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WHO ME? DEFENDING IDENTITY THEFT

LORI COHEN, ESQ.

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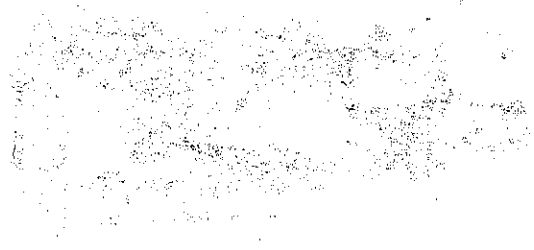

IDENTITY THEFT APLICABLE STATUTES & CASE LAW

I JURISDICTION

• CPL 20.40(1) (as applicable)

A person may be convicted in an appropriate criminal court of a particular county, of an offense of which the criminal courts of this state have jurisdiction pursuant to section 20.20, committed either by his or her own conduct or by the conduct of another for which he or she is legally accountable pursuant to section 20.00 of the penal law, when:

2. (l) An offense of identity theft or unlawful possession of personal identifying information and all criminal acts committed as part of the same criminal transaction as defined in subdivision two of section 40.10 of this chapter may be prosecuted (i) in any county in which part of the offense took place regardless of whether the defendant was actually present in such county, or (ii) in the county in which the person who suffers financial loss resided at the time of the commission of the offense, or (iii) in the county where the person whose personal identifying information was used in the commission of the offense resided at the time of the commission of the offense. The law enforcement agency of any such county shall take a police report of the matter and provide the complainant with a copy of such report at no charge.

II Definitions

• Applicable to "theft of Identity" PL §190.77

1. For the purposes of sections 190.78, 190.79, 190.80 and 190.80-and 190.85 of this article "personal identifying information" means a person's name, address, telephone number, date of birth, driver's license number, social security number, place of employment, mother's maiden name, financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, taxpayer identification number, computer system password, signature or copy of a signature, electronic signature, unique biometric data that is a fingerprint, voice print, retinal image or iris image of another

person, telephone calling card number, mobile identification number or code, electronic serial number or personal identification number, or any other name, number, code or information that may be used alone or in conjunction with other such information to assume the identity of another person.

2. For the purposes of sections 190.78, 190.79, 190.80, 190.80-a, 190.81, 190.82 and 190.83 of this article:

a. "electronic signature" shall have the same meaning as defined in subdivision three of section three hundred two of the state technology law.

b. "personal identification number" means any number or code which may be used alone or in conjunction with any other information to assume the identity of another person or access financial resources or credit of another person.

c. "member of the armed forces" shall mean a person in the military service of the United States or the military service of the state, including but not limited to, the armed forces of the United States, the army national guard, the air national guard, the New York naval militia, the New York guard, and such additional forces as may be created by the federal or state government as authorized by law.

III TYPES OF CRIMES

• PL §170.78: Identity Theft in the Third Degree:

A person is guilty of Identity Theft when he/she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person or by acting as that other person or by using personal identifying information of that other person and thereby:

1. obtains goods, money, property or services or uses credit in the name of such person or causes financial loss to such person or to another person of persons; or
2. commits a class A misdemeanor or higher crime

•PL § 190.79 Identity theft in the second degree

A person is guilty of identity theft in the second degree when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby:

1. obtains goods, money, property or services or uses credit in the name of such other person in an aggregate amount that exceeds five hundred dollars; or

2. causes financial loss to such person or to another person or persons in an aggregate amount that exceeds five hundred dollars; or

3. commits or attempts to commit a felony or acts as an accessory to the commission of a felony; or

4. commits the crime of identity theft in the third degree as defined in section 190.78 of this article and has been previously convicted within the last five years of identity theft in the third degree as defined in section 190.78, identity theft in the second degree as defined in this section, identity theft in the first degree as defined in section 190.80, unlawful possession of personal identification information in the third degree as defined in section 190.81, unlawful possession of personal identification information in the second degree as defined in section 190.82, unlawful possession of personal identification information in the first degree as defined in section 190.83, unlawful possession of a skimmer device in the second degree as defined in section 190.85, unlawful possession of a skimmer device in the first degree as defined in section 190.86, grand larceny in the fourth degree as defined in section 155.30, grand larceny in the third degree as defined in section 155.35, grand larceny in the second degree as defined in section 155.40 or grand larceny in the first degree as defined in section 155.42 of this chapter.

Identity theft in the second degree is a class E felony.

• PL § 190.80. Identity theft in the first degree

A person is guilty of identity theft in the first degree when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby:

1. obtains goods, money, property or services or uses credit in the name of such other person in an aggregate amount that exceeds two thousand dollars; or

2. causes financial loss to such person or to another person or persons in an aggregate amount that exceeds two thousand dollars; or

3. commits or attempts to commit a class D felony or higher level crime or acts as an

accessory in the commission of a class D or higher level felony; or

4. commits the crime of identity theft in the second degree as defined in section 190.79 of this article and has been previously convicted within the last five years of identity theft in the third degree as defined in section 190.78, identity theft in the second degree as defined in section 190.79, identity theft in the first degree as defined in this section, unlawful possession of personal identification information in the third degree as defined in section 190.81, unlawful possession of personal identification information in the second degree as defined in section 190.82, unlawful possession of personal identification information in the first degree as defined in section 190.83, unlawful possession of a skimmer device in the second degree as defined in section 190.85, unlawful possession of a skimmer device in the first degree as defined in section 190.86, grand larceny in the fourth degree as defined in section 155.30, grand larceny in the third degree as defined in section 155.35, grand larceny in the second degree as defined in section 155.40 or grand larceny in the first degree as defined in section 155.42 of this chapter.

Identity theft in the first degree is a class D felony.

• PL §190.80-a. Aggravated identity theft

A person is guilty of aggravated identity theft when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and knows that such person is a member of the armed forces, and knows that such member is presently deployed outside of the continental United States and:

1. thereby obtains goods, money, property or services or uses credit in the name of such member of the armed forces in an aggregate amount that exceeds five hundred dollars; or

2. thereby causes financial loss to such member of the armed forces in an aggregate amount that exceeds five hundred dollars.

Aggravated identity theft is a class D felony.

•§ 190.81. Unlawful possession of personal identification information in the third degree

A person is guilty of unlawful possession of personal identification information in the third degree when he or she knowingly possesses a person's financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, personal identification number, mother's maiden name, computer system password, electronic signature or unique biometric data that is a fingerprint, voice print, retinal image or iris image of another person knowing such information is intended to be used in furtherance of the commission of a crime defined in this chapter.

Unlawful possession of personal identification information in the third degree is a class A misdemeanor.

•§ 190.82. Unlawful possession of personal identification information in the second degree

A person is guilty of unlawful possession of personal identification information in the second degree when he or she knowingly possesses two hundred fifty or more items of personal identification information of the following nature: a person's financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, personal identification number, mother's maiden name, computer system password, electronic signature or unique biometric data that is a fingerprint, voice print, retinal image or iris image of another person knowing such information is intended to be used in furtherance of the commission of a crime defined in this chapter.

Unlawful possession of personal identification information in the second degree is a class E felony.

•§ 190.83. Unlawful possession of personal identification information in the first degree

A person is guilty of unlawful possession of personal identification information in the first degree when he or she commits the crime of unlawful possession of personal identification information in the second degree and:

1. with intent to further the commission of identity theft in the second degree, he or she supervises more than three accomplices; or

2. He or she has been previously convicted within the last five years of identity theft in the third degree as defined in section 190.78, identity theft in the second degree as defined in section 190.79, identity theft in the first degree as defined in section 190.80, unlawful possession of personal identification information in the third degree as defined in section 190.81, unlawful possession of personal identification information in the second degree as defined in section 190.82, unlawful possession of personal identification information in the first degree as defined in this section, unlawful possession of a skimmer device in the second degree as defined in section 190.85, unlawful possession of a skimmer device in the first degree as defined in section 190.86, grand larceny in the fourth degree as defined in section 155.30, grand larceny in the third degree as defined in section 155.35, grand larceny in the second degree as defined in section 155.40 or grand larceny in the first degree as defined in section 155.42 of this chapter [fig 3] ; or

3. with intent to further the commission of identity theft in the second degree:
(a) he or she supervises more than two accomplices, and
(b) he or she knows that the person whose personal identification information that he or she possesses is a member of the armed forces, and
(c) he or she knows that such member of the armed forces is presently deployed outside of the continental United States.

Unlawful possession of personal identification information in the first degree is a class D felony.

• Penal Law § 190.84. Defenses

In any prosecution for identity theft or unlawful possession of personal identification information pursuant to this article, it shall be an affirmative defense that the person charged with the offense:

1. was under twenty-one years of age at the time of committing the offense and the person used or possessed the personal identifying or identification information of another solely for the purpose of purchasing alcohol;

2. was under eighteen years of age at the time of committing the offense and the person used or possessed the personal identifying or identification information of another

solely for the purpose of purchasing tobacco products; or

3. used or possessed the personal identifying or identification information of another person solely for the purpose of misrepresenting the person's age to gain access to a place the access to which is restricted based on age.

•190.85. Unlawful possession of a skimmer device in the second degree

1. A person is guilty of unlawful possession of a skimmer device in the second degree when he or she possesses a skimmer device with the intent that such device be used in furtherance of the commission of the crime of identity theft or unlawful possession of personal identification information as defined in this article.

2. For purposes of this article, "skimmer device" means a device designed or adapted to obtain personal identifying information from a credit card, debit card, public benefit card, access card or device, or other card or device that contains personal identifying information.

Unlawful possession of a skimmer device in the second degree is a class A misdemeanor.

•Penal Law § 190.86. Unlawful possession of a skimmer device in the first degree

A person is guilty of unlawful possession of a skimmer device in the first degree when he or she commits the crime of unlawful possession of a skimmer device in the second degree and he or she has been previously convicted within the last five years of identity theft in the third degree as defined in section 190.78, identity theft in the second degree as defined in section 190.79, identity theft in the first degree as defined in section 190.80, unlawful possession of personal identification information in the third degree as defined in section 190.81, unlawful possession of personal identification information in the second degree as defined in section 190.82, unlawful possession of personal identification information in the first degree as defined in section 190.83, unlawful possession of a skimmer device in the second degree as defined in section 190.85, unlawful possession of a skimmer device in the first degree as defined in this section, grand larceny in the fourth degree as defined in section 155.30, grand larceny in the third degree as defined in section 155.35, grand larceny in the second degree as defined in section 155.40 or grand larceny in the first degree as defined in section 155.42 of this chapter.

Unlawful possession of a skimmer device in the first degree is a class E felony.

•Penal Law§ 165.17. Unlawful use of credit card, debit card or public benefit card

A person is guilty of unlawful use of credit card, debit card or public benefit card when in the course of obtaining or attempting to obtain property or a service, he uses or displays a credit card, debit card or public benefit card which he knows to be revoked or cancelled.

Unlawful use of a credit card, debit card or public benefit card is a class A misdemeanor.

• Penal Law § 165.45. Criminal possession of stolen property in the fourth degree (as applicable)

A person is guilty of criminal possession of stolen property in the fourth degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof, and when:

2. The property consists of a credit card, debit card or public benefit card; or

Criminal possession of stolen property in the fourth degree is a class E felony.

•Penal Law § 155.30. Grand larceny in the fourth degree (as applicable)

A person is guilty of grand larceny in the fourth degree when he steals property and when:

4. The property consists of a credit card or debit card; or

Grand larceny in the fourth degree is a class E felony.

