SHORT FORM ORDER

INDICTMENT NO. 03398A-2008

County Court of the County of Suffolk
Part 7 – State of New York

PRESENT:
HON. JAMES HUDSON

PEOPLE OF THE STATE OF NEW YORK,

-against-

LOUIS LADONNA,

Defendant.

ORIG. RETURN DATE: 12/14/09
FINAL SUBMIT DATE: 12/14/09

PLTF'S/PET'S ATTY:
HON. THOMAS J. SPOTA
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DEFT'S/RESP'S ATTY:
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Upon the following papers numbered 1 to 11 read on this motion for omnibus relief
Notice of Motion and supporting papers 1-7; Affirmation/affidavit in opposition and supporting papers 8-9; Affirmation/affidavit in reply and supporting papers 10-11; Other ____; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

Before the Court is an omnibus motion by the defendant requesting several forms of relief. The People consented in part and opposed in part. After careful consideration it is hereby:

ORDERED, that defendant's application to dismiss the indictment due to a defective Grand Jury presentation is granted to the extent that the Money Laundering charges, specifically count three, Money Laundering in the Second Degree, and counts ten and twenty-one, Money Laundering in the Third Degree are dismissed. All remaining counts remain intact; and it is further

ORDERED, that defendant's application for the disclosure of the Grand Jury minutes for their review is denied; and it is further

ORDERED, the defendant's application for a more detailed Bill of Particulars is denied; and it is further

ORDERED, the defendant's application for further discovery is denied as moot; and it is further

ORDERED, that the People, upon a proper application by the defendant pursuant to CPL 240.43, are directed to notify the defendant of any uncharged criminal, vicious or immoral conduct which they intend to introduce at trial if the defendant testifies at trial; and it is further

ORDERED, that the defendant's application for a hearing to determine whether the People may introduce the defendant's prior uncharged criminal, vicious or immoral conduct if the defendant testifies at trial is denied with leave to reargue prior to trial; and it is further

ORDERED, that should the People intend to introduce any prior conviction, uncharged crime or bad acts by the defendant in their case in chief, the People are directed to file a motion *in limine* prior to trial so that a hearing may be held on the matter; and it is further

ORDERED, the People's cross-motion for an alibi notice is granted; and it is further

ORDERED, the People's cross-motion for reciprocal discovery (CPL 240.30) is granted; and it is further

ORDERED, the defendant's application to make further pretrial motions is denied absent a showing of unforeseeable circumstances or unless the motion is based on information obtained as a direct result of this decision.

The defendant moved to dismiss the indictment on the grounds that the evidence before the Grand Jury was insufficient to establish the offenses charged (CPL § 210.20[1][b]), and that the Grand Jury proceedings were legally defective (CPL § 210.20[1][c] and 210.35[5]). The People did not oppose an *in camera* inspection of the Grand Jury minutes.

The Court reviewed the Grand Jury minutes and finds that the evidence presented to the Grand Jury was legally sufficient to sustain the indictment and that the Grand Jury was properly instructed on the law (*People v. Mayo*, 36 N.Y.2d 1002, 374 N.Y.S.2d 609 [1975]) on all counts of the indictment except the ones charging the defendants with Money Laundering, specifically counts three, ten and twenty-one. Count three charged the defendants with Money Laundering in the Second Degree (PL 470.15). Counts ten and twenty-one charged the defendants with Money Laundering in the Third Degree. (PL 470.10).

The framework of the People's Money Laundering charges against Louis LaDonna and LaDonna Properties is that Mr. LaDonna would ask an accomplice to find someone with good credit to buy Mr. LaDonna's existing property at an inflated price. This buyer is known as a straw buyer. He

has no intention of taking possession of the property or making any mortgage payments on the property. The straw buyer's only reason to be involved is because he would be paid for his involvement. The accomplice finds a straw buyer and the property is purchased with 100% financing. When the property is sold and the money is distributed at closing, Mr. LaDonna would use the money from the sale of the property to pay the accomplice for finding a straw buyer. Mr. Ladonna would also give additional money to the accomplice and direct that this money be given to the straw buyer as compensation for the straw buyer's participation. The People are alleging that Mr. LaDonna's payment to the straw buyer through the accomplice is a second transaction. That this transaction utilized the stolen proceeds to conceal the origin or nature of the proceeds thereby committing the crime of Money Laundering. There were three counts of money laundering in the indictment. One count for each property. All three money laundering charges operated in a similar manner with the main difference being the alleged amount stolen.

