IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	**Case No. 1:09-CR-335 (RJL)**
AMARO GONCALVES,	)	
OFER PAZ,	)	
ISRAEL WEISLER,	)	
MICHAEL SACKS,	)	
Defendants.	)	

MOTION TO DISMISS COUNTS 1, 2 & 44 IN THE SUPERSEDING INDICTMENT

Amaro Goncalves hereby moves, pursuant to Fed. R. Crim. P. 12, to dismiss Count 1 (FCPA conspiracy), Count 2 (substantive FCPA charge based on Mr. Goncalves' travel to Washington, D.C. to first hear the Gabon "pitch") and Count 44 (money laundering conspiracy) in the Superseding Indictment against him. By this motion, Mr. Goncalves seeks relief consistent with the Court's prior decisions that have dismissed the same or similar counts against other defendants as a matter of law.[1] In further support, Mr. Goncalves states as follows:

INTRODUCTION

The Superseding Indictment relies substantially on the Government's now debunked "overarching conspiracy" theory, including charges of conspiracy to violate the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2 & 78-dd-3, and conspiracy to commit money laundering, 18 U.S.C. §§ 1956(a)(2), 1956(a)(3) & 1957. After the jury was impaneled in the Group 1 trial, the government conceded that its conspiracy theory was "nonconventional." 5/16/2011 PM Tr. at

[1] Ofer Paz, Michael Sacks and Israel Weisler specifically join this motion on their own behalf. They will be prepared to address facts unique to their own circumstances in court when the Court takes up the motion.

91. That was understatement. There is no precedent – no U.S. Supreme Court, D.C. Circuit or other authority – that would support the government's conspiracy theory in this case. No conspiracy charge has ever been sustained where the conspiracy "hub" is a government agent and where there is no evidence of communications or inter-relationships between the supposed "spokes," *i.e*., the various charged defendants. This case, in which the only connection among the defendants is that each was targeted by the "Gabon Sting" is singular in its attempt to distort the law of conspiracy to fit facts the government itself manufactured.

As the Court observed during the Group 1 Rule 29 arguments, "the concept behind conspiracy always was [] that what made a conspiracy so dangerous to society was that people were working in concert with one another, were helping one another, were backing up one another. When one person slipped, they helped pick him up and they covered for him, et cetera, et cetera, et cetera. ***Here the government has concocted a conspiracy sting operation where there's none of that, where it's just a discussion with an undercover agent, a discussion with a cooperator, and a knowledge that there are other people helping out.***" 6/21/2011 PM Tr. at 26 (emphasis added). The Court allowed the Group 1 case to go to the jury, though doing so the Court warned the government about its conspiracy theory that "boy, it's thin. It's a close call. … I think you've really – not you personally, the Department – is pushing this conspiracy concept right out to the edge. I mean right out." *Id.* at 29-30. Confirming the Court's intuition, the first jury was unable to reach a verdict, resulting in a mistrial.

The government said it was sensitive to the problems with the conspiracy charge exposed in the Group 1 trial. Accordingly, in the Group 2 trial it claimed to have "amplified the record" – at least to the extent it was able. 12/20/2011 PM Tr. at 91-92 (stating, "Not only did we put on different witnesses but we put on a lot more of the calls.") Ultimately, however, the problem

with the conspiracy charge is structural, not evidentiary. The Court said as much when it granted the Rule 29 motions at the close of the government case in the Group 2 trial, holding that the concocted Gabon deal "***as it was structured*** did not necessarily link the success or failure of any of the defendant's deal with the success or failure of any of the others', nor did it link the cost and budget of any one of the transactions with the cost and budget of the entire enterprise as a whole." 12/22/2011 PM Tr. at 6 (emphasis added). Further, "the defendants were never told if one or more of the participants dropped out, the deal would be jeopardized, let alone doomed." *Id.* at 7. Accordingly, while there may be evidence that individual defendants pursued part of what they understood was a consolidated deal, the Court properly concluded as a matter of law that the deal was not structured so that any one competitor had any stake or interest in the success of the other others, precluding any rational jury from convicting any defendant of participation in any one overarching conspiracy as alleged. *Id.* 7-8.

