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NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

No. CR 00-0284 MJJ

v.

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION UNDER
FEDERAL RULE OF CRIMINAL
PROCEDURE 29(a)**

PAVEL LAZARENKO,
Defendant.

INTRODUCTION

The government having rested its case-in-chief, the defense now moves for judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

BACKGROUND

Pavel Lazarenko was a renowned public official in the former Soviet Republic of Ukraine. After serving several years in regional governmental positions, he became the Ukrainian First Vice Prime Minister in 1995. In May 1996, he became Prime Minister and held this position for a little over a year. Second Superseding Indictment ("SSI"), at ¶¶ 2-6. After serving as Prime Minister, Lazarenko was demoted in July 1997; he became a member of the Ukrainian Parliament and served as the head of the Firomada Party—a rival party to the then and current Ukrainian President, Leonid Kuchma. *Id.* at ¶ 7.

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1 The government has alleged in this case that while acting as a public official, Lazarenko
2 engaged in extortion and devised a far-reaching scheme to defraud that resulted in personal gains of
3 tens of millions of dollars. Because Lazarenko allegedly wired these misappropriated funds from
4 overseas into banks in San Francisco, California, the government has indicted him here on charges of
5 money laundering, conspiracy to commit money laundering, wire fraud, and interstate transportation
6 of stolen property. SSI at ¶ 26.

7 The government has sought to prove four separate schemes whereby Lazarenko defrauded
8 the people of Ukraine. The government has attempted to demonstrate that Lazarenko, while a
9 government official in Ukraine: (1) committed extortion by inducing Peter Kiritchenko to convey
10 property and financial interests in certain companies to him, SSI at ¶ 19; (2) participated in a scheme
11 in which Naukovy State Farm ("Naukovy Farms"), a Ukrainian government enterprise that produced
12 dairy and other products, falsely represented the value of cattle and other goods it received from a
13 Dutch company in order to personally profit, and syphoned off money to his personal accounts that
14 belonged to Naukovy, *id.* at ¶ 20; (3) received and transferred money that had been stolen, converted,
15 and taken by fraud in connection with the distribution of natural gas in Ukraine, *id.* at ¶ 22; and (4)
16 controlled a corporation, GHP, that sold the Ukrainian government six prefabricated houses at nearly
17 three times their actual cost in order to transfer part of the excess money to accounts he controlled,
18 *id.* at ¶ 23.

19 At the outset, the government and the defense could not agree on what role, if any, Ukrainian
20 law would play with respect to these offenses. After receiving briefing on the issue, the Court issued
21 an Order finding that Ukrainian law is applicable to the government's proof at trial with respect to
22 each of the three main charges in the indictment. The Court found that, with respect to money
23 laundering, the government must prove that the underlying predicate offenses specifically pled in the
24 indictment, including extortion, wire fraud, and interstate transportation of stolen property, were
25 prohibited by Ukrainian law during the relevant time period in order to prove knowledge of unlawful
26 activity, and must also prove commission of the specific predicate offenses alleged in the indictment
27 (*i.e.* foreign extortion, wire fraud, and interstate transportation of stolen property).

28 With respect to wire fraud, the Court found, *inter alia*, that the government must establish a

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1 legal basis—be it statutory or common law, to support an honest services fraud claim. The Court
 2 further ruled that to prove the *mens rea* element of the wire fraud counts, the government would need
 3 to establish that the conduct alleged in Counts 9 through 30 could be deemed fraudulent in
 4 Lazarenko’s home country during the relevant time periods. That Lazarenko’s conduct may have
 5 violated some common law fiduciary duty in the United States would be insufficient to prove that he
 6 failed to provide honest services to the citizens of Ukraine. Finally, regarding the interstate
 7 transportation of stolen property counts, the Court found that the government ultimately must prove
 8 that, under Ukrainian law, the money in question did not belong to Lazarenko at the time it was
 9 transported. *See* Order on the Applicability of Foreign Law, September 10, 2003.

10 After hundreds of pages of pre-trial briefing and several days of oral argument, the trial
 11 commenced on March 15, 2004. The government rested on May 3, 2004, and the defense
 12 immediately moved for a judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of
 13 Criminal Procedure.

LEGAL STANDARD

14 Rule 29(a) requires a court to enter a judgment of acquittal “if the evidence is insufficient to
 15 sustain a conviction.” In considering a Rule 29 motion, the Court “must determine whether, viewing
 16 the evidence in the light most favorable to the government, the jury could reasonably find the
 17 defendant guilty beyond a reasonable doubt.” *United States v. Merriweather*, 777 F.2d 503, 507 (9th
 18 Cir. 1985).

