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ATTORNEY FOR DEFENDANT HOA NGUYEN

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,  
Plaintiff,

Case No. 3:15-cr-00026-7-SI

**MOTION TO DISMISS**

vs.

HOA NGUYEN,  
Defendant(s).

Defendant, Hoa Nguyen, through his counsel, Matthew Schindler, moves the Court to dismiss the Indictment against him because, even taken as true, the allegations regarding his conduct fail to state an offense under the federal money laundering statute, 18 USC 1956(a)(1)(A)(i). Allowing the charges against Mr. Nguyen to go forward enables the Government to prosecute everyone who commits a gambling offense, even bettors, for the much more serious crime of money laundering without anything more than evidence of participation in gambling.

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**1. The Indictment:**

Hoa Nguyen and seven others are accused of orchestrating a money laundering conspiracy as follows:

KIET ANH VO, VINH TUONG NGUYEN, QUAN ANH HO, TAN QUOC TRAN, DUY HUYNH, NHAT LUU, **HOA NGUYEN**, and THAI VIET HUYNH, did knowingly combine, conspire, and agree with each other and with other persons known and unknown to the Grand Jury to knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, which involved the proceeds of a specified unlawful activity, that is operating an illegal gambling business in violation of Title 18, United States Code, Section 1955, with the intent to promote the carrying on of said specified unlawful activity, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

The Indictment then lists the Manner and Means by which these men allegedly conducted this conspiracy.

- It was part of the conspiracy that defendant KIET ANH VO financed, managed, supervised and directed a gambling business that violated the laws of the State of Oregon, involved multiple sub-agents or "bookies" who financed, managed, supervised and directed the illegal gambling business, and said illegal gambling business was in continuous operation since at least April 2014.
- It was part of the conspiracy that defendant KIET ANH VO employed sub-agents or "bookies," including defendants QUAN AHN HO, TAN QUOC TRAN, DUY HUYNH, NHAT LUU, **HOA NGUYEN** and THAI HUYNH to take bets from customers off-line (over the phone or in person) and on-line via the organization's gambling web site [www.vnbets.net](http://www.vnbets.net).

- It was part of the conspiracy that defendant KIET ANH VO and the sub agents working for him, including defendants QUAN ANH HO, TAN QUOC TRAN, DUY HUYNH, NHAT LUU, *HOA NGUYEN* and THAI HUYNH, would charge and collect a percentage fee for each bet placed and the amount would vary based upon the individual gambler and the amount of the wager.
- It was part of the conspiracy that the sub agents working for defendant KIET ANH VO, including defendants QUAN ANH HO, TAN QUOC TRAN, DUY HUYNH, NHAT LUU, *HOA NGUYEN* and THAI HUYNH, would and did collect gambling losses from customers who placed bets on sporting events and pay out gambling winnings to customers on a weekly basis.
- It was part of the conspiracy that the sub agents working for defendant KIET ANH VO, including defendant QUAN ANH HO would and did deposit gambling proceeds in conspirator bank accounts to pay gambling winnings.
- It was part of the conspiracy that the sub agents, including defendants QUAN ANH HO, TAN QUOC TRAN, DUY HUYNH, NHAT LUU, *HOA NGUYEN* and THAI HUYNH, working for defendant KIET ANH VO would and did access individual accounts on the gambling website [www.vnbets.net](http://www.vnbets.net) with a username and password authorized by defendant KIET ANH VO.
- It was part of the conspiracy that defendant KIET ANH VO had the authority to authorize increased wager limits for specific gamblers as requested by sub agents working for VO.
- It was part of the conspiracy that the U.S. currency that represented the gambling winnings and losses off-line and on line via the gambling web site [www.vnbets.net](http://www.vnbets.net) were paid out to and collected from customers in person often through defendant VINH TUONG NGUYEN.

- It was part of the conspiracy that defendants KIET ANH VO and VINH TUONG NGUYEN used illegal gambling proceeds to operate their business the Lava Cafe in Portland, Oregon.
- It was part of the conspiracy that members of the conspiracy would and did meet at defendant KIET ANH VO and VINH TUONG NGUYEN's business, Lava Cafe, to place off-line bets, and to drop off and pick up currency that represented gambling proceeds.
- It was part of the conspiracy that defendant KIET ANH VO would place "lay-off" bets with third party sub agents, such as defendant THAI VIET HUYNH, to balance the books and mitigate the risk to VO's illegal gambling business.

