UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID RED THUNDER, RONALD DUMARCE, DARRELL WHITE, and EDWARD RED OWL, Defendants.	CR 13-10015 GOVERNMENT'S RESPONSE TO MOTIONS TO DISMISS INDICTMENT

The United States of America, by and through Assistant United States Attorney Ann M. Hendrickson, files the following response to the defendants' motions to dismiss indictment:

Each defendant's motion to dismiss the indictment, filed July 9 or 10, 2013, should be denied. The indictment is facially sufficient because it contains all of the elements of each offense charged. Furthermore, the defendants' arguments ignore both the totality of the offense conduct charged and the nature of the financial transaction that allegedly occurred and present a factual question that is an issue for the jury's determination.

FACTS

A federal grand jury indicted the defendants on two counts: one count of conspiracy to commit theft from an Indian tribal organization (18 U.S.C.

§§ 371, 1163) and one count of theft from an Indian tribal organization and aiding and abetting (18 U.S.C. §§ 1163, 2).

Defendants argue that the indictment fails to state an offense because the defendants used an intermediary entity, and this somehow means the funds they acquired and used for their own personal expenses did not belong to an Indian tribal organization within the statute's meaning. Defendants' Memoranda in Support of Motion to Dismiss Indictment, Doc. 51, 53, 54, and 56.

STANDARD OF REVIEW

An indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Defendants may move to dismiss an indictment for a failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B).

At the motion to dismiss stage, an indictment must be tested only by its sufficiency to charge an offense. *United States v. Sampson*, 371 U.S. 75, 78-79 (1962). To be sufficient, an indictment must "contain the elements of the offense charged." *United States v. Olson*, 262 F.3d 795, 799 (8th Cir. 2001) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). A sufficient indictment "fairly informs the accused of the charges against him and allows him to plead double jeopardy as a bar to a future prosecution." *United States v. White*, 241 F.3d 1015, 1021 (8th Cir. 2001) (quoting *United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir. 1988). The use of a particular word or phrase is unnecessary as long as the Court can "recognize a valid offense and the form of

the allegation 'substantially states the element[s].'" *Id.* The Eighth Circuit has stated that it will find an indictment insufficient only if an "essential element 'of substance' is omitted." *Id.*

ARGUMENT

It is a federal criminal offense to embezzle, steal, knowingly convert to one's use or the use of another, willfully misapply or willfully permit to be misapplied any money or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee or agent of an Indian tribal organization. 18 U.S.C. § 1163. "Whether an entity is an Indian tribal organization is a question [of fact] for the jury to decide." *United States v. Pemberton*, 121 F.3d 1157, 1169 (8th Cir. 1997). It is a federal criminal offense if two or more people conspire to commit any federal offense and one or more of those persons does any act to effect the object of the conspiracy. 18 U.S.C. § 371. And it is also a federal offense to aid or abet someone in the commission of a federal criminal offense. 18 U.S.C. § 2.

Here, the indictment is facially sufficient because it contains all of the elements of the offenses charged and fairly informs the defendants of the charges against them. Count 1 alleges the defendants knowingly and willfully conspired and agreed together to commit the offense of theft from an Indian tribal organization in violation of 18 U.S.C. §§ 371 and 1163. Indictment, Doc. 2. *Id.* Count 1 identifies the relevant persons and entities, including the Sisseton-Wahpeton Oyate Sioux Tribe and the Sisseton-Wahpeton Housing Authority, each of which is alleged to be an Indian tribal organization. *Id.*

Count 1 alleges the pertinent relationships, including that three of the four co-defendants (David Red Thunder, Darrell White, and Edward Red Owl) were on the board of directors of two relevant entities, the LTEDC and the LTAI, and that the fourth co-defendant (Ronald DuMarce) at one point signed paperwork representing that he acted on behalf of the LTAI. *Id.* Count 1 also alleges the manner and means of the conspiracy and four overt acts committed by the defendants in furtherance of the conspiracy to obtain money from the Sisseton-Wahpeton Housing Authority. *Id.*

Count 2 realleges and incorporates all of the allegations set forth in Count 1, and then goes on to allege that the defendants committed the offense of theft from an Indian tribal organization and that they aided and abetted each other in doing so in violation of 18 U.S.C. §§ 1163 and 2. *Id.*

Through their motions, defendants are attempting to test the sufficiency of the government's evidence and, in effect, try this case before the trial. Their arguments regard one alleged act, that is, the cashing of checks made payable to them between on or about May 19, 2011 and August 4, 2011, and question whether that act is conversion as contemplated by the 18 U.S.C. § 1163. This argument ignores the totality of the alleged conduct by which the defendants wrongfully obtained money from the Sisseton-Wahpeton Housing Authority through the use of an entity over which they had control, purported to act on behalf of, and used as a financial conduit for the commission of the charged offenses.

The defendants' second stated argument posits a question of fact—whether LTAI is an Indian tribal organization. It is well settled that whether an entity is a tribal organization is a question of fact for the jury's determination. *See Pemberton*, 121 F.3d at 1169 (stating plainly that whether an entity is an Indian tribal organization is a question for the jury to decide). Asking the Court to make such a determination at this stage invites error. *See United States v. White Horse*, 807 F.2d 1426, 1429 (8th Cir. 1986) (reversing convictions because district court, not jury, determined that an entity was a "tribal organization" for purposes of 18 U.S.C. § 1163).

CONCLUSION

For the foregoing reasons, the indictment, as written, is facially sufficient and thus should not be dismissed. The United States respectfully requests that the defendants' motions be denied.

Dated and electronically filed this 16th day of July, 2013.

BRENDAN V. JOHNSON
United States Attorney

/s/ ANN M. HENDRICKSON

ANN M. HENDRICKSON
Assistant United States Attorney
P.O. Box 2638
Sioux Falls, SD 57101-2638
Telephone: (605)330-4400
Facsimile: (605)330-4410
E-Mail: ann.hendrickson@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of July, 2013, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

Thomas L. Sannes – via e-filing

Jodi L. Brown – via e-filing

Christopher Jung – via e-filing

Pamela R. Bollweg – via e-filing

/s/ ANN M. HENDRICKSON
ANN M. HENDRICKSON
Assistant United States Attorney