In addition to their reliance on the same defective "overarching conspiracy" theory as the FCPA conspiracy alleged in Count 1, the money laundering charges in Count 44 are unconstitutionally multiplicitous and flawed as a matter of law. These charges additionally fail because they do not set out conduct analytically distinct from the underlying "specified unlawful activity," *i.e.*, the alleged FCPA violations. The Court recognized the defects in the charges when it dismissed Count 44 at the close of the government's case in the Group 1 trial and again (without objection from the government) at the start of the Group 2 trial. *See* 9/10/2011 Minute Order. These charges are properly dismissed in advance of this trial, too.

Finally, at the close of the government's case in the Group 2 trial, the Court properly dismissed two substantive counts against John and Jeana Mushriqui. 12/22/2011 PM Tr. at 8-9. These counts were based on the Mushriquis' travel to Washington, D.C. to hear the Gabon

"pitch". The Court dismissed the Mushriqui counts because, as the government structured it, the Mushriquis had been told nothing at the time of that trip that would suggest the Gabon transaction might be in any way improper. *See id.* The same is true of Count 2 of the Superseding Indictment against Mr. Goncalves. There are additional defects to Counts 3 and 4 of the Superseding Indictment (the other substantive FCPA charges against Mr. Goncalves), but Mr. Goncalves will address these defects in his Rule 29 motion at trial.

Now, and for the reasons further set forth below, Mr. Goncalves moves to dismiss Counts 1, 2 and 44 against him, consistent with the Court's prior rulings.

ARGUMENT

I. THE GABON TRANSACTION WAS STRUCTURED IN A MANNER THAT CANNOT SUSTAIN THE GOVERNMENT'S "OVERARCHING CONSPIRACY" THEORY

This case involves a fabricated "sting" transaction. Accordingly, unlike most cases in which the government must take the facts as it finds them, in this case the government itself manufactured and structured the facts. As has now been clearly demonstrated through two lengthy trials of 10 defendants, the government failed to do so in a manner that can, as a matter of law, sustain its "overarching conspiracy" theory.

A. The "Overarching Conspiracy" Lacks a Cognizable Hub

First of all, while the "overarching conspiracy" theory is a traditional hub-and-spoke conspiracy, there is no cognizable hub. In this regard, a conspiracy case requires the existence of an agreement between at least two people to achieve a specific illegal end. *See United States v. Cepeda*, 768 F.2d 1515, 1516 (2d Cir. 1985) ("[S]ince the act of agreeing is a group act, unless at least two people commit it no one does.") Proof of an agreement to achieve a lawful goal does not evidence a conspiratorial agreement, nor does "accidentally parallel [criminal] action." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1191 (2d Cir. 1989); *see also United*

States v. McCall, 298 Fed. Appx. 591, 593 (9th Cir. 2008) (acquitting on conspiracy counts because defendants did not knowingly participate in the conspiracy of their colleagues).

The problem for the government in this case is that it structured the fabricated Gabon transaction so that the only "agreements" were between each defendant and either Richard Bistrong, at the time a paid agent of the government, or else with "Pascal Latour," really an FBI agent. While the defense and government do not agree about the contours and substance of those agreements, there can be no dispute that Bistrong and Latour were the "hub" of the Gabon deal. The government and its agents in fact assiduously kept the defendants themselves apart. All communications were funneled through these men. The government employed this structure notwithstanding hornbook law in every Circuit to address the issue that a defendant cannot form a conspiratorial agreement with a government informant or agent as a matter of law.[2] The

[2] *See, e.g.*, *United States v. Nelson-Rodriguez*, 319 F.3d. 12, 39 (1st Dir. 2003) (conceding that a conviction is not possible if the defendant conspired with only government agents or informants); *United States v. Vazquez*, 113 F.3d 383, 387 (2d Cir. 1997) (stating that no conspiracy could have existed among one alleged conspirator, a government agent and a government informant); *United States v. Kama*, 251 Fed. Appx. 121, 123 (3d Cir. 2007) (affirming conviction because a rational trier of fact could have concluded that the defendant engaged in a conspiracy with one or more persons other than the undercover officers and the confidential informant); *United States v. Hayes*, 775 F.2d 1279, 1283 (4th Cir. 1985) (stating that it is undisputed that if all participants in the scheme to bribe were government agents, except for the defendant, then no conspiracy existed); *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965) (establishing the rule that "as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy"); *United States v. Williams*, 274 F.3d 1079, 1084 (6th Cir. 2001) (stating that a government agent cannot be a conspirator); *United States v. Corson*, 579 F.3d 804, 811 (7th Cir. 2009) (holding that "[a] defendant is not liable for conspiring solely with an undercover government agent or a government informant"); *United States v. Nelson*, 165 F.3d 1180, 1184 (8th Cir. 1999) (stating that "[i]t is well settled that there can be no indictable conspiracy involving only the defendant and government agents and informers"); *United States v. Escobar de Bright*, 742 F.2d 1196, 1202 (9th Cir. 1984) (holding that "[t]here is neither a true agreement nor a meeting of minds when an individual 'conspires' to violate the law with only one other person and that person is a government agent"); *United States v. Barboa*, 777 F.2d 1420, 1422 (10th Cir. 1985) (concluding that "[i]f it were determined that Barboa 'conspired' only with a government agent or informant, the conviction and sentence could not stand"); *United States v. Arbane*, 446 F.3d 1223, 1228