According to the Government, Hoa Nguyen could be convicted of money laundering based on the following:

- He placed bets through an online website which he knew to be unlawful under 18 USC § 1955.
- He assisted others in gambling on that site.
- When there were losses (or wins) he either received money or paid money to Kiet Vo.
- He received a commission.

The Government has not provided any evidence showing that Mr. Nguyen ever received any payments from Mr. Vo either as gambling winnings or as something that could be considered a share of the gross receipts of an illegal gambling operation. All discovery provided thus far indicates that Mr. Nguyen's conduct was limited to betting on the NFL, losing, paying Kiet Vo, and obtaining betting accounts for family members to bet on the website. Similarly, nothing in the

discovery indicates Mr. Nguyen received a commission for anything. Wiretap intercepts indicate that he negotiated a reduction in the commission that he and his family paid on losses but he received nothing. When his family lost \$1000.00, they would be credited \$100.00, leaving a net loss of \$900.00.

The Government has not alleged that Mr. Nguyen deposited any of the money into a bank account, wired money, or otherwise engaged in any financial activity other than gambling, losing, and paying off losses. It does not allege the financial transaction he conducted that was specifically intended to support a conspiracy under the money laundering statute. The Government has not alleged how he promoted Kiet Vo's gambling business in a way different from any other bettor. It does not allege how he knew that this online betting website was illegal as opposed to numerous websites widely marketed in the Vietnamese community that tout legal sports betting and appear to be legal. Finally, the Indictment does not disclose how Hoa Nguyen's gambling, which was not prohibited by law, could be criminal.

## **2. The elements of conspiracy to commit money laundering:**

Section 1956 provides, in relevant part:

“(a)(1) 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.”

(h) Any person who conspires to commit any offense defined in this section 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.

18 U.S.C. § 1956(a)(1)(A)(i), (h).

To support a conviction for conspiring to engage in promotional money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), (h), the Government must prove Hoa Nguyen (1) engaged in a financial transaction which involved proceeds from specified illegal activity, (2) knew the proceeds were from illegal activity, and (3) intended the transaction either to promote the illegal activity or to conceal the nature, source, or ownership of the illegal proceeds. *United States v. Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996).

With respect to the second element of money laundering, a distinction must be drawn between the two types of knowledge implicated by the money laundering statute. *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994). “While to sustain a conviction the defendant must have known that the primary predicate activity...was unlawful...he need not have known that the secondary act of laundering the proceeds was unlawful.” *Id.* The Government must prove that Mr. Nguyen knew the underlying activity (i.e., gambling) described in the Indictment was in fact illegal not that he knew his transfer of money was unlawful money laundering.

To prove a conspiracy, the Government must establish: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir.2004).

The Ninth Circuit Model Jury Instructions regarding conspiracy provide a detailed explanation of what that entails:

“For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the Indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.”

#### Ninth Circuit Model Criminal Jury Instruction 8.20

The use of “willfully” in this instruction is significant because it is a higher *mens rea* requirement than the “knowingly” *mens rea* the Government uses throughout the Indictment. It is not enough that Mr. Nguyen “knowingly conspired”

he must have willfully participated in a scheme to conduct financial transactions with the proceeds of an illegal gambling business under § 1955, he must have known the gambling business was illegal, and he must have done so specifically intending to advance the gambling scheme.

**3. Count I does not allege a crime under 18 USC § 1955.**

A conspiracy to violate the Federal Money Laundering Statute through financial transactions involving the proceeds of gambling requires the gambling alleged actually be illegal. The Federal anti-gambling statute, 18 USC § 1955 does not specifically prohibit internet gambling as described in this Indictment, nor does any other Oregon or Federal law.

18 USC § 1955 provides:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section--(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

18 U.S.C.A. § 1955 (West)



This statute broadly criminalizes the conduct of everyone involved in illegal gambling besides the bettor. It does not, however, criminalize Internet gambling. “[P]ersons who perform a necessary function in the operation of illegal gambling whether they be labelled writers, agents, runners, watchmen, telephone clerks, collectors, or subbookmakers conduct an illegal gambling business. Only mere bettors are excluded from the reach of section 1955.” *United States v. Avarello*, 592 F.2d 1339, 1349 (5th Cir. 1979).