IV MISCELLANEOUS STATUTES:

§ NY GENERAL BUSINESS LAW §390-b. Anti-phishing act of 2006

1. This section shall be known as and may be cited as the "anti-phishing act of 2006".

2. For purposes of this section, the following terms shall have the following meanings:

(a) The term "electronic message" means a message sent or posted to a unique destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the "local part") and a reference to an internet domain (commonly referred to as the "domain part"), whether or not displayed, to which an electronic message can be sent , delivered or posted.

(b) The term "identifying information" means an individual's (1) social security number; (2) driver's license number; (3) bank account number; (4) credit or debit card number; (5) personal identification number (PIN); (6) automated or electronic signature; (7) unique biometric data; (8) account passwords; or (9) any other piece of information that can be used to access an individual's financial accounts or to obtain goods or services.

(c) The term "internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the transmission control protocol/internet protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(d) The term "web page" means a location, with respect to the world wide web, that has a single uniform resource locator or other single location with respect to the internet.

3. It is unlawful for any person, by means of a web page, electronic message, or other use of the internet to solicit, request or collect identifying information by deceptively representing himself or herself, either directly or by implication, to be a business or a governmental entity and doing so without the authority or approval of such business or such governmental entity.

4. (a) The attorney general, or any person who either is engaged in the business of providing internet access service to the public or owns a web page or trademark and who is adversely affected by reason of a violation of the provisions of subdivision three of this section, may bring an action against a person who violates the provisions of subdivision three of this section:

(1) to enjoin further violation of the provisions of subdivision three of this section; and

(2) to recover the greater of:

(A) actual damages; or

(B) one thousand dollars for each instance in which identifying information is solicited, requested or collected from a person in violation of the provisions of subdivision three of this section.

(b) In an action under paragraph (a) of this subdivision, a court may:

(1) increase the damages up to three times the damages allowed by paragraph (a) of this subdivision where the defendant has been found to have engaged in a pattern and practice of violating the provisions of subdivision three of this section; and

(2) award costs and reasonable attorney's fees to a prevailing party.

5. Nothing in this section shall in any way limit rights or remedies which are otherwise available under law to the attorney general or any other person authorized to bring an action under subdivision four of this section.

•NY GENERAL BUSINESS LAW § 399-ddd. Confidentiality of social security account number

1. (a) As used in this section "social security account number" shall include the number issued by the federal social security administration and any number derived from such number. Such term shall not include any number that has been encrypted.

(b) For purposes of this section, the term "inmate" means a person confined in any local correctional facility as defined in subdivision sixteen of section two of the correction law or in any correctional facility as defined in paragraph (a) of subdivision four of section two of the correction law pursuant to such person's conviction of a criminal offense.

2. No person, firm, partnership, association or corporation, not including the state or its political subdivisions, shall do any of the following:

(a) Intentionally communicate to the general public or otherwise make available to the general public in any manner an individual's social security account number. This paragraph shall not apply to any individual intentionally communicating to the general public or otherwise making available to the general public his or her social security account number.

(b) Print an individual's social security account number on any card or tag required for the individual to access products, services or benefits provided by the person, firm, partnership, association or corporation.

(c) Require an individual to transmit his or her social security account number over the internet, unless the connection is secure or the social security account number is encrypted.

(d) Require an individual to use his or her social security account number to access an internet web site, unless a password or unique personal identification number or other authentication device is also required to access the internet website.

(e) Print an individual's social security account number on any materials that are mailed to the individual, unless state or federal law requires the social security account number to be on the document to be mailed. Notwithstanding this paragraph, social security account numbers may be included in applications and forms sent by mail, including documents sent as part of an application or enrollment process, or to establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the social security account number. A social security account number that is permitted to be mailed under this section may not be printed, in whole or part, on a postcard or other mailer not requiring an envelope, or visible on the envelope or without the envelope having been opened.

(f) Encode or embed a social security number in or on a card or document, including, but not limited to, using a bar code, chip, magnetic strip, or other technology, in place of removing the social security number as required by this section.

(g) Knowingly use the labor or time of or employ any inmate in this state, or in any other jurisdiction, in any capacity that involves obtaining access to, collecting or processing social security account numbers of other individuals.

3. This section does not prevent the collection, use, or release of a social security account number as required by state or federal law, the use of a social security account number for internal verification, fraud investigation or administrative purposes or for any business function specifically authorized by 15 U.S.C. 6802.

4. Any person, firm, partnership, association or corporation having possession of the social security account number of any individual shall, to the extent that such number is maintained for the conduct of business or trade, take reasonable measures to ensure that no officer or employee has access to such number for any purpose other than for a legitimate or necessary purpose related to the conduct of such business or trade and provide safeguards necessary or appropriate to preclude unauthorized access to the social security account number and to protect the confidentiality of such number.

5. Any waiver of the provisions of this section is contrary to public policy, and is void and unenforceable.

6. No person may file any document available for public inspection with any state

agency, political subdivision, or in any court of this state that contains a social security account number of any other person, unless such other person is a dependent child, or has consented to such filing, except as required by federal or state law or regulation, or by court rule.

7. Whenever there shall be a violation of this section, application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction by a special proceeding to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violations; and if it shall appear to the satisfaction of the court or justice that the defendant has, in fact, violated this section, an injunction may be issued by such court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Whenever the court shall determine that a violation of subdivision two of this section has occurred, the court may impose a civil penalty of not more than one thousand dollars for a single violation and not more than one hundred thousand dollars for multiple violations resulting from a single act or incident. The second violation and any violation committed thereafter shall be punishable by a civil penalty of not more than five thousand dollars for a single violation and not more than two hundred fifty thousand dollars for multiple violations resulting from a single act or incident. No person, firm, partnership, association or corporation shall be deemed to have violated the provisions of this section if such person, firm, partnership, association or corporation shows, by a preponderance of the evidence, that the violation was not intentional and resulted from a bona fide error made notwithstanding the maintenance of procedures reasonably adopted to avoid such error.

•NYS LABOR LAW§ 203-d. Employee personal identifying information

1. An employer shall not unless otherwise required by law:

(a) Publicly post or display an employee's social security number;

(b) Visibly print a social security number on any identification badge or card, including any time card;

(c) Place a social security number in files with unrestricted access; or

(d) Communicate an employee's personal identifying information to the general public. For purposes of this section, "personal identifying information" shall include social security number, home address or telephone number, personal electronic mail address, Internet identification name or password, parent's surname prior to marriage, or drivers' license number.

2. A social security number shall not be used as an identification number for purposes of any occupational licensing.

3. The commissioner may impose a civil penalty of up to five hundred dollars on any employer for any knowing viblation of this section. It shall be presumptive evidence that a violation of this section was knowing if the employer has not put in place any policies or procedures to safeguard against such violation, including procedures to notify relevant employees of these provisions.

[***1] **The People of the State of New York against Basil Agrocostea, Defendant.**

2012NY018993

CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY

35 Misc. 3d 1241A; 2012 N.Y. Misc. LEXIS 2830; 2012 NY Slip Op 51098U

May 21, 2012, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HEADNOTES

[*1241A] Crimes--Unauthorized Use of Computer. Crimes--Identity Theft.

COUNSEL: [**1] For Defendant: Deborah J. Blum, Esq., New York, New York.

ADA Zachary Weintraub, Manhattan District Attorney's Office, New York, New York.

JUDGES: Hon. Diana M. Boyar, Justice of the Criminal Court.

OPINION BY: Diana M. Boyar

OPINION

Diana M. Boyar, J.

An accusatory instrument was filed on March 12, 2012, charging defendant with Unauthorized Use of a Computer (*Penal Law § 156.05*) and Identity Theft in the Third Degree (*Penal Law § 190.78*). By Notice of Omnibus Motion dated April 9, 2012, defendant moves, *inter alia*, for an order to dismiss the complaint for facial insufficiency

The factual portion of the accusatory instrument alleges on January 26, 2012 at about 2:00 hours inside of 499 Seventh Avenue in the County and State of New York, defendant committed these offenses under the following circumstances:

Deponent is informed by Steven Goldglit, of an address known to the District Attorney's Office, that informant is the managing partner of Goldglit and Company, an accounting firm located at the above location. Informant states that defendant was formerly employed at Goldglit and Company, and that on January 20, 2012, defendant's employment was terminated. Informant states that on January 26, 2012, an email was sent [**2] from informant's business email account to busyagro@gmail.com which reads, in substance: BASIL AGROCOSTEA IS MY SILENT REAL PARTNER. I SHOULD NOT HAVE FIRED HIM. HE WASN'T PAID ENOUGH. HE WAS THE FIRST TO IMPLEMENT MANY GOOD IDEAS. HE TAUGHT ME THINGS AND WAS A VALUABLE MEMBER OF THE FIRM. I WAS WRONG FOR NOT ADEQUATELY COMPENSATING HIM AND FOR FIRING HIM. PLEASE CONSIDER HIM FOR EMPLOYMENT. Informant states that the email purports to be signed by informant, but that informant did not sign said email.

Deponent is further informed that informant did not send the above stated email, that defendant does not have access to his computer, computer network, and email account, and that [***2] he does not have permission or authorization to use said email account.

Deponent is further informed that informant has read a letter dated February 20, 2012, directed to a client of Godglit and Company and signed by defendant, which letter enclosed a copy of the above-mentioned email and which letter described said email as "PRAISE COURTESY OF MY FORMER EMPLOYER."

The supporting deposition indicates that defendant was fired on January 11, 2012.

Facial Sufficiency

When a defendant is charged in a misdemeanor complaint, [**3] unless he pleads guilty or waives prosecution by information, the misdemeanor complaint must be replaced prior to trial with an information meeting the requirements for facial sufficiency. *CPL §§ 170.65; 100.40(1)(c); 100.15(3); 170.35; People v Alejandro, 70 NY2d 133, 511 N.E.2d 71, 517 N.Y.S.2d 927 (1987)*. The information must, for jurisdictional purposes, contain non-hearsay factual allegations sufficient to establish a *prima facie* case. *People v Alejandro, 70 NY2d 133 at 137, 511 N.E.2d 71, 517 N.Y.S.2d 927*. Furthermore, both informations and misdemeanor complaints must allege or be based upon "reasonable cause to believe" the defendant committed the offenses charged. *People v Dumas, 68 NY2d 729, 497 N.E.2d 686, 506 N.Y.S.2d 319 (1986)*. "Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it..." *CPL § 70.10(2)*. A conclusory allegation a defendant committed each and every element of a crime, standing alone, does not meet the reasonable cause requirement. [**4] *People v Kalin, 12 NY3d 225, 229, 906 N.E.2d 381, 878 N.Y.S.2d 653 (2009)*.

In reviewing an accusatory instrument for facial sufficiency, "[s]o long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense...," the court should give it "[a] fair and not overly restrictive or technical reading." *People v Casey, 95 NY2d 354, 360, 740 N.E.2d 233, 717 N.Y.S.2d 88 (2000)*. Moreover, the Court of Appeals in *People v Allen, 92 NY2d 378, 385, 703 N.E.2d 1229, 681 N.Y.S.2d 216 (1998)*, held that at the pleading stage, all that is needed is that factual allegations are sufficiently evidentiary in character and tend to support the charges.

Unauthorized Use of a Computer

With regards to the Unauthorized Use of a Computer charge, defendant argues that the complaint fails to allege facts to establish that defendant knowingly used or accessed the informant's computer without authorization. This Court disagrees.