rationale of these courts is simple: conspiracy requires an agreement and no cognizable agreement is possible with a government agent who does not mean what he says. A common way to state the rationale for this rule is that "[t]here is neither a true agreement nor a meeting of minds when an individual 'conspires' to violate the law with only one other person and that person is a government agent." *United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984). Yet, by government design, the only agreement in this case was between Mr. Goncalves and agents of the government, including Mr. Bistrong.

The fact that the government designed the Gabon scenario not to require or include a cognizable agreement, the *sine qua non* of conspiracy, between Mr. Goncalves and any of the other charged defendants, is fatal to the conspiracy counts. Though what is described in this case is a classic hub-and-spoke conspiracy, this defect would prevail whatever analogy or shape is used to describe the charge. Mr. Goncalves never even transmitted information to any other defendant through Bistrong. *E.g., United States v. Medina*, 32 F.3d 40, 42 (2d Cir. 1994) (where defendant hired government informant to hire others to commit a robbery). Nor did Bistrong act as a facilitator of a transaction between Mr. Goncalves and the other defendants. *E.g., United States v. Fincher*, 723 F.2d 862, 863 (11th Cir. 1984) (where defendant purchased weapons through a government agent from a genuine co-conspirator); *United States v. Martino*, 648 F.2d 367, 405 (5th Cir. 1981) (where defendant in arson conspiracy raising issue of conspiring with government agent purchased property to be burned with a genuine co-conspirator). Instead, the government structured the Gabon scenario so that Mr. Goncalves' agreement – such as it was – was only with government agents. It may have been parallel to other concocted deals in the

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(11th Cir. 2006) (stating that "[i]f there are only two members of a conspiracy, neither may be a government agent or informant who aims to frustrate the conspiracy"); *United States v. Oruche*, 333 Fed. Appx. 578, 579 (D.C. Cir. 2009) (noting that the government conceded that the alleged conspiracy involving a government informant "foreclosed a finding of a conspiracy").

sting, but this was a function of investigative expedience and nothing more. Moreover, as noted above, mere parallel conduct is insufficient as a matter of law. *Beech-Nut Nutrition Corp.*, 871 F.2d at 1191. The government must now properly live with the consequence of how it concocted the Gabon scenario.

Mr. Goncalves has been unable to find even a single example – not in the Supreme Court, not in the D.C. Circuit, nowhere – in which a court has sustained a conspiracy structured like this one. The conspiracy counts are, on this basis alone, properly dismissed.

B. The "Overarching Conspiracy" Lacks Interdependence, or a "Rim"

Though the absence of a cognizable "hub" itself defeats the government's conspiracy theory (and both Counts 1 and 44) as a matter of law, the Gabon scenario – as the Court has brought out through its own questioning in the prior trials – was further structured by the government with no interdependence between the different defendants' deals, sometimes referred to as the "rim" between "spokes" of a conspiracy. The D.C. Circuit has said on this subject that "competing spoke suppliers in a hub conspiracy must not only have a connection to the hub sellers but must also have interdependence among each other in order to form a rim and constitute a single conspiracy." *United States v. Mathis*, 216 F.3d 18, 24 (D.C. Cir. 2000) (finding that lack of interdependence among defendants evidenced multiple conspiracies as opposed to a single conspiracy). Although Mr. Goncalves had no ongoing professional relationships (and indeed, for the most part, had never even casually met) any of his putative co-conspirators, the fact is that mere knowledge of other defendants is insufficient to establish interdependence. *See Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946) (*quoting United States v. Lekacos*, 151 F.2d 170, 173 (2d Cir. 1945) ("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.").