The critical word is “illegal.” The gambling must be illegal to violate § 1955. What the Government failed to do here is sufficiently allege conduct that amounts to participation in an **illegal** gambling business. This Indictment describes gambling that is not illegal.

It is important in this context that money related to gambling is different from money relating to controlled substances or other contraband. Gambling is legal in many forms and is generally accepted as a morally and legally appropriate diversion subject to regulation. In some places it is completely barred but in most countries and states, some form of gambling is legal. There are legal Tribal casinos everywhere. The internet is flush with legal gambling. Most states sponsor gambling and sports gambling through lotteries and websites promoting lotteries.

In Vietnamese culture gambling is considered family entertainment that is always a part of celebrations and holidays. Numbers and luck have ancient mystical properties that have inspired gambling in Vietnamese culture for thousands of

generations. Mr. Nguyen was introduced to it as a child and has gambled in one form or another his entire life, even if that meant nothing more than buying a lotto ticket. Websites featuring online betting are widely marketed in the Vietnamese community as legal, fun entertainment and that is exactly what it was for Mr. Nguyen and his family, until he went to jail.

Heroin, in contrast, is unquestionably and under every circumstance illegal. When one provides cash to a drug dealer for heroin, there cannot be any confusion about the status of that transaction. There are no websites selling legal heroin. This distinction is important here, where the Government has crafted a money laundering conspiracy based on gambling that is not clearly illegal.

This distinction is further important because Hoa Nguyen has been lawfully employed at Gunderson Rail for 20 years and has no criminal history. He would never have associated with Kiet Vo or used vnbets.net had he known it was illegal. He does not know Kiet Vo from jail or the streets, he knows him from the lunch room at Gunderson where they have worked for the last three years at least. Hoa Nguyen had no idea what Kiet Vo was doing besides working at Gunderson, betting on football, and opening a café.

Mr. Nguyen's "bookmaking" involved nothing more than helping his family members (his sisters-in-law, his wife, and his 85 year old mother-in-law) obtain accounts on the website. When they lost, and all they did was lose, Mr. Nguyen collected the money and gave it to Mr. Vo, most often at work, but once he left it for Mr. Vo at the Lava Café.

For Hoa Nguyen, or any other casual observer, [www.vnbets.net](http://www.vnbets.net), the website listed in the Indictment, looks like any one of hundreds of other seemingly legal gambling websites. The Court may take judicial notice of this and other reliable information on the Internet cited in this Motion under Federal Rule of Evidence 201. *United States v. Hom*, 45 F. Supp. 3d 1175, 1181 (N.D. Cal. 2014). Vnbets.net operates today and can be currently accessed from any computer with Internet access in the District.

A web search for “legal online sports gambling” leads to thousands of internet gambling websites which resemble [www.vnbets.net](http://www.vnbets.net). Both of the first two search results<sup>1</sup> are websites that offer extensive legal arguments about why betting online through websites not based in the United States is lawful. The arguments are not spurious. Gaming law is complex and overlaid with sometimes inconsistent state, federal, and international laws. *See e.g. United States v. Bala*, 489 F.3d 334 (8th Cir. 2007).

Similar websites are widely marketed in legitimate newspapers to the Vietnamese community. Attached as Exhibit 1 is an advertisement which appeared on the front cover of the Little Saigon News of Oregon this year. *See Exhibit 1*. That website, Viebets.eu, looks and works very similarly to vnbets.net. Nothing in the advertisement indicates that the Federal Government will kick in your door and search through your wife’s underwear drawer if you gamble on the website.

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<sup>1</sup> See <http://www.legalbettingsites.com> and <http://www.legalbettingonline.com/sports/>

It does not appear that either Federal law or Oregon law criminalizes gambling on a website if the website is operating legally where it is based. Although far from clear, the Federal Wire Act (“Wire Act”) appears to criminalize internet gambling in some circumstances but the prohibition only applies to transactions involving sports *and* the wager is illegal where the website is based. *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) *aff'd sub nom. In re MasterCard Int'l Inc.*, 313 F.3d 257 (5th Cir. 2002).

The Federal Wire Act, found at 18 U.S.C. § 1084 provides as follows:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under his title or imprisoned....

