplicity and to dismiss either count I or count III of the superseding indictment on grounds of multiplicity.

An indictment which charges two or more distinct offenses in a single count is duplicitous. United States v. Parker, 991 F.2d 1493 (9th Cir.),*cert. denied*, 510 U.S. 839, 114 S.Ct. 121 (1993). The ban against duplicitous indictments derives from several concerns: (1) the lack of adequate notice of the

nature of the charges against the defendant; (2) the possibility of prejudicial evidentiary rulings at trial; (3) to prevent placing defendant in double jeopardy; (4) the risk of a jury's non-unanimous verdict if two or more distinct offenses are included in one count of the indictment; and (5) to prevent prejudice to defendant in obtaining appellate review. *See e.g.* United States v. Cooper, 966 F.2d 936, 939 n.3 (5th Cir. 1992).

Here, defendant Huang argues that counts III (18 U.S.C. §§ 2, 1956 (a)(1)(A)(i), 1956(c), and §1956(h)) and IV (18 U.S.C. §§ 2, 1956(a)(1)(A)(i), and § 1956(c)) of the superseding indictment should be dismissed because both counts accuse him of both an attempt *and* the commission of the charged crimes.[1] Citing one of the concerns about duplicity mentioned above, defendant argues that, should he be convicted, it will not be clear if he was

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[1] Count III, Conspiracy to Launder Monetary Instruments, charges in relevant part that defendants "did willfully...conspire..to...knowingly and intentionally *conduct and attempt to conduct* a financial transaction affecting interstate and foreign commerce[.]" (Court's italics.)

Count IV, Laundering of Monetary Instruments, charges in relevant part that defendants "did willfully, knowingly and intentionally *conduct and attempt to conduct* a financial transaction affecting interstate and foreign commerce[.]" (Court's italics.)

convicted of the attempt or the completed crime.

Plaintiff responds that there is no general federal "attempt" statute and that the wording of 18 U.S.C. § 1956 simply provides two separate ways to commit the same crime: by attempting its commission or by completing its commission.

Where a statute enumerates several means of committing an offense, the indictment may contain several allegations in the conjunctive. United States v. Fulbright, 105 F.3d 443 (9th Cir.), *cert. denied*, 520 U.S. 1236, 117 S.Ct. 1836 (1997). Where a count of an indictment charges a defendant both under the general statutory crime and also for attempt, it is not duplicitous because the defendant is on notice of the nature of the charges against him and he can only receive one sentence on the count. United States v. Steward, 16 F.3d 317 (9th Cir. 1994). Finally, it remains the law of the Ninth Circuit[2] that the grand jury may word an indictment conjunctively even if the statute is worded disjunctively, and the jury may convict on a finding of the elements of a

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[2] And other circuits: United States v. McDonough, 56 F.3d 281 (2nd Cir. 1995); United States v. Still, 102 F.3d 118 (5th Cir. 1996), *cert. denied*, 118 S.Ct. 43 (1997); United States v. Hixon, 987 F.2d 1261 (6th Cir. 1993); United States v. LeDonne, 21 F.3d 1418 (7th Cir.), *cert. denied*, 513 U.S. 1020, 115 S.Ct. 584 (1994); United States v. Street, 66 F.3d 969 (8th Cir. 1995).

disjunctively defined offense. United States v. Bettencourt, 614 F.2d 214 (9th Cir. 1980). Accordingly, defendant Huang's motion to dismiss on the ground that the indictment is duplicitous is denied. Any lingering concerns about confusing the jury can be resolved through jury instructions and verdict forms. United States v. Adesida, 129 F.3d 846 (9th Cir. 1997) (jury instruction cured technically duplicitous indictment charging both conspiracy to import and attempt to import heroin, requiring a unanimous verdict on one offense or the other).

Defendant Huang next argues that either count I or count III of the superseding indictment should be dismissed on grounds of multiplicity. An indictment is multiplicitous if it charges a single offense in several counts. *See* United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976). Such an indictment seeks to impose multiple punishments for what is in essence one crime. United States v. Jewell, 827 F.2d 586, 588 (9th Cir. 1987).

Defendant argues that counts I (Conspiracy to Conduct an Illegal Gambling Business) and III (Conspiracy to Launder Monetary Instruments) impermissibly seek to convict him of two separate conspiracies when, if the facts as they are presently known are accepted as true, there was but one

conspiracy to conduct an illegal gambling operation and launder the proceeds therefrom. He supports his argument by noting that the defendants are the same in both counts, that there was a significant overlap of time in the two alleged crimes, that there is a seamless continuity between the two crimes, and that the entire operation evinced pursuit of one goal, and not two separate goals.

Plaintiff responds that the test of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932), is met and that there is no multiplicity. Blockburger provides the standard for determining if it is appropriate to charge two separate conspiracies based on a single agreement:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 52 S.Ct. at 182.

The continuing vitality of Blockburger was reaffirmed in Rutledge v. United States, 517 U.S. 293, 116 S.Ct. 1241 (1996).

Similarly, in Albernaz v. United States, 450 U.S. 333, 337 (1981), the Supreme Court stated that no multiplicity exists if the two specific conspiracy

charges are predicated on two different substantive offenses, and each substantive offense requires proof of a fact that the other does not.

In count I, defendant is charged under 18 U.S.C. § 2 (Principals), § 371 (Conspiracy to Commit Offense or to Defraud United States), and § 1955 (Prohibition of Illegal Gambling Businesses). In count III, defendant is charged under 18 U.S.C. § 2 (Principals), § 1956(a)(1)(A)(i) (Laundering of Monetary Instruments), § 1956(c) (which requires that a defendant know that the laundering activity involves proceeds from an unlawful activity), and § 1956(h) (which provides that a conspirator is subject to the same penalties as those prescribed for the offense which was the object of the conspiracy).

The court denies the motion, finding that proof of one conspiracy requires proof of an element not necessary to prove the other conspiracy. Count I has as an element the intention to conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business. Count III requires that the person must know that the property involved in a financial transaction represents the proceeds of unlawful activity and still conduct or attempt to conduct the financial transaction. The overt acts required to commit each crime and the statutes alleged to have been violated are sufficiently distinct to

form the basis for two separate convictions. *See* United States v. Stoddard, 111 F.3d 1450, 1454 (9th Cir. 1997).

FOR THE FOREGOING REASONS, defendant Huang's motions to dismiss are denied.

DATED this 1st day of December, 2000.

ALEX R. MUNSON
Judge