An individual violates *Penal Law § 156.05* "[w]hen he or she knowingly uses, causes to be used or accesses a computer, computer service, or computer network without authorization. "The allegations of the instant complaint are sufficient to meet the burden of reasonable [**5] cause to believe that defendant knowingly accessed the informant's email account without authorization. The supporting deposition alleges that the defendant was fired on January 11, 2012. The accusatory instrument alleges that thereafter, on January 26, 2012, an email was sent from the informant's email account to the email address basyagro@gmail.com expressing regret for firing the defendant and requesting that the defendant be considered for employment. The [***3] complaint further alleges that the email purports to be sent by the informant, but that the informant did not send the email. The complaint also references a letter, dated February 20, 2012, signed by defendant and sent to one of the informant's clients. This letter references the content of the email sent from the informant's email account. These allegations, taken together, given a fair and not overly technical reading are sufficient to meet the burden of reasonable cause to believe that defendant knowingly accessed defendant's computer without permission.

Defendant's claim that the complaint is facially insufficient because it does not demonstrate that he sent the email or how he accessed the informant's email account is unavailing. [**6] Given that the email was sent shortly after defendant was fired, that the email commends the defendant's job performance, expresses regret for firing him, urges that he be considered for employment, and is attached to a letter from defendant endorsing its content, the Court may draw the reasonable inference that the defendant accessed the informant's email account and sent the email for the purposes of obtaining employment.

Moreover, the statute does not require that the People allege precisely how the defendant accessed the informant's email account, but merely that the defendant knowingly used or accessed the informant's computer or computer network without permission. It is well known that an individual need not be present or ever have had contact with the computer terminal of another in order to access their email account or computer network. Based upon the foregoing, the facts of the instant complaint provide the Court reasonable cause to believe that defendant knowingly accessed his former employer's email account or caused it to be used to send an email that he was not authorized to send.

Accordingly, defendant's motion to dismiss *Penal Law § 156.05* for facial insufficiency is [**7] denied.

Identity Theft in the Third Degree

Here, the defendant argues that the complaint lacks sufficient allegations to establish that defendant assumed

the informant's identity. The Court disagrees. *Penal Law § 190.78* provides that:

A person is guilty of identity theft in the third degree when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby: (1) obtains goods, money, property or services or uses credit in the name of such other person or causes financial loss to such person or to another person or persons or (2) commits a class A misdemeanor.

The allegations of the complaint are sufficient to meet the burden of reasonable cause to believe that defendant, with the intent to defraud potential employers assumed his former employer's identity, by sending an email through his employer's email account, in the name of his employer, for the purpose of obtaining employment. The accusatory instrument further supports the reasonable inference that defendant distributed this email to others.

Accordingly, [**8] the defendant's motion to dismiss the complaint for facial insufficiency is denied in its entirety.

This is the decision and order of the Court. [***4]

Dated: May 21, 2012

New York, New York

Hon. Diana M. Boyar

Justice of the Criminal Court

No. 156
The People &c.,
Respondent,
v.
Western Express International Inc., et al.,
Defendants,
Douglas Latta and Anna Ciano a/k/a Angela Perez,
Appellants.

Jan Hoth, for appellant Latta.
Submitted by Marianne Karas, for appellant Vassilenko.
Allen Fallek, for appellant Roach.
Matthew J. Galluzzo, for appellant Perez.
David M. Cohn, for respondent.

LIPPMAN, Chief Judge:

Appellants have been indicted for enterprise corruption (Penal Law § 460.20 [1] [a]), a class B felony, based in essential part on their commission of numerous predicate

offenses.[1] There was proof before the grand jury that three of them - Douglas Latta, Lyndon Roach and Angela Perez -- repeatedly purchased stolen credit card data which they then used for fraudulent purposes, and that the remaining appellant, Vadim Vassilenko, through the company he controlled, defendant Western Express International, Inc. (Western Express), facilitated transactions by which the purloined credit card data was transferred.

Appellants' conduct, the People claim, was part of a larger enterprise to traffic in stolen credit card information. To make out the corrupt enterprise, the People adduced before the grand jury proof that Eastern European vendors of stolen credit card data engaged in internet transactions with buyers in New York. There was also proof that, in consummating these transactions, buyers and sellers sometimes availed themselves of services offered by Western Express through its publicly accessible internet web sites. While Western Express's menu of services -- i.e., check cashing, mail receiving, issuing money orders, digital currency exchange, and Russian/English translation -- was superficially unremarkable, the services themselves being legal and admitting of legitimate utility in the

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[1]These included scheme to defraud, conspiracy, grand larceny, money laundering, possession of stolen property, and falsifying business records. No issue is before us respecting the sufficiency of the counts charging these offenses; this appeal concerns no more than the sufficiency of the evidence offered in support of the enterprise corruption count.

conduct of international transactions, there was evidence that some Western Express customers, among them defendants Latta, Roach and Perez, used the company's services for "carding" purposes, i.e., to traffic in stolen credit card information.

The People, in presenting the matter to the grand jury, dwelt principally on the carders' use of Western Express's digital currency exchange service. Western Express, having purchased large sums of the unregulated internet currencies EGold and Webmoney, was an authorized vendor of those forms of tender. For a commission of between two and five percent, the company would transfer into a customer internet account held in an assumed name digital currency purchased from it by the customer with US dollars. The digital currency could then be, and on occasion was, transferred to pay for stolen credit card information, after which the vendor would sell the digital currency received in payment back to Western Express for its value in another digital currency or US Dollars, with Western Express taking an additional commission. This transactional pattern recommended itself for money laundering purposes by reason of the circumstance that E-currency was not government regulated and that international transactions using it went largely unscrutinized.

There was evidence that Western Express was not a neutral observer of this use of its services; its employees offered advice on how to structure transactions to avoid

detection and defendant Vassilenko, the company's president, recognizing that a significant portion of Western Express's business was from "carding" transactions,[2] actively sought the patronage of carders. Carder business was encouraged by postings on the Western Express web sites and there was proof that Vassilenko attempted (evidently unsuccessfully) to advertise Western Express's services on Carder Planet, a members-only web site devoted exclusively to facilitating illegal carding activities.

Supreme Court granted appellants' respective motions to dismiss the subject indictment's enterprise corruption count upon the ground that the proof before the grand jury, even when viewed most favorably to the People, did not make out the existence of a "criminal enterprise." As is here relevant, guilt of enterprise corruption under New York's Organized Crime Control Act (OCCA) (Penal Law § 460.00 et seq.) requires proof that the accused "when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise . . . intentionally conducts or participates in the affairs of [the] enterprise by participating in a pattern of criminal activity" (Penal Law § 460.20 [1] [a]). For OCCA purposes a "criminal enterprise" is "a group of persons sharing a common purpose of engaging in criminal conduct,

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[2]Vassilenko estimated that 5% of his business was from carding transactions. The People contend that the actual percentage was much higher.

associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents" (Penal Law § 460.10 [3]). In dismissing the enterprise corruption count, Supreme Court focused upon the absence of proof of an "ascertainable structure distinct from a pattern of criminal activity":

> "Here, the People have failed to even articulate - much less adduce evidence proving - any system of authority or hierarchy in which the defendants participated . . . [W]hat the People allege are a series of arms-length business transactions - admittedly extensive and, if the People's allegations are true, illegal - conducted by a variety of organizations and individuals, each operating independently and with no overarching structure or system of authority. In essence, the People have described an illegal industry rather than a corrupt enterprise, the criminal parallel of a typical legitimate industry consisting of producers, wholesalers, distributors, retail outlets, and credit suppliers, each of [whom] has a unique but independent role in the industry."

In reversing and reinstating the enterprise corruption count (85 AD3d 1 [1st Dept 2011]), the Appellate Division, while acknowledging that there was no evidence of a traditionally structured, i.e., hierarchical, entity, theorized that Vassilenko had used Western Express to create a structured enterprise the purpose of which was to "actively encourage more and larger transactions by its participants on an ongoing basis" (id. at 14). The evidence, said the Court, permitted the inference that

defendants knowingly played roles in the enterprise even though, for the most part, they had no personal interaction (id.). Two Justices dissented, expressing the view that the requisite "ascertainable structure" to the alleged enterprise had not been demonstrated, even to the bare bones extent necessary to sustain the enterprise corruption count to trial. The dissenters found compelling the absence of "evidence of any collective decision-making or coordination with respect to the purported enterprise's activities or of any overarching structure of authority or hierarchy in which defendants participated" (id. at 19). One of the dissenting Justices granted appellants' separate applications for permission to appeal to this Court. We now reverse and reinstate the orders of Supreme Court dismissing the enterprise corruption count as against appellants.

New York's OCCA was enacted in 1986 to afford state prosecutors a means of exacting heightened penalties for criminal activity referable to or generative of structured criminal enterprises (see Penal Law § 460.00). Those enterprises were understood to present a distinct evil by reason of their unique capacity to plan and carry out sophisticated crimes on an ongoing basis while insulating their leadership from detection and prosecution (see id.; People v Besser, 96 NY2d 136, 142 [2001]). The Federal Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1961 et seq.) had, of course, for some time enabled federal prosecutors to prosecute enterprise corruption as

such, but until the enactment of the OCCA there was no New York State analogue.

The common challenge posed both federal and state legislators in penalizing enterprise corruption as a separate crime was to delineate the circumstances under which conduct already fitting under a criminal definition would additionally be subject to prosecution and more serious penalization for its connection to a criminal organization. To justify the superadded penalties for participation in a corrupt enterprise, and concomitantly to avoid sweeping relatively minor offenders into complex multi-defendant, multi-count prosecutions entailing a risk of draconian punishment, it was necessary to distinguish between what on the one hand were merely patterns of criminal conduct and what on the other were patterns of such conduct demonstrably designed to achieve the purposes and promote the interests of organized, structurally distinct criminal entities. Accordingly, both RICO and the OCCA require the prosecution to prove, in addition to a pattern of criminal activity, the existence of a separate criminal enterprise to which that pattern of activity is beneficially connected (see United States v Turkette, 452 US 576, 583 [1981]; Penal Law §§ 460.20 [1]; 460.10 [3]). While RICO does not explicitly require proof of the enterprise's structural integrity, it is settled that a qualifying enterprise must have structure (Boyle v United States, 556 US 938, 940-941 [2009]). And, as noted, the OCCA, which is

assertedly of more narrow application than RICO (Penal Law § 460.00),[3] makes the requirement of "an ascertainable structure distinct from a pattern of criminal activity" express in its definition of "criminal enterprise" (Penal Law § 460.10 [3]). Both statutes demand or have been understood to demand proof of an association possessing a continuity of existence, criminal purpose, and structure -- which is to say, of constancy and capacity exceeding the individual crimes committed under the association's auspices or for its purposes (id.; Boyle, 556 US at 946).

There is no question that the People presented as to each appellant considerable evidence of a pattern of illegal activity. The issue to be decided is whether they also presented evidence from which a petit jury could reasonably infer (see People v Bello, 92 NY2d 523, 525 [1998]) that that activity bore the requisite relation to a distinct criminal enterprise - a "group of persons" seeking a "common purpose" and associated in an ascertainably structured entity. The People and the Appellate Division majority proposed a structure composed of buyers and sellers of stolen credit card information arrayed around Western

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[3]As is here relevant the Legislature in enacting the OCCA was careful to explain that "[t]he organized crime control act is a statute of comparable purpose [to that of RICO] but tempered by reasonable limitations on its applicability, and by due regard for the rights of innocent persons. Because of its more rigorous definitions, this act will not apply to some situations encompassed within comparable statutes in other jurisdictions" (Penal Law § 460.00 [emphasis supplied]).