18 U.S.C. § 1084(a) (emphasis added).

Section (b) of the statute carves out a critical exception to the rule:

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, *or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.*

18 U.S.C. § 1084(b)

The Wire Act, therefore, does not prohibit an internet transmission from the United States to another jurisdiction where betting on that sports event is legal. *See In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) *aff'd sub nom. In re MasterCard Int'l Inc.*, 313 F.3d 257 (5th Cir. 2002).

From 1996-2006, Congress tried on several occasions to update and clarify the Wire Act as to what it did and did not prohibit; each of these efforts failed primarily because of internecine fights between different gaming sectors — i.e., commercial vs. tribal, horse vs. dog racing, lotteries vs. convenience stores. In 2006, Congress abandoned efforts to update the Wire Act, and instead passed the Unlawful Internet Gambling Enforcement Act (UIGEA, 31 U.S.C § 5361-67).

This Act prohibited the acceptance or processing of a financial instrument for the purpose of “unlawful Internet gambling” but did not directly define that term, instead relying on other federal and state laws as to what wagers were illegal. Importantly, it did not reach or purport to criminalize gambling, only the act of accepting or processing a financial instrument for the purpose of unlawful gaming. *Interactive Media Entm't & Gaming Ass'n Inc. v. Attorney Gen. of U.S.*, 580 F.3d 113, 116 (3d Cir. 2009). In this case, the Indictment makes clear there were no financial instruments accepted by the website.

No federal court of appeals has held that either the Wire Act or the UIGEA would apply to Internet gambling under these circumstances. There is no clear prohibition on Internet gambling from Oregon through a website offering legal betting where the website is based and without any electronic or wire financial

transaction. Since Count I does not describe a conspiracy which describes Hoa Nguyen's involvement in a gambling that is actually illegal under 18 USC § 1955 it should be dismissed.

**4. Hoa Nguyen's conduct also does not violate state gambling laws and therefore he cannot have conspired to violate 18 USC § 1956.**

A further problem with this Indictment is that Oregon law, like Federal law, does not prohibit gambling on a website not based in Oregon that does not involve an online financial transaction of some kind.

Oregon Revised Statute 167.109 deals with Internet gambling:

(1) A person engaged in an Internet gambling business may not knowingly accept, in connection with the participation of another person in unlawful gambling using the Internet:

(a) Credit, or the proceeds of credit, extended to or on behalf of such other person, including credit extended through the use of a credit card;

(b) An electronic funds transfer or funds transmitted by or through a money transmission business, or the proceeds of an electronic funds transfer or money transmission service, from or on behalf of the other person;

(c) Any check, draft or similar instrument that is drawn by or on behalf of the other person and is drawn on or payable at or through any financial institution; or

(d) The proceeds of any other form of financial transaction that involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of the other person.

(2) Violation of subsection (1) of this section is a Class C felony.

Or. Rev. Stat. Ann. § 167.109 (West)

None of Hoa Nguyen's alleged conduct is covered by this statute. He did not accept any credit, use a credit card, or participate in a transaction through a bank. *See e.g. United States v. Greco*, 619 F.2d 635, 640 (7th Cir. 1980).

Like the Wire Act, and the UIGEA, Oregon law criminalizes accepting certain financial transactions relating to Internet gambling but does not prohibit Internet gambling nor does it criminalize having custody of gambling funds. Nothing in this statute would appear to apply to a person who gambles online and does not engage in a financial transaction online or through a financial institution.

No other Oregon law addresses gambling online at a website legal where it is based. The defense could not identify any Oregon criminal cases prosecuting gambling on an internet website. Because the Indictment fails to allege underlying conduct violating state law, Mr. Nguyen cannot have violated 18 USC § 1955 therefore Count 1 should be dismissed.

**5. Collecting and delivering money related to an illegal<sup>2</sup> gambling business cannot subject Mr. Nguyen to Federal prosecution for conspiracy to commit money laundering.**

There is some minimum threshold of conduct required to show that Mr. Nguyen was willfully supporting the conspiracy's effort to launder money besides

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<sup>2</sup> Mr. Nguyen does not concede that the gambling alleged in this Indictment that he participated in is illegal.

gambling in an illegal gambling business you did not know was illegal. In fact, something more is required than knowingly being a low level employee of an illegal gambling operation. *United States v. Termini*, 992 F.3d 879, 882 (8<sup>th</sup> Cir. 1993).