The defense argued that the prosecution's theory of the case did not constitute the crime of money laundering. In order to qualify as money laundering they argue that the transaction must occur after the completion of the underlying criminal conduct. That the laundering of funds cannot occur in the same transaction through which those funds first became tainted by crime. In support of this position the defense cited to *United States v. Santos* (128 S.Ct. 2020 [2008]). This case involved the promotion of an illegal lottery scheme. In the Court's discussion of the promotion provision of the money laundering statute, the Court commented that "the money laundering statute created a separate crime of money laundering that is distinct from the substantive offense (in this case gambling) that initially generated the illegal funds" (citing *United States v. Jackson*, 935 F.2d 832 [7th Cir., S. Dist. I.L. 1991]). The defense also cited to *People v. Johnson* (971 F.2d 562 [10th Cir., N. Dist. O.K. 1992]) in which the Government attempted to charge the defendant with racketeering in a criminal scheme where the victims would wire the defendant money thinking they were involved in an arbitrary transaction when in reality the defendant was just stealing the money. In the discussion of whether the wired money was "criminally derived property" the Court turned to *People v. Lovett* (964 F.2d 1029 [10th Cir., W. Dist. O.K. 1992]), a money laundering case in which the Court found that the money laundering statute was intended to be a separate crime distinct from the underlying offense that generated the money and concluded that "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity'" (*People v. Johnson*, 971 F.2d 562 [7th Cir. 1991] citing *Lovett* at 214).

The People did not directly respond to the defendant's challenge of the money laundering charges in their answer.

The People have made a persuasive argument. New York State's money laundering statute (Penal Law 470.10) is based on the Federal Money Laundering Control Act of 1986 (*In re Fazio*, 35 A.D.3d 33, 823 N.Y.S.2d 421 [2 Dept., 2006]). Thus in the Practice Commentary of McKinney's by William C. Donnino, it is suggested that at least initially, the Federal case law be a guide to their interpretation (see McKinney's, Book 39 - 2008, section 470, page 214). A search of New York State case law reveals that the money laundering statute has not been used in any similar "straw buyer" mortgage fraud cases. There also seems to be a lack of precedence in New York regarding whether its money laundering statute applied to transactions which were part of the crime that generated the illegal proceeds. The Court must therefore look to Federal case law.

On the federal level, money laundering charges have also not been widely used in straw buyer mortgage fraud cases. When they have been applied it usually dealt with the reinvesting of the illegally-obtained proceeds to purchase additional properties so that the mortgage fraud scheme could be perpetuated (see *United States v. Woods*, 554 F.3d 611 [6th Cir. Ohio 2009], *United States v. Parish*, 565 F.3d 528 [8th Cir. Minn. 2009]). This is known as a promotion theory and is codified in both the Federal (18 U.S.C.S. Sec. 1956[a][1][A][i]) and New York State's money laundering statutes (Money Laundering in the Second Degree – PL 470.15 [1][a][i][A], Money Laundering in the Third Degree – PL 470.10[1][a][1][A]). The case at bar is different because there are no allegations that proceeds from one fraud were used in a separate fraud or transaction. As charged in the indictment and further clarified in the People's Bill of Particulars, each money laundering charge applied to a single property only. The money that Mr. LaDonna gave to the accomplice to pay the straw buyer, this money that the People characterized as a second transaction, was payment to the straw buyer for his participation in the mortgage fraud that generated the illegal proceeds. This transaction was the dividing up of the joint venture's illegally-obtained proceeds. It was part of the original crime.

In *United States v. Adefehinti* (510 F.3d 319, 379 U.S. App. D.C. 91 [D.C. Cir. 2007]), a money laundering case involving straw buyers similar to the case at bar, the Court held that a money transfer from a fictitious seller to one of the participants in a mortgage fraud was insufficient to sustain a conviction for money laundering because the necessity to conceal requires more than the mere transfer of unlawfully obtained funds. Subsequent transactions must be specifically designed to hide the provenance of the funds involved (*Adefehinti* at 322 citing *United States v. Jackson*, 935 F.2d 832, 843 [7th Cir. 1991]). When the prosecution in *Adefehinti* argued that the concealment was the making of checks payable to straw buyers—as the prosecution argues in the case at bar, the *Adefehinti* Court held that such "proposed analysis would conflate the act of fraudulently obtaining money with the act of concealing it—two different activities which are rarely the same (citing *United States v. Seward*, 272 F.3d 831, 836 [7th Cir., N. Dist. I.L. 1998]). The *Adefehinti* Court further quoted: "Money laundering criminalizes a transaction in proceeds, not the transaction that creates the proceed" (citing *United States v. Mankarious*, 151 F.3d 694, 705 [7th Cir. Wis. 1998]). Based on these findings the

Adefehinti Court held that "Having carried out a fraud of which concealment was an integral part, defendants cannot be charged with the same concealment a second time, as if it were the sort of independent manipulation of the process required for money laundering" (*Adefehinti* at 324). Similarly in the case at bar, the prosecution is attempting to charge money laundering based on a transaction that was integral to the crime which created the illegal proceeds. This would be an inappropriate application of the law. The money laundering charges are therefore dismissed.