ANALYSIS

- 20 -----
- 21 **A. UESU**
- 22 **1. Wire Fraud**
- 23 **a. Property Fraud**

24 To prove the property fraud aspect of the wire fraud charges with respect to UESU, the
 25 government was required to prove that Lazarenko had a specific intent to defraud, by means of false
 26 or fraudulent pretenses, representations, or promises, and obtained money or property as a result. 18
 27 U.S.C. § 1343. The government’s case rests on the premise that the Ukrainian government and
 28 people were the victims of this scheme to defraud. The “false or fraudulent pretenses,

1 representations, or promises"¹ are allegedly twofold; the government claims that (1) a contract
2 involving UESU and RAO Gazprom ("the UESU-RAO Gazprom contract") falsely represents that
3 UESU (as opposed to UEIL) would sell gas received from RAO Gazprom; (2) a governmental decree
4 signed by Lazarenko falsely identified UESU as a distributor of gas in Ukraine, when in fact UEIL
5 would sell UESU's gas; and (3) Lazarenko made a material omission in failing to inform the
6 Ukrainian people that he was receiving funds from his relationship with UESU. The government has
7 failed to prove the elements of wire fraud as a matter of law.

8 With respect to the alleged misrepresentation contained in the UESU-RAO Gazprom contract
9 and the governmental decree, the Court fails to see any actionable fraud on the Ukrainian people.² In
10 the UESU-RAO Gazprom contract, UEIL is clearly identified as a "corporate member" of UESU and
11 that it would be "acting in support" of UESU. Exs. 807, 810. As for the decree, if the argument is
12 that insofar as UEIL is a non-Ukrainian entity the Ukrainian government was deprived of a
13 regulatory interest in keeping the title of gas within the country, such a deprivation does not affect
14 tangible property interests and thus is not cognizable under federal wire fraud statutes. *Cleveland v.*
15 *United States*, 531 U.S. 12 (2000).

16 The notion that Lazarenko's failure to inform the Ukrainian people that he was receiving
17 funds from his relationship with UESU supports a property fraud charge is similarly unavailing.
18 There is simply no evidence that the omission was material regarding the operation of the Ukrainian
19 gas market. The government's theory essentially is one involving a deprivation of the Ukrainian
20 people's right to Lazarenko's honest services.

21 **b. Honest Services Fraud**

22 18 U.S.C. § 1346 expands section 1343 to include a scheme to deprive another of "the
23 intangible right of honest services." As the Court has previously held, to prove an honest services
24 fraud charge the government must establish an analogous violation of Ukrainian law. No reasonable
25 trier of fact could find that it has. Section 165 of the Ukrainian Commercial Code ("UCC") requires

26 _____
27 ¹ 18 U.S.C. § 1343.

28 ² At oral argument on the Rule 29 motion, the government disavowed any claim that, with respect
to the substantive wire fraud counts, RAO Gazprom was a victim of fraud.

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1 an official act, taken for mercenary gain, contrary to the interest of service, causing material harm to
 2 the state or social interests. The government has utterly failed to establish material harm. In this
 3 respect, the Court rejects as having no evidentiary support the Government's assertion that the
 4 issuance of the guarantee to RAO Gazprom on behalf of the Ukrainian gas industry caused harm to
 5 the Ukrainian people or government. Equally unsupported by the record is the claim that, absent
 6 Lazarenko's actions, (1) other entities would have been willing to distribute gas at more favorable
 7 prices than UESU, or (2) the citizens of Ukraine would have paid less out of pocket for their gas.
 8 The Court further finds that the record is devoid of evidence to support any other UCC violation.

c. Other Entities

9
 10 The Court finds that the allegations involving Itera, Nakosta and Somolli also fail, as the
 11 government has not established actionable fraud with respect to these entities.

3. Money Laundering

12
 13 The government's theory of the UESU wire fraud is different with respect to the money
 14 laundering counts to the extent it claims that RAO Gazprom, as opposed to the Ukrainian people, is
 15 the victim of the fraud. The result for purposes of this motion, however, is the same. To begin with,
 16 the record does not reflect that there was any misrepresentation in the first place with respect to the
 17 UESU-RAO Gazprom contract—as noted above, UEIL is clearly identified as a "corporate member"
 18 of UESU and that it would be "acting in support" of UESU. Exs. 807, 810. The government also
 19 argues that Lazarenko received money from UESU to which RAO Gazprom was legally entitled.
 20 The law is clear, however, that this does not constitute a theft of funds from RAO Gazprom. *United*
 21 *States v. Rodrigues*, 159 F.3d 439, 448 (9th Cir. 1998).³ Therefore, the government has not
 22 established property fraud with respect to UESU's dealings with RAO Gazprom, and a money
 23 laundering charge based thereon would not lie.

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 28 ³ In any event, there has been no evidence that would establish RAO Gazprom was not paid
 money to which it was entitled under the UESU-RAO Gazprom contract.