Like this one, *Termini* was a gambling and money laundering case. *Id.* at 880. The 8<sup>th</sup> Circuit described Mr. Termini as a “route man” traveling to bars and restaurants to perform services on Be Amused’s machines. *Id.* at 880. Be Amused Vending and Amusement Company placed cigarette machines, jukeboxes, pool tables, and electronic amusement machines in bars and restaurants. *Id.* These machines included video poker and slot machines that allowed players to obtain illegal cash payouts in violation of state law. *Id.*

As part of his job, Termini travelled to bars and restaurants to perform services on Be Amused’s machines. His duties included collecting proceeds from the machines, restocking cigarette machines, and reimbursing bar owners for the illegal payouts to video machine players. *Id.* The proceeds from the machines were commingled by Termini and delivered to Be Amused. *Id.* From that point forward Termini was not involved in handling the money. There was no question that Mr. Termini knew it was an illegal gambling operation, the players knew it was illegal, and some of the money he handled was absolutely related to illegal gambling. Mr. Nguyen’s conduct in betting and in referring others in his family to bet on the website are far less substantial than those engaged in by Termini.

The Government obtained a two-count Indictment against Termini and five co-defendants. Count I charged Termini and four co-defendants with conducting an



illegal gambling business in violation of Missouri state law. Count II charged co-defendants Simone and Moretina with money laundering, and charged Termini and four co-defendants with aiding and abetting the money laundering offense. 992 F.2d at 880. Termini was the only defendant to go trial and he was convicted of illegal gambling and aiding and abetting money laundering.

Mr. Termini appealed arguing that the evidence was insufficient to convict him of aiding and abetting money laundering. The 8<sup>th</sup> Circuit reversed the conviction, finding proof of willful efforts to aid and abet money laundering lacking:

The United States contends that Termini's commingling of the illegal funds with the legitimate funds at the time of collection was a significant step in the money laundering scheme... We cannot agree. There is no logical nexus between returning the collected funds with a marked record of their various sources and an intentional effort to hide their illegal source...

There is no evidence, and the Government does not argue, that the defendant had any involvement beyond the collection of Be Amused's money. The jury may well have disbelieved the defendant's statements that he did not know who counted or deposited the money. (Trial Tr., Vol. III at 47.) But without more, Termini's mere association with Simone and Moretina, or his mere knowledge of their unlawful money laundering activities is legally insufficient to sustain his aiding and abetting conviction.

*United States v. Termini*, 992 F.2d 879, 881-82 (8th Cir. 1993)

Even assuming the allegations in this Indictment are true, the Government failed to allege involvement by Mr. Nguyen sufficient to sustain a prosecution for conspiracy to commit money laundering. Just as in *Termini*, having a role in an

illegal gambling operation, even collecting money, does not a money launderer make even if, unlike Hoa Nguyen, you knew it was an illegal gambling operation. Like aiding and abetting considered in *Termini*, conspiracy liability requires something more, something like the conduct alleged against Kiet Vo and Vince Nguyen, to support independent money laundering charges. See ¶ 9 of the Indictment.

**6. Delivery of money representing gambling losses cannot be “proceeds” for the purposes of the money laundering statute.**

As to Mr. Nguyen, there is a fundamental temporal flaw in the Indictment. Assuming everything the Government says to be true, he, along with others in his family, placed wagers through a gambling website. They lost money and Mr. Nguyen collected that money from his wife and his 85 year old mother-in-law. He commingled it with his own losses and ultimately delivered that money to his friend and co-worker, Mr. Vo. The Indictment discusses offline bets but Hoa Nguyen never successfully placed an “offline” bet with Kiet Vo. Until the money that Mr. Nguyen allegedly collected was handed to Mr. Vo, it was not proceeds of gambling because none of it belonged to or was shared with Hoa Nguyen. When Hoa Nguyen delivered money representing his losses on an apparently legitimate online gambling website to a friend and co-worker and he has no knowledge of or involvement in that money going forward, that cannot be both illegal gambling and money laundering simultaneously.

In Hoa Nguyen’s situation, until the delivery occurs and there is a transfer of interest in the money, the money represents Mr. Nguyen’s net loss and not the “proceeds” or gross receipts of anything for the purposes of the money laundering statute. The gambling offense does not conclude and the money laundering offense cannot begin until *after* that transfer of money has taken place in a situation where the defendant receives nothing, no share of the profits or proceeds of the conspiracy.