Another specific point of contention was the People's acknowledgment that accomplice corroboration instructions were not given to the Grand Jury. The People contend that they are not required to give such instructions. They cited to *People v. Bomberry* (112 A.D.2d 18, 490 N.Y.S.2d 382 [4 Dept., 1985]) and *People v. Lowery* (151 A.D.2d 1026, 542 N.Y.S.2d 88 [4 Dept., 1989]). Both cases stand for the position that the prosecution is not required to instruct the Grand Jury with respect to the legal significance or evaluation of accomplice testimony, but may do so in their discretion.

The defense argued that the People's position is mistaken and cite to *People v. Pacheco* (56 A.D.3d 381, 868 N.Y.S.2d 625 [1 Dept., 2008]) to hold that accomplice corroboration instructions are required in a Grand Jury to sustain an indictment. The *Pacheco* case dealt with four defendants charged with burglarizing a parked van. The Police testified at the Grand Jury stating they saw two men break into a van while the defendant was on the street acting as a lookout while the driver stayed in the car. All four were arrested when the three returned to the car with objects taken from the van. The defendant accused of being the lookout testified at the Grand Jury. He stated that he exited the car separately from the two men who broke into the van and that the only reason he left the car was to tell them to stop what they were doing. He claimed he was not a participant to the crime. The Grand Jury then asked to hear from the driver before they decided on the lookout's case. The driver testified that all three men left the car together and that he did not know what they were going to do and that he was not a participant to the burglary. The prosecutor did not give accomplice-corroboration instructions. The Grand Jury came back with true bills against the lookout and the two other defendants, but declined to indict the driver. While no corroboration instructions were given in *Pacheco*, the Court did not dismiss the indictments. The Court held that corroboration instructions were both necessary and appropriate pursuant to CPL 190.65[1] because the indictment was based on the driver's uncorroborated testimony. Nevertheless the failure to provide these instructions did not rise to the level of impairing the integrity of the Grand Jury (CPL 210.35[5]). It found the defendant's own testimony and the testimony of the police officers provided sufficient evidence tending to connect the defendant to the crimes charged.

The case at bar is distinguishable from *Pacheco*. In *Pacheco* there was no corroborating evidence. In the case at bar there was testimony from non-accomplices who corroborated the

accomplices' testimony to sufficiently connect the defendants to the crimes charged. CPL 190.65(1), provides that:

> "Subject to the rules prescribing the kinds of offenses which may be charged in an indictment, a grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such offense provided, however, *such evidence is not legally sufficient when corroboration that would be required,* as a matter of law, to sustain a conviction for such offense *is absent*, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense." (emphasis added).

There is a distinction between the absence of corroborating evidence and the failure to instruct the Grand Jury on the need to corroborate accomplice testimony. What CPL 190.65[1] prohibits is the use of uncorroborated accomplice testimony to sustain an indictment because then the indictment would have been based on legally insufficient evidence rendering the proceeding defective. While it certainly would have been preferable to give accomplice corroboration instructions, the failure to do so in this case did not impair the integrity of the Grand Jury because there was legally sufficient evidence presented in the form of non-accomplice corroborating evidence.

A further point should be made that an indictment is defective only if both the integrity of the proceeding is impaired *and* if prejudice to the defendant may result (*People v. Darby*, 75 N.Y.2d 449, 455, 554 N.Y.S.2d 426, 428, 553 N.E.2d 974, 976 [1990]). CPL 210.35[5] provides:

> "A grand jury proceeding is defective ... when ... the proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired *and* prejudice to the defendant may result." (Emphasis added.).

This is a two-prong requirement. There must be impairment to the presentation *and* prejudice to the defendant. Neither of these circumstances occurred in our case. The corroborating evidence from non-accomplices rendered the accomplice's testimony legally sufficient therefore there was no prejudice to the defendant.