Express's hub-like web sites, drawn there by reason of the sites' menu of facilitative services. As Supreme Court perceptively observed, however, this does no more than describe a prevalent pattern evidently organic to the "carding" market; it is how that business often happens to be configured given the needs and interests of the individual market participants. It is, however, not indicative of a distinct, structured criminal enterprise. There is no hint that any of the market participants acted except for and according to their own particular interests,[4] much less that their actions within the illicit market were somehow connected to the workings of a structured, purposeful criminal organization.

The People urge that a criminal enterprise need not be hierarchical to be structured and that structure may be inferred from patterns of criminal conduct. While both of these propositions may be true in theory, it remains that under the OCCA a "common purpose" is required and the structure of a criminal enterprise must be "ascertainable." Here these conditions are not met. The presented evidence was indicative of no more than the manner in which international transactions in stolen credit card data were commonly conducted, with or without

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[4]We note that, while the Appellate Division offered that the common purpose of the purported enterprise was to encourage more and larger criminal transactions, there was no proof that Western Express's customers availed themselves of the company's services with any objective other than the expedient conduct of their own individual transactions.

the use of Western Express's services[5]; it did not support the further inference of a distinct, beneficially related criminal enterprise.

It is true that in Boyle the RICO requirement of enterprise structure was deemed satisfied simply by proof of the underlying pattern of criminal activity and the inference of structure that that proof would bear (see 556 US at 947-948). The OCCA, unlike RICO, however, specifically demands that the structure be distinct from the predicate illicit pattern, and not surprisingly there are no New York cases in which the requisite structure has been inferred simply from an underlying pattern. Moreover, Boyle involved a ring of thieves whose relatively constant membership met from time to time to plan and execute bank heists, the proceeds of which they shared (see id. at 941). There was, then, some evidence from which a continuing cooperative criminal enterprise possessed of a common purpose and some, albeit loose, structure could be inferred. Here, although there was evidence of many arms' length transactions, there was no proof of concerted activity from which a petit jury might reasonably have gathered that the appellants were knowing participants in the affairs of a "criminal enterprise" within the meaning of Penal Law § 460.10 (3).

Doubtless, the internet may be used to facilitate

[5]There are numerous providers of such services and, in fact, after Western Express's demise, its carder clientele simply switched to different providers of comparable services.

crime, and we do not exclude the possibility that a web site singularly preoccupied with processing a screened clientele's illicit transactions could be understood as elemental to and reflective of a criminal enterprise. But crimes committed by resort to cyber means are not invariably referrable to distinct nefarious enterprises, and the web sites here involved do not permit the inference of an overarching criminal purpose or organization; while Western Express may have sought to make its web sites attractive to carders, the sites themselves presented simply as publicly accessible loci for the conduct of business, the legality of which turned in the end upon the independent agendas of individual users. To the extent that the usage was for illegal purposes, it reflected the existence of a prevalent black market but did not reasonably justify the additional inference necessary to the viability of the proposed enterprise corruption prosecution, that there was within that market an enduring structurally distinct symbiotically related criminal entity with which appellants were purposefully associated.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed and the orders of Supreme Court, New York County, dismissing the enterprise corruption count of the indictment as against appellants, reinstated.

Penal Law § 105.20.

Footnote 13: Under New York law, for example, one can conspire to commit a crime with a person who has no intent to commit a crime (like an undercover police officer) or who has no legal capacity to commit a crime (like a minor). This makes New York a state which has adopted the "unilateral" theory of conspiracy.

Footnote 14: The Court does not ascribe any bad faith to the People with respect to this colloquy. Indeed, the gist of the instruction they provided mirrors the carefully considered legal arguments they have made here, that a defendant's lack of knowledge or intent regarding the value of a larceny conspiracy is "no defense" in a conspiracy prosecution.

Footnote 15: For an excellent discussion of the equivalence of legally sufficiency determinations in trial vs. grand jury proceedings, see Marks, Dean, Dwyer, Girese & Yates, "New York Pretrial Criminal Procedure", Second Edition, Thompson, West, (2012), § 5.27. During or after a trial, the legal sufficiency inquiry relates to whether there was sufficient evidence which would allow a fact finder to find guilt beyond a reasonable doubt. People v. Khan, 81 NY3d 535 (2012). A grand jury sufficiency inquiry, in contrast, is applied to determinations made by grand juries that reasonable cause exists to find that a defendant committed a crime. But the underlying legal sufficiency standard in both cases is identical.

Footnote 16: The Court here is recounting what it understands informed the People's decision not to charge 51 defendants in this case with larceny. The Court does not necessarily agree that such larceny prosecutions were barred in each of these cases.

Footnote 17: The Court does not ascribe any improper motivation to the People in this respect or any other. Nor is the Court asserting that the People were motivated to bring conspiracy charges in this case because of venue concerns. The simple fact, however, is that without the conspiracy charges, the People apparently believed that 51 of the 94 defendants in this case could not have been prosecuted in Manhattan.

Footnote 18: See New Jersey Code of Criminal Justice § 2C:20-3 (defining the crime of Theft); Connecticut Penal Code §§ 53a-119; 53a-122-125b (defining the crime of Larceny).

captioned beginning with the fourth defendant, Carlos Moreno, immediately following the four Principals and Accomplices who are subject to this Decision and Order.

Footnote 5: To derive this figure, the Court calculated the date on which each account was opened and the latest date on which funds were withdrawn for each Account Holder subject to the instant Decision and Order and then calculated the average time between those two events. The Court excluded one Account Holder whom the evidence indicated had a significantly longer period between an opening and withdrawal than all of the others: Jonas Fernandez (#76). The equivalent time period for this defendant was 48 days.

Footnote 6: People's Supplemental Affirmation in Response to the Defendants' Motion to Dismiss, April 2, 2012, ¶¶ 35-36.

Footnote 7: The People also cite, in support of their position, the trial court's decision in People v. Canales, 32 Misc 3d 1211(A) (Kings County Supreme Court, 2011, Dwyer, J.). In Canales the Court held that under the first degree conspiracy statute which enhances conspiracy penalties when a co-conspirator is under the age of 16, a defendant need not know this fact to be liable. That element of the first degree conspiracy statute, however, is written in a manner which clearly indicates that the statute's intent requirement does not apply to a defendant's age. The Court's decision in Canales, therefore, is not particularly relevant here.

Footnote 8: This statute has been amended many times since 1988 to add additional categories of public servants to the list of persons covered under the law but continues to have the same basic design.

Footnote 9: See, e.g. the following definitions of the word "constitute" from dictionaries available on the Internet: Free Online Dictionary, Thesaurus and Encyclopedia: "To be the elements or parts of, compose . . . To amount to: equal". Free Merriam-Webster Dictionary: "Make up, form, compose . . . 12 months constitute a year". Macmillian Dictionary: "if several people or things constitute something, they combine to form it".

Footnote 10: See Penal Law § 105.10, McKinney, 2012, "Historical and Statutory Notes"

Footnote 11: Bill Jacket, Chapter 1030 of the Laws of 1965, Letter from Richard J. Bartlett to Sol N. Corbin, Esq., July 1, 1965. In a long and distinguished legal career, Richard Bartlett served as a member of the New York State Assembly from 1959-1966 and as the first Chief Administrative Judge of the New York State Unified Court System from 1974-1979.

Footnote 12: A conspiracy, of course, requires the commission of an overt act by a conspirator in furtherance of the conspiracy. But no overt act need be committed by any particular defendant.

Fifth Degree and in some cases, additionally, the Class A misdemeanor of Petit Larceny in full satisfaction of the charges in the indictment. Those dispositions have generally included sentences to probation or a conditional discharge, no jail time and community service. [*20]

This Court is not seeking to offer legal advice to any of the defendants. Defendants and their attorneys should obviously, however, consider their next steps. Since the instant Decision has ordered the dismissal of multiple counts of this indictment, the remedies available to the People pursuant to CPL 210.20 (6), including an automatic 30 stay of this Order, are not applicable. See People v. Moquin, 77 NY2d 449 (1991). Nevertheless, the Court has decided, sua sponte, to stay the instant Order dismissing the conspiracy charges for 30 days. If during that time, any defendant wishes to enter into an agreed-upon disposition of his or her case in accordance with the current charges pending in New York County, the Court will consider any such application.

April 27, 2012_____

Daniel Conviser, A.J.S.C.

Appendix "A": Defendants' Counsel List

Footnotes

Footnote 1: Each of the 94 defendants in this case have been assigned a number by the Court to make keeping track of their cases easier. The instant Decision and Order applies only to those defendants captioned here. The defendants not captioned here have: (i) not yet been apprehended or arraigned, (ii) already pled guilty, been sentenced and waived their right to appeal, or, (iii) otherwise waived or deferred a decision on the sufficiency of the grand jury evidence.

Footnote 2: In addition to larceny and conspiracy charges, Defendant Joel Luciano is charged with three counts of Criminal Possession of a Forged Instrument in the Second Degree. The instant Decision and Order does not apply to alleged principal Jose Cruz because he has not yet been apprehended.

Footnote 3: The identified defendants Stephanie Roman, Hector Hernandez, a.k.a., "Bori", Jennifer Feldmeth and Alberto Torres and the unidentified defendants John Doe Lollipop, John Doe Curly Hair and Jane Doe are all alleged to have been Accomplices. Ms. Feldmeth pled guilty to the indictment charges, was sentenced and waived her right to appeal and Mr. Alberto Torres has not yet been apprehended. The instant Decision and Order therefore applies only to the alleged Accomplices Stephanie Roman and Hector Hernandez.

Footnote 4: 28 of the 32 above-captioned defendants are alleged "Account Holders". They are

This Court has obviously ordered the dismissal of the conspiracy counts in this case. But that does not mean, in the Court's view, that the defendants did not conspire in New York State to commit the crime of larceny. The conspiracy counts are being dismissed because the Account Holders conspired to steal amounts less than $50,000 and because the indictment alleged a single conspiracy rather than multiple conspiracies. These dismissals, however, do not mean that in reviewing whether adequate jurisdiction exists the Court cannot consider the plain fact that the grand jury heard legally sufficient evidence that each of these defendants did, indeed, conspire in New York to commit the crime of larceny.

In the Court's view, venue was also proper with respect to all of the larceny charges in this case because each of the defendants either opened an account in New York County, withdrew funds from that account in New York County or had two of those events occur in Manhattan. With respect to defendants who fraudulently withdrew funds in New York County, of course, venue was obviously proper since those alleged thefts occurred here. CPL 20.40 (1) (a). Venue is also proper in a county where a defendant conspires to commit an offense like larceny. With respect to those defendants who opened fraudulent accounts in New York County, the grand jury was entitled to find that these defendants conspired in Manhattan to commit larceny. CPL 20.40 (1) (b). Finally, with respect to the forged instrument counts against Defendant Joel Luciano, jurisdiction and venue are proper in New York County because it is alleged that the Defendant possessed those instruments here.

CONCLUSION

Although the Court has spent the bulk of this decision outlining what it believes are the deficiencies in the conspiracy charges in this case, it is also important to recognize the ways in which the People have effectively prosecuted this action. In the Court's view, the People have done a commendable job in this case in helping to uncover evidence of a massive fraudulent scheme, presenting clearly sufficient larceny evidence to a grand jury and effectively moving these cases towards resolution.