Consistent with the Court's observations when it entered its judgment of acquittal on the conspiracy charge in the Group 2 trial, as quoted above, there is no such interdependence where "[n]o spoke depended upon, was aided by, or had any interest in the success of the others." *United States v. Chandler*, 388 F.3d 796, 811 (11th Cir. 2004); *see, e.g., United States v. Kemp*, 500 F.3d 257, 289-290 (3d Cir. 2007) (holding variance from indictment charging a single conspiracy where "their activities and those of [the other spokes] were neither interdependent nor mutually supportive" and "[t]he evidence. . . demonstrates that [one spoke's] transactions were able to proceed without any reliance on [the other spoke], and vice versa."). As the Court in *Chandler* found, there is no conspiracy where: "Each spoke acted independently and was an end unto itself." *Chandler*, 388 F.3d at 811.

In this case the fabricated Gabon scenario did not include any suggestion to the defendants that there would be any consequence to one defendant from the participation or lack of participation of another. *See* 6/2/2011 AM Tr. at 13-14 (the Court eliciting from Jonathan Spiller that there was no discussion concerning the impact on one deal of any other individual deal falling through). There is no allegation in the Superseding Indictment that Mr. Goncalves was even aware of the identity of others who were supplying different products to Gabon, let alone evidence that he or any one of the defendants depended in any manner whatsoever on any of the others in the deal. Neither has there been (or will there be) evidence in this regard.

At most – though the government claims his statements are not offered for their truth – Mr. Bistrong told Mr. Goncalves and the other defendants that others were providing different products for the Gabonese presidential guard. Mr. Bistrong never said that if one component

was not supplied, or not supplied by a particular defendant, then the deal for any other defendant was off, however. Rather, Mr. Bistrong and the other government agents went out of their way to keep the defendants apart and not to discuss with any one of them the role of any other.

The separation of the defendants, and the lack of interdependence between them, is further evidenced in the separate "balcony discussions" at Clyde's, which have been featured in both trials to date. (Mr. Goncalves, for his part, did not attend Clyde's and the Superseding Indictment does not allege otherwise.) Additional demonstration of the absence of interdependence among the defendants can be found in the contracts the government provided each defendant, which described the sale of goods to Gabon without contingency on a larger deal or others' participation. Those contracts (written, it turns out, by the Government, which forged the signature and seal of Gabon) purported to obligate Gabon based solely on the signing defendant's performance. A copy of the contract that Mr. Goncalves signed on behalf of his then-employer, Smith & Wesson, is attached here as Exhibit 1. Had that contract been real, and not a Government fake, then upon Smith & Wesson's individual performance, Gabon would have been obligated to pay regardless of what other defendants did or did not do. There was no contingent relationship between Mr. Goncalves and any of the other defendants in this case.

For all of the above reasons, and consistent with the Court's prior decisions with regard to Counts 1 and 44, those counts should be dismissed now as a matter of law.

II. THE MONEY LAUNDERING CHARGE IS CONSTITUTIONALLY AND LEGALLY DEFECTIVE

The money laundering conspiracy charge in Count 44 not only suffers from the same defects just discussed as to Count 1, but is further flawed as a matter of law because it is unconstitutionally multiplicitous and inconsistent with the statutes upon which it is based. Again, these defects are consequent to the government-contrived structure of the Gabon scenario,

which is why this charge has not made it to the jury in either of the prior trials – in the Group 2 trial, without objection by the government.