The defense requested a Bill of Particulars and the People responded by providing one in their answer. The defense replied that they were not satisfied with the People's response in particular to counts three, ten and twenty-one of the indictment which charged Louis Ladonna and Ladonna Properties with money laundering. The defense specifically wanted the prosecutor to

disclose the particular conduct Mr. LaDonna engaged in that constituted money laundering. The defense also claimed the People asserted a new theory of money laundering which was not charged in the indictment by alleging in their Bill of Particulars that funds were distributed to continue the fraud by paying the mortgage loan for a short period of time before the loan went into an anticipated default.

As explained above the money laundering charges have been dismissed, however, the Court wishes to address the defense's argument that additional charges have been asserted in the Bill of Particulars that may become an issue at trial.

In support of their position the defense cited to *People v. Grega* (72 N.Y.2d 489, 534 N.Y.S.2d 647 [1988]) and *People v. Woods* (208 A.D.2d 874, 618 N.Y.S.2d 51 [2 Dept., 1994]). In *Grega*, the People's experts' opinion at trial was different from what was charged in the indictment and from what was noticed in the discovery. In *Woods* the jury was charged in error as to which defendant had a gun as charged in the indictment. In both these cases the theory of the crime that was presented to the jury was different from the indictment. This compromised two functions of an indictment—notice the accused and the power of the Grand Jury to determine the charges. Where a defendant's right to fair notice of the charges or his right to have those charges selected by the Grand Jury is violated, reversal is required (*Grega* at 496).

The *Grega* and *Woods* cases are distinguishable from the situation at bar. The most obvious difference is that both these cases dealt with either facts or charges that were presented to a jury that was different from the indictment. In the case at bar we have not reached the trial stage and nothing has been presented to a Jury. Additionally, although the defense claims that the People have asserted a new theory of money laundering that was not charged in the indictment—that funds were distributed to pay the mortgage loan in question for a short period of time—this so called new theory was disclosed in a Bill of Particulars. The purpose of a Bill of Particulars is to in greater detail describe the crimes charged in the indictment (CPL 200.95[1], see also *People v. Raymond G.*, 54 A.D.2d 596, 387 N.Y.S.2d 174 [3 Dept., 1976]). A reading of the People's Bill of Particulars does not point to the defense's position that its inclusion of additional information was to establish a new unindicted theory of money laundering. The disclosure reads "... funds were distributed to continue the fraud ..." It's disclosure appears to be an attempt to disclose in more detail the extent of the fraud. The fraud explains in more detail the Grand Larceny charges. The Court does not find that the People's Bill of Particulars have inserted additional charges.

The defense next argued in their reply that the People failed to inform them of whether Mr. LaDonna is accused of preparing a fraudulent HUD-1 form or a fraudulent Uniform Residential

Loan Application form (hereinafter URLA).The Court has reviewed the indictment and finds that it sufficiently informs the defendant of the alleged fraudulent form.

The defendant's omnibus motion requested discovery pursuant to CPL 240.20. The People responded to the defendant's request in their answer. The defendant did not submit a reply contesting the sufficiency of the People's answer. Therefore it seems that the People have fully complied with the defendant's request. Accordingly defendant's application is denied as moot.

Defendant's application for a *Sandoval* hearing is denied (*People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 [1974]). The People indicated that they have not been informed of any "prior uncharged criminal, vicious, or immoral conduct" by the defendant and the defense has failed to inform the Court of any such conduct (*People v. Matthews*, 68 N.Y.2d 118, 506 N.Y.S.2d 149 [1986]). The People are aware of their continuing obligation to inform the defendant of such conduct upon a proper request by the defense (CPL 240.43). Should prior criminal convictions or prior bad acts be discovered, the Court will re-entertain an application for a *Sandoval* hearing before trial.

The People are also directed to file a motion *in limine* prior to trial should they intend to introduce any prior conviction, uncharged crime or bad acts by the defendant in their case in chief so that a hearing may be held to determine its admissibility as delineated in *People v. Molineux* (168 N.Y. 264 [1901]) and *People v. Ventimiglia* (52 N.Y.2d 530, 439 N.Y.S.2d 96 [1981]).

The People's cross-motion for an alibi notice (CPL 250.20) and reciprocal discovery (CPL 240.30) is granted.

The defendant's application to make further pretrial motions in the future is denied absent a showing of unforeseeable circumstances or unless the motion is based on information obtained as a direct result of this decision.

This constitutes the decision and order of the Court.

Dated: Riverhead, New York
January 13, 2010

JAMES HUDSON
J.C.C.