It is also important for the defendants who are only charged with conspiracy in this case to consider an important point which the People made during the oral argument on this motion. The point is that any dismissal or reduction of the charges against the conspiracy-only defendants may end up being a Pyrrhic victory for them. That is because the evidence in this case could allow those defendants to be indicted for the completed crime of larceny in the geographic locations (such as the Bronx) where those larcenies occurred. Indeed, some defendants now charged with the Class E felony of Conspiracy in the Fourth Degree could be charged with Grand Larceny in the Third Degree (a Class D felony) in other jurisdictions. During the oral argument, the People indicated that a dismissal or reduction of the felony conspiracy charges against those defendants might provide an impetus for such larceny prosecutions to commence elsewhere.

The cases of 31 of the 94 defendants in this litigation have already been resolved by plea. In most cases, the Account Holders have pled guilty to the Class A misdemeanor of Conspiracy in the

the conspiracy counts against all of the defendants. 211 AD2d at 816. The same rule must apply here.

At the same time, however, it is apparent that the People would very likely be able to properly charge multiple conspiracies in this case. The current evidence certainly would allow a conspiracy to be adequately alleged between the Principals and Accomplices. Moreover, it is evident that multiple separate conspiracies could be alleged between the Account Holders and this core group (albeit, in the Court's view, at the Class A misdemeanor level with respect to the Account Holders). Since the Court's instant dismissal order is based on legally insufficiency, the People are entitled to move to re-present any of those conspiracy charges to another grand jury. CPL 210.20 (4).

III. MOTION TO DISMISS FOR IMPROPER JURISDICTION & VENUE

Various defendants have moved to dismiss the indictment on grounds of improper jurisdiction and venue. With respect to the non-conspiracy counts, those motions are denied.

In order to establish territorial jurisdiction over an offense, it must be demonstrated that a defendant is liable as a principal or accomplice for conduct occurring in New York which establishes an element of an offense, an attempt to commit an offense or a conspiracy to commit an offense, if, in the latter case, the conspiratorial conduct of a defendant occurred in this state. CPL 20.20; 20.40. When a person is alleged to have partially committed a criminal offense in this state which was consummated in another jurisdiction, or an offense of conspiracy in this state to commit a crime in another state, the courts of this state only have jurisdiction if the "conduct constituting the consummated offense or, as the case may be, the conduct constituting the crime . . .conspiratorially contemplated . . . constitutes an offense under the laws of such other jurisdiction as well as under the laws of this state." CPL 20.30 (1); Penal Law § 105.25 (2). The monetary withdrawals which completed the alleged thefts in this case occurred in New York, New Jersey or Connecticut. Both New Jersey and Connecticut criminalize theft or larceny in a similar manner as New York.[FN18]

All of the Defendants in this case are alleged to have opened accounts at TD Bank in New York in order to steal money from those accounts. All are alleged to have provided their account information to Principals or Accomplices to enable those co-conspirators to deposit fraudulent funds into those accounts. Additional actions by some defendants, like depositing fraudulent checks or transferring money between accounts, are also alleged to have occurred in New York. At a minimum, the grand jury evidence was sufficient to establish that each of the defendants conspired in New York to commit the felony of larceny under New York or Connecticut law or "theft", under New Jersey law and that each of these defendants committed significant overt acts [*19]in New York in furtherance of that conspiracy. See CPL 20.20 (1) (c); People v. Kassebaum, 95 NY2d 611 (2001); People v. Carvajal, 6 NY3d 305 (2005).

persons who can be charged in a single conspiracy. Nor are such raw numbers determinative of whether a valid unitary conspiracy exists. The fact that the instant indictment alleges one agreement among 94 people, however, certainly makes this case exceedingly rare. More to the point, were this prosecution to go forward in its current form, it would have a great potential to cause prejudice to the Account Holders at the periphery of the scheme.

The initial function which was served by the instant conspiracy charges is also apparent. Without those charges, because of venue requirements, 51 of the 94 defendants in this litigation would apparently never have been charged with committing any crime in New York County. The People presented evidence in this case that each of the Account Holders engaged in the same basic scheme and provided three geographic locations where key events relevant to the larcenies occurred. Those were the county where accounts were opened, the county in which fraudulent funds were deposited and the county where funds were withdrawn. In some cases, all three events occurred in New York County, in some two events occurred in Manhattan, in some one event occurred in this county and in some none of those events occurred here.

As the district attorney's office has repeatedly outlined during court appearances in this matter, the People believed that if certain of these events occurred in New York County, venue was proper in Manhattan. (see discussion infra). Those defendants were charged with larceny. The People also apparently believed, however, that if none of these actions occurred in Manhattan or if the only event which occurred in Manhattan was the depositing of fraudulent checks, venue was not proper in New York County. Such defendants were charged with conspiracy but not larceny.[FN16]

By charging one conspiracy among every one of the 94 defendants, however, the venue issue was eliminated. Venue in a conspiracy case is proper in any county in which an overt act in furtherance of a conspiracy is committed. CPL 105.25. Moreover, by charging that each defendant conspired to steal more than $50,000, the People were able to bring Class E felony charges in New York County which were roughly equivalent to the Class E or D larceny charges these defendants might otherwise have faced in the venues where their thefts actually took place.[FN17]

In the Court's view, the grand jury evidence was clearly sufficient to establish the existence of a conspiracy between the Principals and the Accomplices. That evidence allowed the inference to be drawn that these defendants did work together towards a common goal and were connected to each other and that their individual success was dependent upon the success of [*18]the criminal enterprise as a whole. The New York case law cited supra, however, does not allow for a multiple conspiracy improperly prosecuted as a single conspiracy to be reformed. As the Court of Appeals held in Leisner, where multiple conspiracies are prosecuted improperly as one at a trial an acquittal of all of the conspiracy charges must be directed. In Giordano, supra, the Court likewise held that where two conspiracies are improperly joined as one and there is not sufficient proof of the "particular conspiracy charged in the indictment" the remedy is the dismissal of all of

The definition of what constitutes "legally sufficient" trial and grand jury evidence, however, is identical. See CPL 70.10 (1); compare, CPL 290.10 (motion for a trial order of dismissal); CPL 210.20 (1) (b) (motion to dismiss an offense because of legally insufficient grand jury evidence); Swamp, supra; People v. Van Buren, 82 NY2d 878 (1993); People v. [*16]Vollick, 75 NY2d 877 (1990).[FN15] Therefore, the same legal sufficiency rules should apply.

Reviewing single conspiracy legal sufficiency at the grand jury stage also, in the Court's view, makes eminent sense. If this were not done, there would be no bar to improperly lumping numerous separate conspiracies into a single indictment and then obtaining all the benefits a single conspiracy prosecution enjoys up to the moment a trial sufficiency motion was determined. This would not only result in extreme prejudice to defendants but cause needless conviction reversals which could easily be avoided by a proper review at the outset.

It is clear that under any analytic measure, the People did not present legally sufficient evidence that the 94 defendants charged in this indictment were part of one conspiracy. With limited exceptions, the grand jury did not hear evidence which connected the Account Holders to each other. It heard evidence which connected the Account Holders to the Principals and Accomplices. There was thus no prima facie proof of a "rim" which connected the spokes of the alleged conspiracy together.

The conceptual rules followed by the Second Circuit in analyzing Kotteakos claims also clearly indicate, in the Court's view, that a single conspiracy was not adequately alleged in this case. There was no evidence that any Account Holder "agreed to participate in what he knew to be a collective venture directed toward a common goal". Sureff, supra. The thefts by the Account Holders were not collective and they did they have a common purpose. Nor was there prima facie evidence that the Account Holders had "reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture". Id.Each Account Holder was paid a few hundred dollars to open an account and withdraw money from it, actions which on average took less than five days to complete. There was no evidence from which it could be inferred that these defendants had an interest in ensuring that the other defendants stole money as part of the same scheme. The success of the overall operation had no relevance whatsoever to the few hundred dollars each Account Holder was paid. The proceeds, in each case, apparently, came solely from the accounts each defendant opened. Whether the operation included 3000 additional Account Holders or none was of absolutely no consequence to these defendants. As the Supreme Court in Kotteakos observed, in analyzing the case of a fence who buys illegal wares from many criminals: "Thieves who dispose of their loot to a single receiver — a single fence — do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a fence' to make them such". 328 US at 755 (quotation omitted).

The sheer size of the agreement alleged in this case is also relevant. The potential deprivation of due-process inherent in mass prosecutions was the underlying evil which [*17]motivated the Supreme Court's decision in Kotteakos. There is no numerical limit, of course, on the number of

county in which an overt act in furtherance of the conspiracy was committed. 73 NY2d at 149 (quotations and citations omitted).[*15]

These potent tools, the Court held, created a risk of prejudice to defendants, a risk which was must acute when multiple conspiracies were charged as one: This risk is greatest when the prosecution combines a number of seemingly related criminal agreements into a single integrated conspiracy count. In such circumstances, the all too real' danger that a jury will find guilt by association is well recognized. Moreover, jury confusion may arise when the prosecution's proof establishes several discrete conspiracies, but not the single integrated conspiracy charged in the indictment. Indeed, it has been noted that this danger of sacrificing individual justice arises most often . . . wherein questions are raised as to whether there was one single conspiracy or several minor conspiracies' Id. (quotations and citations omitted).

There are a legion of federal cases interpreting the Kotteakos rule with different federal circuits applying different formulations to determine whether single or multiple conspiracies exist. Although some New York appellate cases have applied the Leisner holding, none have outlined in detail how the Kotteakos doctrine should be analyzed. First Department cases which have ruled on whether single or multiple conspiracies exist, however, have relied primarily on the jurisprudence of the Second Circuit. See People v. Alfonso, 35 AD3d 269 (1st Dept 2006), lv denied (citing United States v. Aracri, 968 F2d 1512, 1521 (2nd Cir 1992); United States v. Maldonado-Rivera, 922 F2d 934, 962-963 (2nd Cir 1990), cert denied, 501 U.S. 1233 (1991)); Thomas, supra, 215 AD2d 211 (1st Dept 1995), citing, United States v. Alessi, 638 F2d 466 (2nd Cir 1980).

The Second Circuit has held that to show a single conspiracy it must be demonstrated that "each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal." United States v. Sureff, 15 F3d 225, 229 (2nd Cir 1994). To establish a single conspiracy, it is not necessary that every conspirator know each other or every detail of a criminal enterprise. It is essential, however, that conspirators know or "have reason to know" that others are involved in the illegal operation and have "reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture". 15 F3d at 230 (additional quotation omitted).

Defendants under New York law are entitled to a jury instruction on single vs. multiple conspiracies at trial if they request one. But, in the Court's view, there is no requirement that such instructions be given during a grand jury presentation and the People in this case did not provide the grand jurors with such an instruction. Case law makes plain that a conspiracy conviction must be dismissed if there is not legally sufficient evidence which demonstrates that the defendant was part of a single conspiracy alleged in an indictment rather than a member of one of multiple conspiracies. See, e.g., Giordano, supra; Thomas, supra. The Court is not aware of a case which has examined the same legal sufficiency issue with respect to grand jury evidence.

[*14]conspirators were not connected to the other spokes in the conspiracy. Their only connection was through the hub.

The Court held that allowing such a "rimless conspiracy" to be prosecuted was inimical to due-process because it had too great a potential to dispense with an individual determination of guilt: Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. . . . When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group. Criminal they may be, but it is not the criminality of mass conspiracy. 328 US at 773.

In a mass proceeding, the Court explained, "[t]he dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Id., at 773-774.