A. The Money Laundering Charge Unconstitutionally Merges with the Underlying Alleged FCPA Allegations

First, the money laundering charge in the Superseding Indictment is unconstitutionally multiplicitous (*i.e.*, it unconstitutionally mergers with the FCPA charges) because it is based on the exact same monetary transactions that supposedly support the FCPA charges. *Compare* Superseding Indictment, ¶¶ 31(d)(4), 31(d)(7), 31(d)(12), 31(d)(14)) and ¶¶ 31(e)(4), 31(e)(7), 31(e)(12) and 31(e)(14) *with id.*, ¶ 34 (incorporating ¶ 31 in its entirety to support money laundering allegation). No other or subsequent transactions are identified in the indictment. Only one conspiracy is alleged in the Superseding Indictment (to violate the FCPA in Count 1), with the money laundering count simply incorporating by reference that same conspiracy with that same exact object. *See id.* This results in an unconstitutional "merger" of crimes – one punishable for up to five years (FCPA) and one punishable for up to twenty years (money laundering). Count 44 cannot be sustained in this context, as the government implicitly recognized by not opposing the dismissal of those charges in the Group 2 trial.[3]

[3] In policy guidance, the government itself acknowledges that there must be a clear delineation – absent in this case – between the specified unlawful activity and the financial transaction before the latter can be characterized as a money laundering violation. *See* U.S. ATTORNEY'S MANUAL 9-105.330(3) ("*Explanation:* Sections 1956 and 1957 both require that the property involved in the money laundering transaction be the *proceeds* of specified unlawful activity at the time that the transaction occurs. The statute does not define when property becomes 'proceeds,' but the context implies that the property will have been derived from an already completed offense, or a completed phase of an ongoing offense, before it is laundered. Therefore, as a general rule, neither § 1956 nor § 1957 should be used where the same financial transaction represents both the money laundering offense and a part of the specified unlawful activity generating the proceeds being laundered."); *see also* CRIMINAL RESOURCE MANUAL 2187.

Controlling authority holds that an indictment is multiplicitous, and therefore constitutionally defective, "if a single offense is alleged in a number of counts, unfairly increasing a defendant's exposure to criminal sanctions." *United States v. Harris*, 959 F.2d 246, 250 (D.C. Cir. 1992), *abrogated on other grounds, United States v. Stewart*, 246 F.3d 728 (D.C. Cir. 2001). Such indictments expose a defendant to the threat of multiple punishments for the same offense. *United States v. Podell*, 869 F.2d 328, 330 (7th Cir. 1989). "The primary problem is that the jury can convict on both counts, resulting in two punishments for the same crime in violation of the Double Jeopardy Clause of the Fifth Amendment." *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004). Furthermore, where a single offense is charged in multiple counts, it can prejudice juries by creating the negative impression of more criminal activity than that which actually may have occurred. *United States v. Carter*, 576 F.2d 1061, 1064 (3d Cir. 1978).

To avoid multiplicity, or merger, the offense of money laundering must be separate and distinct from the underlying offense that generated the money that allegedly was laundered. *See United States v. Hall*, 613 F.3d 249, 254 (D.C. Cir. 2010) ("The offense of money laundering must be separate and distinct from the underlying offense that generated the money that allegedly was laundered."); *United States v. Castellini*, 392 F.3d 35, 47 (1st Cir. 2004) (money laundering "cannot be the same as the illegal activity which produces the proceeds"); *United States v. Mankarious*, 151 F.3d 694, 706 (7th Cir. 1998) ("a money laundering transaction … must be separate from any transaction necessary for the predicate offense to generate proceeds"). Put another way, the alleged money laundering transaction cannot be payment of expenses that are also the basis of the specified unlawful activity on which the money laundering is based. *See Hall*, 613 F.3d at 255 ("a criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money laundering statute") (quotation omitted).

Courts steadfastly have refused to allow the government to seek enhanced penalties by charging as money laundering conduct that is part and parcel of an alleged underlying crime. At a policy level, both the government and Congress share this view.[4] Yet, that is precisely what the Superseding Indictment seeks to do in this case, exponentially multiplying the potential punishment from five years under the FCPA to twenty years under the money laundering statutes for the single course of conduct alleged in the Superseding Indictment. This is improper, and Count 44 must, accordingly, be dismissed here as it was for the prior 10 defendants tried.

B. The Money Laundering Charges are Further Legally Defective

There are additional defects to the money laundering charge beyond the constitutional defect. These include that: (i) the laundering laws are misapplied where the underlying conduct is already reached by another law; (ii) no "proceeds" of unlawful conduct were derived or used based on the structure of the government-fabricated Gabon scenario; and (iii) the Gabon scenario did not include any international money transfers. Each of these defects provide an alternative basis to confirm the Court's prior ruling dismissing Count 44 as to the other defendants.