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1 **B. PMH-GHP**
 2 **1. Wire Fraud**
 3 **a.) Property Fraud**

4 The government argues that Lazarenko was complicit in a fraudulent scheme whereby he
 5 applied pressure and otherwise engaged in conduct in his official capacity to ensure that the
 6 Ukrainian government entered into a contract to purchase pre-fabricated houses. According to the
 7 government, the record establishes that sometime after the contract for the houses was entered into,
 8 Lazarenko and others submitted false invoices for payment to the Ukrainian government that
 9 significantly overstated the actual price of the houses. The government has alleged and sought to
 10 prove that Lazarenko received approximately half of the amount of the ill-gotten gain from the
 11 PMH-GHP deal.

12 Realizing that the falsified invoices did not impact the Ukrainian government's decision to
 13 enter into the contract in the first instance, the government does not rely on a theory of fraud arising
 14 from false representations to support its fraud theory regarding the purchase of the houses. Instead,
 15 the government argues that Mr. Lazarenko's failure to disclose to the Ukrainian citizenry that he was
 16 receiving funds from an entity in which he had an ownership interest constitutes a material omission
 17 supporting its fraud claim. To the extent that there is an actionable fraud arising out of these facts,
 18 the Court finds as a matter of law the fraud would be of the honest services type. As such, the
 19 government is required to establish a violation of Ukrainian law as a part of its proof in this matter.
 20 A review of the record establishes that no reasonable juror could find a violation of Ukrainian law on
 21 these facts.

22 Under UCC § 165, the government has failed to establish the element of material harm in
 23 connection with the deal. To the extent the government seeks to argue material harm under section
 24 165 by asserting that the Ukrainian government overpaid for the houses, it is estopped from making
 25 such a claim. During the discovery phase of this case, the government disclaimed any intention of
 26 arguing that the price paid for the houses was excessive, noting that "the Indictment is devoid of any
 27 allegation concerning the expense of the homes." United States' Rule 15 Opposition, at 9. Rather,
 28 the government explained, "the gist of the fraud is that the defendant took official action to benefit

1 **B. PMH-GHP**

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27 allegation concerning the expense of the homes." United States' Rule 15 Opposition, at 9. Rather,
28 the government explained, "the gist of the fraud is that the defendant took official action to benefit

1 GHP, received money from GHP and failed to disclose the receipt of that money.” *Id.* The Court
 2 relied upon the government’s view of the scope of the indictment in ruling on discovery requests
 3 tendered by the defense and did not allow discovery regarding the value of the houses. The
 4 government cannot now argue that the Ukrainian government paid an excessive price for the houses
 5 to establish the element of material harm for section 165 purposes.

6 The Court further finds that the record is devoid of evidence to support any other UCC
 7 violation.

8 C. Naukovy Farms

9 The Court denies the defense’s motion with respect to the alleged Naukovy Farms fraud. The
 10 Court finds that the government has established an evidentiary record such that a reasonable juror
 11 could find beyond a reasonable doubt that Lazarenko is guilty of the offenses charged.⁴

12 D. Conspiracy, Money Laundering, and ITSP Charges

13 The Court finds that the government has presented sufficient evidence such that a reasonable
 14 juror could find beyond a reasonable doubt that Lazarenko committed extortion with respect to Mr.
 15 Kiritchenko and therefore denies the defense’s motion to dismiss the conspiracy and substantive
 16 money laundering counts. However, given the Court’s dismissal of the allegations regarding UESU,
 17 Somolli, et al., and PMH-GHP, the government is precluded from going to the jury on the ITSP
 18 counts with respect to those issues. Nor can the government utilize these transactions as predicate
 19 acts in support of the conspiracy or substantive money laundering counts.

20 E. Count 30 and Dityakovsky Allegations

21 Consistent with the government’s oral motion and comments at the Rule 29 hearing, Count
 22 30 and the allegations in the SSI with respect to Mr. Dityatovksy are hereby dismissed.

23 CONCLUSION

24 For the foregoing reasons, the Court **GRANTS** the Rule 29 motion regarding the wire fraud
 25 charges with respect to UESU and associated entities, and PMH-GHP. The government cannot rely
 26 upon these theories of fraud to support the money laundering charges nor the charge of conspiracy to


27 _____
 28 ⁴The Court will address the issue of electing to proceed on money laundering versus wire fraud
 with respect to the Naukovy Farms scheme when the parties settle jury instructions in this matter and
 therefore declines to rule on the issue on this motion.

1 launder money. Moreover, the government will not be allowed to seek convictions under the ITSP
2 counts regarding these particular fraudulent schemes. The Court **DENIES** the motion with respect
3 to the wire fraud charges relating to Naukovy Farms, as well as the money laundering, conspiracy
4 and ITSP charges relating to Naukovy Farms and the alleged extortion of Mr. Kiritchenko.

5 Under this Order, Counts 9 through 19, 30, and 32 through 42 are hereby dismissed. The
6 Court will issue a modified Order after discussing with the parties how the dismissal of the
7 allegations regarding UESU, Somolli, et al., and PMH-GHP affects other counts in the SSI.

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9 **IT IS SO ORDERED.**

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11 Dated: May 7, 2004


MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

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