Such dangers, moreover, the Court held, applied particularly in conspiracy cases. The Court noted that where the number of persons charged in a conspiracy was small, the danger of prejudice was correspondingly limited. But as the numbers became greater:

[I]n varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater. (citations omitted). At the outskirts they are perhaps higher than in any other form of criminal trial our system affords. The greater looseness generally allowed for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, becomes magnified as the numbers involved increase. Id., at 776.

The Court also noted that in such cases, the most significant protection a defendant could be afforded were proper court instructions which "scrupulously safeguard each defendant individually" and prevent "unwarranted imputation of guilt from others' conduct". Id. See also, Leisner, 73 NY2d at 150 (recognizing that the "clarity of the charge" in a conspiracy case is "crucial").

The Leisner Court outlined the significant practical consequences to defendants charged with conspiracy under New York law: The crime of conspiracy has been described as the "darling of the modern prosecutor's nursery" perhaps because it exemplifies the tendency of a principle to expand itself to the limit of its logic' and furnishes the prosecution with potent evidentiary weapons. For instance, the overt acts of any conspirator may be attributed to other conspirators to establish the offense of conspiracy. Similarly, the acts and declarations of any conspirator may be used against the others once a prima facie conspiracy case has been established. In addition, a conspirator may be prosecuted in the county in which he entered into the conspiracy or in any

II: DISMISSAL OF CONSPIRACY CHARGES

The foregoing facts indicate to this Court that the felony conspiracy charge for each of the Account Holders must be reduced to the lesser included misdemeanor offense of Conspiracy in the Fifth Degree. But the Court has also concluded that all of the conspiracy charges in this case must be dismissed for all of the defendants for a related reason.

In order to reduce an indictment charge based on legally insufficient evidence to a lesser included offense, the court must find that the evidence is "legally sufficient to establish the commission of a lesser included offense". CPL 210.20 (1-a). In this case, the evidence was sufficient to establish that the Account Holders agreed with the defendants who recruited them to steal money from TD Bank. It was also sufficient, in the Court's view, to establish a conspiracy among the Principals and Accomplices to commit the larcenies alleged in the indictment. Neither of these sufficient multiple conspiracies, however, were presented to the grand jury. The indictment alleged a scheme in which 94 people agreed with each other to steal money. That alleged scheme was clearly not, in the Court's view, supported by legally sufficient evidence. A defendant cannot be convicted of conspiracy under New York law if he is charged in an indictment which improperly alleges that he is a member of a single conspiracy when that defendant, in reality, is a member of one of multiple conspiracies which have been improperly alleged to be one. Leisner, supra; People v. Thomas, 215 AD2d 211 (1st Dept 1995), app denied, 86 NY2d 803; People v. Giordano, 211 AD2d 814 (2d Dept 1995).

This rule was outlined by the Court of Appeals for the first time in 1989 in Leisner. There, the Court noted that although this issue had never before been addressed under New York law, the federal courts had struggled with the problem of single vs. multiple conspiracies for years. The Court held that juries were required to be instructed on the difference between single and multiple conspiracies in appropriate cases and instructed to acquit a defendant charged as part of a single conspiracy if a true unitary conspiracy had not been proven. In reaching that conclusion, the Court adopted the reasoning of the seminal decision of the United States

Supreme Court in Kotteakos v. United States, 328 US 750 (1946). In Kotteakos, using the analogy of a bicycle wheel, the Supreme Court held that where one or more defendants in a conspiracy case were at the "hub" of a wheel, additional conspirators emanated from that hub as "spokes" but no "rim" connecting those spokes to each other was proven, a single conspiracy did not exist. In Leisner, the Court similarly held that "a single conspiracy cannot be found unless there is a rim of the wheel to enclose the spokes'". 73 NY2d at 151, quoting Kotteakos, 380 US at 755.

Kotteakos involved a conspiracy by 32 defendants to obtain fraudulent loans insured by the Federal Housing Administration which were brokered in each case by a single defendant, (the "hub" of the conspiracy). Some of the conspirators had connections to each other and could be construed to have been divided into as few as eight groups. For the most part, however, the

Riggins and Brooks, which both in fact concerned the same conspiracy, show how relaxed the proof of intent in a conspiracy prosecution can be. The defendants in these cases had been involved over an extended period of time in a multi-state large scale illegal narcotics operation; Defendant Riggins made individual interstate narcotics sales in amounts as high as $70,000. Both Defendants argued that the evidence supporting their convictions for conspiracy were insufficient, asserting that they were unaware of various aspects of the conspiracy and the participants in it. The Court in both cases rejected those arguments, noting that "one who deals in large quantities of narcotics may be presumed to know that he is a part of a venture which extends beyond his individual participation". Riggins, 28 AD3d 934, 935; Brooks, 268 AD2d 889, 890 (citations omitted).

In this case, however, in the Court's view, the evidence presented to the grand jury did not allow for such inferences. The Account Holders in this case all engaged in a single sequence of transactions in which up to $5500 was stolen. The thefts with respect to the instant Account Holders (with one exception) took an average of less than five days to complete. The Account Holders were not embedded in an ongoing conspiracy or working as professional criminals. Many, in fact, had absolutely no contact with the criminal justice system prior to the charges in this case. Each was recruited by the Principals or Accomplices to engage in a brief series of steps ending in a single larceny. That scheme netted each of them a few hundred dollars and sometimes, apparently, a meal at McDonalds. Since the Account Holders all used their own valid identification documents to open accounts and were all photographed perpetuating the fraud, their detection was assured. That is not to minimize the seriousness of these crimes. It is to point out that the inferences which may be fairly drawn for large scale interstate narcotics traffickers, like the defendants in Riggins and Brooks, cannot be drawn for the Account Holders in this case.

The specific intent to commit a crime under the conspiracy laws may be proven by circumstantial evidence, like any other element of a crime. An inference of intent under the conspiracy statutes, however, "presents special problems" of proof and must be scrutinized with care to avoid "piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes. Ozarowski, supra, 38 NY2d at 489 (quotation and citation omitted). "[T]he gist of the offense [of conspiracy] remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant". People v. Leisner, 73 NY2d 140 (1989). [*13]

Many of the Account Holders in this case have not only been charged with felony conspiracy but felony larceny. In the Court's view, those larceny charges were uniformly supported by legally sufficient evidence. There was insufficient evidence to support an indictment charging the Account Holders with conspiring to commit a Class C felony, however. The reason the indictment was in fact voted, moreover, is apparent. The grand jurors were specifically instructed that no intent to steal a large sum of money was necessary.

What we're asking you to consider is conspiracy to commit grand larceny. So it's conspiracy to commit the charge of grand larceny as it was charged to you. Grand Jury Minutes, p. 380.[*11]

The People had earlier correctly charged the grand jury on the object crime of Grand Larceny in the Second Degree, telling the jurors that in order to convict a defendant of Conspiracy in the Fourth Degree, they would have to find that each defendant intended to commit the crime of Grand Larceny in the Second Degree. The above cited passage did not provide an incorrect legal instruction — although it did fail to answer the question of what the intent requirement under the conspiracy statute meant.

The problem came in the following passage. Here a grand juror raises the same general issue, by asking how a person who has no idea that a large amount of money will be stolen can be found guilty for conspiring to steal that sum. In response, the instruction given is a recitation of Penal Law § 105.30: Conspiracy: No Defense. That statute, however, does not address the mental state which is required to be proven with respect to a defendant. It addresses the fact that this intent requirement does not apply to a co-conspirator. See People v. Schwimmer, 47 NY2d 1004 (1979); People v. Berkowitz, 50 NY2d 333, 342-343 (1980).[FN13] The answer by the assistant district attorney responding to the question ends with the assertion that there is "no defense" with respect to the question the grand juror asked: Grand Juror: I have one — just to make — simplify this whole thing, you enter into this thing, and you think you're going to make $200. You have no idea down the road. Maybe half a million dollars. How do we make that jump to say that you know, I introduced this thing, maybe I did something a little wrong. Which you had no idea someone was going to be stealing a million dollars. Can you read the law that might help me on that. (emphasis added). ADA: It was — I will reread it to you. 105.30, Conspiracy, No Defense. It is no defense to a prosecution for conspiracy that owing to criminal responsibility or other legal incapacity or exemption, or to unawareness of criminal nature of the agreement or the object conduct or the defendant's criminal purpose or to other factors precluding the mental state required for the commission of conspiracy or object crime, one or more of the defendants co-conspirators could not be guilty of the conspiracy of the object crime.It's no defense — I hope I'm answering. The way the law is worded, there is almost flipped. When you hear it, I think that will answer your question. Grand Jury Minutes, pp. 381-383. (emphasis added).

Under the law, of course, the fact that a defendant had no idea that more than $50,000 would be stolen as part of the scheme was a defense. It was a fact which, if believed by the grand jurors, [*12]would have necessitated a negative vote on the fourth degree conspiracy charge.[FN14]

There is no doubt that a defendant charged with conspiracy need not know or intend to commit all of the particular acts which her co-conspirators perpetrate. Conspiracy charges frequently depend on a range of reasonable inferences regarding a defendant's knowledge and intent. See People v. Riggins, 28 AD3d 934 (3d Dept 2006), lv denied, 6 NY3d 897; People v. Brooks, 268 AD2d 889 (3rd Dept, 2000).

Sufficiency of the Grand Jury Evidence Regarding Fourth Degree Conspiracy

Each of the Defendants in this case is alleged to have stolen, at most, amounts of up to approximately $5500. Many are alleged to have caused a loss to TD Bank in an amount of less than $3000. In order to present legally sufficient evidence to sustain the fourth degree conspiracy charge, however, the People were required to present prima facie evidence that the Defendants intended to steal more than $50,000. Thus, the facts would have had to allow the inference to be drawn that each Defendant not only intended to steal the money which he or she stole, but to participate in a conspiracy to steal at least 9 times that amount and in many cases a multiple significantly greater than that.

As noted supra, the vast majority of the proof with respect to the Account Holders came from paper records. Those records did not provide evidence from which grand jurors were entitled to infer that each of these defendants intended to and agreed to steal more than $50,000. It demonstrated that these defendants intended and agreed to steal the amounts they stole. See People v. Giordano, 211 AD2d 814, 816 (2d Dept 1995) ("The scope of [the defendant's] agreement must be determined individually from what was proved as to him") (quotation omitted, bracket in original).

There was also evidence presented that trips to locations like casinos in at least a few cases involved not only an Account Holder but more than one additional Principal or Accomplice. In a couple of cases, the evidence allowed the inference to be drawn that these trips involved two rather than one Account Holder. With respect to the vast majority of the instant Account Holders, however, there was no evidence which indicated that any of them knew that other persons were stealing money as they were.

Even if the inference could be drawn, moreover, that each of the defendants in this case must have known that other persons were participating in the scheme and even if that knowledge could then lead to an inference that each of them intended to steal more than the amounts they stole, at most, in the Court's view, that would allow the inference that these defendants perhaps intended to steal ten or fifteen or twenty thousand dollars. There was no evidence presented to the grand jury which would allow the inference that any of the Account Holders entered into an agreement and intended to steal more than $50,000. If I separately ask 100 people to each steal $1 for me, that does not necessarily mean that each of those persons has entered into a conspiracy to steal $100.