1. Money-Laundering Statutes Are Misapplied to Conduct Punishable by Other Substantive Laws

First, Count 44 does not allege any conduct other than the overt acts allegedly comprising the FCPA conspiracy alleged in Count 1. That is to say that there is no allegation of conduct by the Defendants distinct from the "specified unlawful activity" that underlies the supposed money

[4] *See* Fraud Enforcement and Recovery Act of 2009 § 2(g)(1), 123 Stat. 1618 ("SENSE OF CONGRESS.—It is the sense of the Congress that no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, should be undertaken in combination with the prosecution of any other offense, without prior approval of the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the relevant United States Attorney, if the conduct to be charged as "specified unlawful activity" in connection with the offense under section 1956 or 1957 is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses"); *see also* U.S. ATTORNEY'S MANUAL 9-105.330; CRIMINAL RESOURCE MANUAL 2187.

laundering. Application of the money laundering statutes in this context is improper as a matter of law.

The Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956 and 1957, (the "Act") was designed to fill a gap in federal law by criminalizing "the complex schemes [used] to disguise the illegal nature and true source" of funds obtained through criminal activity. S. Rep. No. 99-433 at 2 (1986); *United States v. Butler*, 211 F.3d 826, 829 (4th Cir. 2000) ("Congress passed the money laundering statutes to criminalize the means criminals use to cleanse their ill-gotten gains.") (internal quotation marks omitted). Congress intended to target those actors (specifically those in organized crime and narco-trafficking) who were not necessarily perpetrators of the specified unlawful activity but who facilitated transactions in money derived from criminal activity. *See* H.R. Rep. No. 99-855 (1986).

To reach the targeted activity of those individuals assisting organized crime and drug trafficking in covering up their financial gains, Congress established a series of new criminal offenses, not previously recognized or reached by federal law. *See United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994), *abrogated on other grounds*, *United States v. Cabrales*, 524 U.S. 1, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998) ("Congress intended [the Act] to prevent an ill <u>*other than*</u> those already prohibited by other laws") (emphasis added). The money-laundering statutes were not intended to serve as "an alternative means of punishing the prior specified unlawful activity." *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992) (internal quotation marks omitted). In other words, where (as in this case) the subject conduct/transactions are already the subject of the underlying "specific unlawful activity," the money laundering statutes have no proper application – and no impact, other than to increase the maximum potential penalty from 5 years to 20. That is why courts have reversed money laundering convictions in these

circumstances. *See, e.g., id.* at 570; *United States v. Christo*, 129 F.3d 578, 581 (11th Cir. 1997). This presents an independent reason to dismiss Count 44.

2. There Are No Alleged "Proceeds" of Specified Unlawful Activity

Sections 1956(a)(3)(A) and 1957 – two of the three statutory provisions relied upon in the Superseding Indictment – specifically require proof that the Defendants conducted a financial transaction with the "proceeds" of specified unlawful activity. *See* Superseding Indictment, ¶¶ 35(b), 35(c).[5] Transactions with "proceeds" from specified unlawful activity (in this case violation of the FCPA) must be separate and distinct from the underlying criminal activity that generated those "proceeds" in order to sustain a money laundering charge. *See Mankarious*, 151 F.3d at 705 ("Money laundering requires the proceeds of a discrete predicate crime. That predicate crime must have produced proceeds in acts distinct from the conduct that constitutes money laundering."); *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994) (money laundering is a "separate crime distinct from the underlying offense that generated the money"); *United States v. Carucci*, Nos. 02-2198, 03-1158, 03-1244, 2004 WL 771464, at *5 (1st Cir. Apr. 13, 2004) (holding that criminal proceeds must have been derived before alleged laundering can occur) (citing *Mankarious*, 151 F.3d at 704). The transactions by which "proceeds" are generated or obtained, by definition, cannot constitute money laundering as a matter of law.

[5] Whereas § 1956(a)(3)(A) specifically references "proceeds," § 1957 references transactions involving "criminally derived property," which is defined as "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2). "Proceeds" and "criminally derived property" are considered by courts to have the same meaning. *See, e.g., Castellini*, 392 F. 3d at 45 n. 7 ("Although 18 U.S.C. § 1957 uses the phrase 'criminally derived property' instead of the phrase 'proceeds of specified unlawful activity,' which is used in 18 U.S.C. § 1956, courts have interpreted the two to be equivalent and have read cases decided under § 1957 as persuasive authority in the interpretation of cases arising under § 1956."); *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995), *partially abrogated on other grounds by United States v. Van Alstyne*, 584 F.3d 803, 813 (9th Cir. 2009) ("'criminally derived property' under § 1957 is equivalent to 'proceeds' under § 1956, *i.e.*, funds obtained from prior, separate criminal activity.").