Even when “proceeds” for the purposes of the money laundering statute is defined as gross receipts, Hoa Nguyen’s gambling loss (or anyone else’s) cannot be his gross receipt, and that is all the Mr. Nguyen ever possessed. It is only once Kiet Vo or Vince Nguyen takes control of that money, using it to fund the Lava Café, or wiring it to Hawaii, or paying their girlfriend’s cellphone bill, that it becomes “proceeds” subjecting them to money laundering liability. Unless Hoa Nguyen shares in the gross receipts, which he never did, he cannot commit money laundering.

The allegations of lay off bets are important here because the Government knows that Mr. Nguyen had nothing to do with those. Those are critical because those guarantee the house a “profit” no matter the outcome of the game. Because Hoa Nguyen, unlike others, was never in the position to share that profit he cannot have willfully conspired to advance their scheme.

- 7. This Indictment, as to Mr. Nguyen, suffers from the “merger” problem identified by the Supreme Court in *Santos* and by the Ninth Circuit in *Van Alstyne*.**

When the Supreme Court decided *United States v. Santos*, 553 U.S. 507, 514 (2008), it was unable to reach consensus about the meaning of the money laundering statute and its applicability to a gambling case. It issued a plurality opinion which found that “proceeds” are only profits and not gross receipts under § 1956. That decision was superseded by Congressional action in 2009 which amended § 1956 and made clear that proceeds includes gross receipts. That amendment is immaterial here.

Nevertheless, there was issue in *Santos*, one that five justices all noted, which is that in some situations a financial transaction is so inherent and central to the underlying predicate criminal activity that it “merges” and cannot be charged separately as money laundering. *United States v. Santos*, 553 U.S. 507, 515 (2008); *see also United States v. Van Alstyne*, 584 F.3d 803, 814 (9th Cir. 2009)(“Only the desire to avoid a “merger problem” united the five justices who held that Santos' payments to winners and runners did not constitute money laundering.”). This is one of those situations.

Congress did not intend every gambling case to be prosecuted as money laundering. *Santos*, 553 U.S. at 516. The concern is particularly acute here because the Government has increased the statutory maximum through the overlay of money laundering charges based on conduct essential to the underlying unlawful gambling conduct. *Id.* “An additional aspect of conducting an illegal gambling business necessarily includes the collecting of the proceeds of the illegal gambling activity.” *United States v. Conley*, 37 F.3d 970, 978-79 (3d Cir. 1994).

In this case, as in *Santos*, the Government has used the money laundering statute to exponentially increase the statutory maximum applicable to Mr. Nguyen when, according to the Indictment, he did not do anything other than participate in the much less serious predicate gambling crime. In Hoa Nguyen's case, just as in *Santos*, the statutory maximum has been increased from five years for a violation of 18 USC § 1955, the anti-gambling statute, to twenty years for a violation of 18 USC § 1956 based on identical conduct. *See United States v. Kratt*, 579 F.3d 558, 562 (6th Cir.2009) (holding that proceeds "means profits only when the § 1956 predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase.") Just as in *Santos* and *Van Alstyne*, there is a merger problem here that exists irrespective of the 2009 Congressional amendments to the money laundering statute.

The charges against Hoa Nguyen represent the Government taking what is not even a legitimate Federal gambling case under § 1955, breaking off a piece inherent to that offense (paying a gambling loss) and calling it money laundering. Delivering one's own (or another's) gambling loss cannot be illegal gambling and illegal money laundering at the same time and based on the same conduct. The money laundering requires something more that promotes the gambling scheme and properly subjects him to 15 more years in prison. The Indictment is insufficient in that respect.

In light of this Indictment it is impossible to see how anyone could participate in conduct violating 18 USC § 1955 (5 year max) without violating 18 USC § 1956 (20 year max). That cannot be what Congress intended.

**8. Conclusion:**

There are men in this Indictment who belong, Hoa Nguyen does not. The Indictment does not properly charge him with an offense under Federal law because the gambling he participated in was not illegal under Federal or State law. The Indictment is further flawed because the conduct it alleges he participated in cannot be money laundering as it merged with the underlying violation of 18 USC § 1955.

Gambling is far too much a legitimate part of our culture to turn every loser into a money launderer. The Indictment should be dismissed.

Respectfully submitted on December 18, 2015.

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