In the Court's view, the grand jury's vote with respect to the conspiracy charges was also compromised by a key incorrect answer to questions grand jurors had with respect to the mental state required to prove conspiracy. The grand jury minutes make plain that the grand jurors understandably struggled with the difficult conspiracy instructions they were given and focused repeatedly on what the People were required to prove with respect to the intent of the defendants: Grand juror: When you speak about intent, the intent is as to each individual person? Is it to commit the crime or to commit that particular — that crime or that particular felony?ADA:

Revision of the Penal Law and Criminal Code. The Commission's Chairman, the Honorable Richard Bartlett, noted in a 1965 letter to the Governor's Counsel urging approval of the statute that its provisions governing the principles of criminal liability (including, obviously, the conspiracy statutes) had been grouped together in one section, given "careful definition" and "describe with precision the principles of criminal liability, defense, etc., which heretofore have [*9]been left largely to case law".[FN11] (emphasis added).

There are also sound reasons, apart from semantics, to treat attempt and conspiracy crimes differently. When a person is guilty of an attempt to commit a crime, they must not only have the intent to commit that crime. They must also engage in conduct which comes "dangerously near commission of the completed crime". People v. Naradzay, 11 NY3d 460, 466 (2008) (quotation omitted). When the culpability of an attempt offense is elevated because of the occurrence of a strict liability aggravating factor, as occurred in Miller, moreover, it will often be because the aggravating factor was not only attempted but actually happened. It is fair enough to hold one whose conduct, at a minimum, comes dangerously close to the commission of a completed felony to a higher level of culpability when an egregious result like the causing of serious physical injury occurs.

The crime of conspiracy, however, does not require that a defendant engage in conduct.[FN12] The crime consists simply of an agreement. It is one thing to hold a defendant who intends to commit a robbery liable for a limited number of the common unintended consequences of that crime. It is another to punish a person for entering into an agreement to do something he never agreed to do. To take the construction of the conspiracy statute urged by the People to its logical extreme, if "A" and "B" agree to steal $1 and "B" then, unbeknownst to "A", steals $100 million "A" is guilty of conspiring to steal $100 million. As the People point out, attempt crimes are punished at a higher level than conspiracy crimes involving the same completed offense. Those differing punishments, however, do not, in the Court's view, justify the significant expansion of the conspiracy statutes which the People have urged here.

Nor is there anything irrational in requiring an intent to commit an element of a completed crime which does not require any mental culpability. The Court of Appeals directly confronted that issue in People v. Saunders, 85 NY2d 339 (1995), a case decided a few months before Miller. In Saunders, the Court held that it was possible to attempt to commit the crime of Criminal Possession of a Weapon in the Third Degree even though the completed crime was essentially a strict liability offense involving the possession of a loaded and operable firearm. The Defendant in Saunders was charged with an attempt, rather than a completed crime, because the gun he possessed was inoperable. The Court distinguished its earlier holding in Campbell by noting that the issue in Saunders was not whether an unintentional result could be attempted but whether conduct which was unintentional could be attempted. The Court held that: "the specific intent required to commit an attempt is not, under all circumstances, incompatible with recognizing penal responsibility for an attempt to commit a strict liability offense". 85 NY2d at 343. [*10]

result. That was the holding of the Second Department in Joyce, supra.

The Court reached the same conclusion in People v. Dathan, 27 AD3d 575 (2d Dept 2006), lv denied, 7 NY3d 787. There, the Court reversed a conviction for the crime of Conspiracy in the Second Degree (Penal Law § 105.15) which contains the identical intent language as the fourth degree conspiracy statute. The Court held that the People had not demonstrated that the weight threshold requirement for the completed Class A-II felony the Defendant had been charged with conspiring to commit had been proven. The conspiracy conviction was dismissed because the People proved only that the Defendant conspired to sell [*8]narcotics, rather than narcotics weighing a half ounce or more. Weight requirements under the Penal Law's narcotics statutes, however, like valuation amounts under the larceny statutes, are strict liability aggravating factors with respect to a completed crime. See, L.1995, ch. 75 (overruling Ryan, supra); People v. Davis, 244 AD2d 1003 (4th Dept 1997); see also People v. Moses, 291 AD2d 814 (4th Dept 2002) (conviction for a conspiracy to commit a Class A felony drug offense sustained because there was sufficient evidence of "defendant's knowledge and agreement that more than four ounces of cocaine would be possessed" by a co-conspirator.)There are also good reasons, based on both the differing language and purposes of the attempt and conspiracy statutes, to treat these crimes differently. The language of the attempt statute imposes criminal liability for one who has the "intent to commit a crime" and then engages in conduct which tends to effect that crime's commission. Penal Law § 110. The intent requirement of the conspiracy statute at issue here, however, is worded differently. Under the crime of Conspiracy in the Fourth Degree, the question is whether a defendant had the "intent that conduct constituting a class B or C felony be performed". (emphasis added).

In Miller, the question was what the Legislature meant when they required that a defendant have the generalized "intent to commit a crime". The Court quite reasonably held that this intent requirement applied only to those elements of a completed crime which required intentional conduct. The conspiracy statute at issue here, however, allows little room for interpretation. Rather than simply describing the general mental state of intention, the statute focuses specifically on the intent to commit the "conduct constituting" the completed crime. The clear connotation, in the Court's view, by virtue of the use of the word "conduct" and the definition of the word "constitute", is that what is required is an intent to commit the "conduct constituting" the entire crime, not some of that conduct.[FN9] In construing a statute, a court should generally assume that every word in the statute has a meaning and was inserted for a purpose. See Bliss v. Bliss, 66 NY2d 382 (1985); Direen Operating Corp. v. State Tax Commission, 46 AD2d 191 (3d Dept 1974); NY McKinney's Statutes § 231.

The legislative history of the fourth degree conspiracy statute, moreover, provides every reason to believe those words were chosen carefully. The statute was enacted in modern times as part of the 1965 revision of the Penal Law and was derived from the Penal Law of 1909.[FN10] The 1965 Penal Law revisions were the result of four years of work by the Temporary Commission on

be convicted for attempting to commit the crime of Assault in the Second Degree under Penal Law § 120.05. That statute provides that a defendant is guilty of assault when he has the intent to prevent certain specified public servants from performing a lawful duty and causes physical injury to such a person.[FN8] The Court pointed out that the "physical injury" element of this crime does not require any intent by a defendant. It held that because "the very essence of a criminal attempt is the defendant's intention to cause the proscribed result, it follows [*7]that there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended". 72 NY2d at 605.

In Miller, however, the Campbell holding was significantly limited. The Miller court held that when the issue was whether a strict liability aggravating factor which elevated the level of a crime could be attempted even though that factor did not require any mens rea, the answer was yes. In Miller the Defendant was convicted of Attempted Robbery in the First Degree even though the fact which elevated that crime from attempted third degree robbery (a Class E felony) to attempted first degree robbery (a Class C felony) was an element (causing serious physical injury) for which no mental state was required. The distinction between Campbell and Miller was that in Campbell, the strict liability factor was necessary in order to convict the defendant of any crime. In Miller, the strict liability factor "only" elevated the crime from a Class E to a Class C felony. While the first scenario was logically impossible, the Court held, the second was perfectly permissible: Because strict liability attaches to an aggravating circumstance rather than the proscribed result, it is not the case that a robber charged with attempted robbery in the first degree is being punished for an unintended criminal act . . . as occurred under the second degree assault statute. (87 NY2d at 218). The presence of an aggravating factor — the serious physical injury . . . . merely serves to elevate the degree of the attempted offense and the severity of the punishment. 87 NY2d at 219.

The Court thus held that "the People bear no greater burden to establish a robber's culpable mental state when that person is charged with first degree robbery as compared to a second or third degree robbery". 87 NY2d at 217. The People urge that the same principle should be applied to the conspiracy statutes. The logic of Miller, they argue, obviates the People's obligation in a conspiracy case to prove that a Defendant intended to cause a result for which no completed crime mental state is required. If the logic of Miller were simply engrafted onto the conspiracy laws, as the People urge, the grand jury evidence in this case would be clearly sufficient to demonstrate that each defendant intended to commit a Class C felony. In the Court's view, however, that would be the incorrect result for a number of reasons.

First, the People's position does not reflect the current state of New York law. Miller has been cited in 36 reported decisions during the past 27 years. The Miller doctrine has never been cited in any reported opinion as an authority in construing the conspiracy statutes. Controlling appellate authority, in fact, has quite clearly held that a defendant charged with conspiring to commit a crime which contains a strict liability element must have the specific intent to cause that

That identical mens rea is applicable to the felony of Criminal Possession of Stolen Property in the Fourth Degree (PL § 165.45) which is a Class E felony. The crime is elevated where one of seven additional aggravating circumstances exists, such as the fact that stolen property is a credit card or the value of the property exceeds $1000. A defendant, however, need not intend or even be aware under the statute that stolen property falls into one of these aggravating categories in order to be guilty of the higher level crime. The crime is committed if the mens rea for the underlying misdemeanor and felony crime is present and the aggravating fact exists.

As the Court of Appeals explained in People v. Mitchell, 77 NY2d 624 (1991), however, the reason the mens rea requirement for this felony crime (and many others in the Penal Law) do not apply to aggravating factors arises from simple grammar. The stolen property statute, for example, quite clearly in one passage establishes an underlying mens rea and in a second passage tacks on aggravating factors for which no additional mental state is required. Thus the fourth degree criminal possession of stolen property statute reads as follows: A person is guilty of criminal possession of stolen property in the fourth degree [*6]when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof, and when:1. The value of the property exceeds one thousand dollars. . . .

See also, People v. Thompson, 99 NY2d 38 (2002) (same); People v. Parker, 97 AD2d 943 (4th Dept, 1983) (outlining the same principle under the first degree robbery statute). In People v. Logan, 243 AD2d 920 (4th Dept 1997), applying the same principle, the Court held that the People did not have to prove that a defendant knew the value of property he had stolen exceeded $1000 in order to be guilty of Grand Larceny in the Fourth Degree.

The fourth degree conspiracy statute at issue in this case, however, is written in a completely different manner. That statute clearly provides that the relevant mens rea applies to the requirement that a defendant intend to commit a Class B or C felony. Thus, this statute, as noted supra, reads as follows: A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting: 1. a class B or class C felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct.

See People v. Ryan, 82 NY2d 497 (1993) (where former PL § 220.18 (5) made it a felony to "knowingly and unlawfully possess . . . six hundred twenty-five milligrams of a hallucinogen", the knowledge requirement applied to the entire sentence, requiring that the Defendant know he possessed the requisite weight of the substance).[FN7]

The People also present a second argument along these lines which derives from the holding of the Court of Appeals in People v. Miller, 87 NY2d 211 (1995). Miller analyzed the mens rea requirements for attempt crimes and clarified the scope of the Court's earlier holding in People v. Campbell, 72 NY2d 602 (1988). In Campbell, the Court considered whether the Defendant could

(1976). What the People did not present legally sufficient evidence of, as outlined infra, was that any of the Account Holders had the intent to steal more than $50,000.

A good illustration of how that principle applies can be found in People v. Joyce, 100 AD2d 343 (2d Dept 1984). In Joyce the Defendant was convicted of Conspiracy in the Fourth Degree for conspiring to commit the crime of Burglary in the Second Degree (a Class C felony) in connection with a planned bank robbery. One of the substantive elements of this underlying burglary crime was that, in committing the burglary, a defendant would have to display what appeared to be a firearm. The Defendant argued that, assuming he had the requisite intent to commit a burglary, there was no evidence that he had intended and entered into an agreement to have a gun displayed during the crime. He thus argued that he could only be found guilty of the crime of Conspiracy in the Fifth Degree, since he had conspired to commit a Class D felony (Burglary in the Third Degree) not a Class C felony.

In agreeing with this contention, the Court held that: [*5] [I]n order to sustain the defendant's conviction of conspiracy in the fourth degree, the plain language of subdivision 1 of section 105.10 of the Penal Law required the People to prove beyond a reasonable doubt that he agreed to the display of what would appear to be a firearm. In the absence of such proof, the defendant's conviction of conspiracy in the fourth degree cannot stand. (citation omitted). Not only was there no proof that the defendant agreed to the display, but there was no proof that he was even aware that his coconspirators planned to possess what would appear to be firearms in the course of the burglary. . . . the statute plainly requires the specific intent that conduct constituting a class C felony be performed. . . . (emphasis in original) 100 AD2d at 347.

The People have a fundamentally different view of what the law requires. According to the People, they were required only to prove that the Account Holders had the "the specific intent to steal". They were "not required to prove that the defendants had the mens rea to steal over $50,000 because the amount, a value, is considered an aggravating factor and each defendant is strictly liable for that factor."[FN6] They make a number of related arguments in support of that view.

First, the People point out that various crimes in the Penal Law contain both a requirement that the intent to commit an underlying crime be proven and aggravating factors for which no additional mens rea is necessary. Such aggravating factors typically raise the offense level for such crimes. See, e.g. Criminal Possession of Stolen Property, Penal Law §§ 165.40 -165.54; Robbery, Penal Law §§ 160.05-160.15.The People urge that the conspiracy statutes should be read in the same way. For example, a person is guilty of Criminal Possession of Stolen Property in the Fifth Degree, a Class A misdemeanor, when such a person "knowingly possesses stolen property, with the intent to benefit himself or a person other than an owner thereof or to

impede the recovery by an owner thereof". PL § 165.40.

The crime of Conspiracy in the Fourth Degree occurs when, "with the intent that conduct constituting: (1) a Class B or Class C felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct." PL 105.10 (1). In this case, it is alleged that all 94 defendants conspired together to commit the crime of Grand Larceny in the Second Degree, a Class C felony. That crime requires that a defendant steal property with a value exceeding $50,000. Conspiracy generally requires that "with the intent that the object crime be committed, the defendant agreed with one or more people to engage in or cause the commission of the object crime, and that one of the conspirators committed an overt act in furtherance of the conspiracy." People v. Ackies, 79 AD3d 1050, 1056 (2nd Dept, 2010), citing, [*4]People v. Arroyo, 93 NY2d 990 (1999) (additional citations omitted).

The crime of Conspiracy in the Fourth Degree is obviously different than the crime of Conspiracy in the Fifth Degree, a Class A misdemeanor. The misdemeanor crime requires only that a Defendant enter into a conspiracy and intend that conduct constituting a felony (as opposed to a Class B or Class C felony) be performed. PL § 105.05 (1). In this case, that would only require the People to present legally sufficient evidence which demonstrated that each of the defendants entered into a conspiracy to steal more than $1000 (the Class E felony of Grand Larceny in the Fourth Degree).

A grand jury indictment is authorized when the evidence before the grand jury is "legally sufficient" to establish that a person committed a charged offense and when competent and admissible evidence provides reasonable cause to believe the person committed that crime. CPL 190.65 (1). The first prong of the statute requires that the People present prima facie evidence of an offense. The second prong describes the degree of certainty which grand jurors must have to sustain an indictment. On a motion to dismiss or reduce an indictment pursuant to CPL 210.20 (1)(b) the Court's review is limited to the first prong of the statute. People v. Swamp, 84 NY2d 725 (1995).

The question in such motions is whether "the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury". People v. Bello, 92 NY2d 523, 525 (1998). "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt". Ackies, supra, 79 AD3d 1050, 1056 (2d Dept 2010). "[L]egal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt". Bello, supra, 92 NY2d at 526.

The grand jury evidence in this case was sufficient with respect to many of the elements of Conspiracy in the Fourth Degree with respect to each Account Holder. The evidence allowed the inference that each Account Holder entered into an agreement with one or more persons to steal the amounts each Account Holder stole and that overt acts in support of that conspiracy were committed. New York's conspiracy statutes, however, also require the specific intent to commit the crime a defendant is alleged to have conspired to commit. People v. Ozarowski, 38 NY2d 481

The People presented the testimony of three witnesses in the grand jury who opened accounts and withdrew funds from them. None of the above-captioned defendants testified before the grand jury. These witnesses testified about the manner in which they were approached to participate in the scheme, how they opened accounts, how checks were deposited into them and how funds were withdrawn. In each case, Principals or Accomplices took Account Holders to open accounts and also traveled with them to a second location to withdraw money. These trips involved more than one apparent Principal and\or Accomplice. The evidence presented to the grand jury also allowed the inference to be drawn that some of these trips included two Account Holder defendants along with Principals and Accomplices, rather than only one Account [*3]Holder.

The vast majority of the proof in the grand jury with respect to the Account Holders came solely from paper banking records and photographs taken at banking, casino and Western Union offices. The People also introduced evidence establishing the identity of the defendants. With respect to the Account Holders, the grand jury evidence indicated that each Account Holder opened accounts at TD Bank, that in each case, checks were deposited into those accounts, that these checks were not supported by underlying funds, that these non-existent deposits were then transferred from savings to checking accounts, that the Account Holders then withdrew money from these checking accounts and that TD Bank suffered a loss because of those withdrawals.

The evidence provided the dates on which the illegal actions relevant to the larcenies began and ended. The Court's analysis indicates that with the exception of one Account Holder, the average time between the opening of an account and the fraudulent withdrawal of funds by the Account Holders was less than five days.[FN5]

All of the account openings occurred in New York State. Some occurred in New York County and some in other counties. Most of the unlawful withdrawals occurred outside New York State, in Atlantic City or Connecticut. The ultimate loss to TD bank from these alleged larcenies varied in each case and ranged up to a maximum loss of approximately $5000-$5500 per account. Many of the losses per account were in the range of $2000-$3000.

The legal analysis of the conspiracy charges in this case is provided infra in two parts. First, the Court concludes that the grand jury evidence was not sufficient to charge the Account Holders with the crime of Conspiracy in the Fourth Degree because none of the Account Holders had the intent to steal more than $50,000, the object crime of the alleged conspiracy. Second, the Court concludes that the grand jury evidence was also insufficient to charge any of the defendants with the conspiracy charged in the indictment because the evidence alleged a series of separate conspiracies rather than one conspiracy involving an agreement among 94 people.

I: INSUFFICIENCY OF FOURTH DEGREE CONSPIRACY CHARGES

Legal Requirements for the Crime of Conspiracy in the Fourth Degree

STATEMENT OF FACTS

The 94 defendants in this litigation are all alleged to have been part of a simple "check kiting" scheme targeting TD Bank which was organized by three principal defendants: Jose Cruz, Freddie Mercado, a/k/a. Freddie Mercado Joubert and Joel Luciano, a/k/a. Joel Torres (herineafter the "Principals").[FN2] The thefts apparently arose because of a glitch in the system which TD Bank formerly used to determine whether checks deposited into a savings account were supported by sufficient funds. Under that system, apparently, if a check supported by non-existent funds was deposited into a newly opened savings account and the amount of this deposit was then transferred by the account holder to a newly opened checking account, the funds became immediately available for withdrawal. The Principals allegedly discovered this glitch and then recruited 91 co-defendants to work with them to steal money from TD Bank using in each case the essentially identical scheme.

The Principals, often acting with or through seven co-defendants (hereinafter the "Accomplices"), would approach a defendant and ask that defendant to open an individual [*2]checking and savings account at TD Bank.[FN3] The account would be opened with a cash deposit of perhaps a few hundred dollars by this account holder (hereinafter the "Account Holders").[FN4] In at least some cases, the cash to open the original account was supplied by one of the Principals or Accomplices.

The Account Holder would then receive various materials relevant to that account including a VISA debit card. These materials or the means to use them were then typically provided by the Account Holder to one of the Principals or Accomplices. Shortly thereafter, one of the Principals or Accomplices would deposit checks from closed accounts or accounts with non-existent funds into the newly opened savings account. In at least some cases, these deposits may not have been authorized or even made with the initial knowledge of the Account Holders.

Funds would then be transferred, usually by telephone, from the newly opened savings account to the newly opened checking account. This was done by the Account Holder, an Accomplice or a Principal. The maximum amount which could be withdrawn from a TD Bank ATM machine at the time of the alleged conspiracy was $762. Using the VISA card, however, up to $5000 could be withdrawn at an Atlantic City or Connecticut casino by using the "Global Cash Access" system (GCA). GCA is a cash advance system which services the gaming industry.

In at least some cases, the Principals and\or Accomplices would organize a trip to a casino with an Account Holder. The Account Holder, by using the VISA card and the GCA system, would obtain a check from his checking account or cash from that account in an amount up to $5000. The Account Holder would be paid a small portion of the proceeds (typically, apparently, a few hundred dollars) and the Principals or Accomplices would retain the bulk of the stolen money. Some funds were also accessed through an ATM transaction or Western Union.

People v Luciano

[*1] People v Luciano 2012 NY Slip Op 50730(U) Decided on April 27, 2012 Supreme Court, New York County Conviser, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 27, 2012
Supreme Court, New York County

The People of the State of New York

against

2. Joel Luciano a/k/a Joel Torres, 3. FREDDIE MERCADO a/k/a JOUBERT, 9. STEPHANIE ROMAN, 10. HECTOR HERNANDEZ a/k/a "BORI 19. CARLOS MORENO a/k/a "PADRINO", 24. TAMIKA YOUNG a/k/a "LEWIS KEVIN", 25. LAKIESHA YOUNG, 26. NEREIDA SANTIAGO a/k/a "NENA", 30. TOYIA WHITE, 32. EMIL MANZANO, 37. VERONICA CRUZ, 38. ROSA LEON, 39. JUSTIN DOUGHERTY, 40. JAMALA BLY, 41. JUAN LUIS ROMAN, 43. JOANNA GONZALEZ, 45. PANAMA SMALLS, 47. RICARDO RODRIGUEZ, 48. FRANK CLARK, 55. JUAN VEGA, 60. XIOMARA PEREZ, 67. DIOSA D. FIGUEROA, 69. JEAN JAYSURA, 70. JAMES LEONARD, 71. SANFORD WILLIAMS, 76. JONAS FERNANDEZ 77. TREVOR O. ALLEN 79. VIVIANA CHAPARRO 82. LOURDES COLON 88. JEFFREY W. STILL, 92. AMADO RIVERA, 93. ANTONIO RIVERA, , Defendants.

Daniel P. Conviser, J.

The 32 defendants captioned here are among 94 defendants who have been charged in one indictment with being part of a single conspiracy.[FN1] All 94 defendants have been charged with the Class E felony of Conspiracy in the Fourth Degree. Many have also been charged with various degrees of grand larceny. The captioned defendants have all moved to dismiss or reduce the indictment charges against them based on insufficient grand jury evidence. For the reasons stated below, the Court holds that the grand jury evidence was not legally sufficient to sustain the conspiracy charges in this case against any of the these defendants and therefore orders the dismissal of all of the conspiracy charges against them. The People may move to re-present those charges to another grand jury. The Court finds that the grand jury evidence and the instructions and procedures relevant to the grand jury presentation were otherwise sufficient in all respects. Defendants' motions directed to the sufficiency of the grand jury evidence are therefore otherwise denied.