This rule of law is why "[t]he main issue in a money laundering charge [] is determining when the predicate crime becomes a 'completed offense' after which money laundering can occur." *Christo*, 129 F.3d at 579-80 (quoting *United States v. Kennedy*, 64 F.3d 1465, 1477-78 (10th Cir. 1995)). *Christo* is instructive. The defendant there was charged with bank fraud, misapplication of funds and money laundering as a result of a check-kiting scheme. *Id.* at 579. The government's proof of each count involved a similar series of transactions such that money was withdrawn from the defendant's Bay Bank account as a note payment to SouthTrust Bank, and each check was paid by Bay Bank on the basis of credit extended on uncollected funds through several of the defendant's Bay Bank accounts for a period of one to three days until good funds arrived from the defendant's main operating account in Mississippi. *Id.* at 580. The Court concluded that these facts were insufficient to establish that the defendant engaged in a monetary transaction that was separate from and in addition to the underlying criminal activity. *Id.* The Court explained: "The check kite did not deprive the bank of anything, nor did [the defendant] unlawfully obtain something from the bank, until Bay Bank disgorged its funds by the payment of the check to SouthTrust Bank." *Id.* The Court thus held that "the withdrawal of funds charged as money laundering was one and the same as the underlying criminal activity of bank fraud and misapplication of funds" and rejected the notion that money laundering is inherent in bank fraud or the misapplication of funds. *Id.* (stating that "the underlying activity must be *complete* before money laundering can occur").

The same analysis applies here. Not only was the underlying activity in this case ***not*** complete before the alleged money laundering in this case, but here the supposed money laundering conduct is identical to the underlying activity. This is directly contrary to the rule that "money laundering criminalizes a transaction in proceeds, not the transaction that creates the

proceeds." *Mankarious*, 151 F.3d at 705. "Put plainly, the laundering of funds cannot occur in the same transaction through which those funds first become tainted by crime." *United States v. Butler*, 211 F.3d at 830.

Courts up to and including the U.S. Supreme Court have recognized that any other rule would mean the Government could transform any case involving an exchange of money into a money laundering case, as here. *See United States v. Cabrales*, 524 U.S. at 2 (explaining money-laundering statutes "interdict only the [later] financial transactions … not the anterior criminal conduct that yielded the funds allegedly laundered."); *Heaps*, 39 F.3d at 485-86 (reversing money laundering conviction where government charged that defendant's receipt of money for drugs, and subsequent placement of money in lock box, constituted a money-laundering offense, noting that if government's theory of money laundering were viable then "virtually *every* sale of drugs would be an automatic money laundering violation as soon as money changed hands," a result that could not be squared with Congressional intent.).[6]

Because in this case the monetary transactions underlying the conspiracy to commit money laundering ***are*** the underlying FCPA offense, there are no "proceeds" in this case that could support conviction under §§ 1956(a)(3)(A) or 1957. Dismissal of Count 44 is required on this ground, too.

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[6] *See also United States v. McGahee*, 257 F.3d 520, 528 (6th Cir. 2001) (money laundering did not occur where the charged transactions "were part and parcel of the fraud and theft, and were not a separate act completed after the crime, as required under the money-laundering statute"); *Christo*, 129 F.3d at 580-81 (money laundering did not occur where "the withdrawal of funds charged as money laundering was one and the same as the underlying criminal activity of bank fraud and misapplication of bank funds"); *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994) (money laundering conviction could not stand because it violated "congressional intent that the proceeds of a crime be in the defendant's possession before he can attempt to transfer those proceeds in violation of section 1957"); *Johnson*, 971 F.2d at 570 (transaction by which the defendant obtained proceeds of his fraud could not qualify as money laundering).

3. The Gabon Scenario Was Structured With No International Money Transfers

Finally, Count 44 of the Superseding Indictment invokes 18 U.S.C. § 1956(a)(2)(A), the international money laundering section. That section requires the Government to present evidence that the defendants "(1) conspired; (2) to transport funds between the United States and another country; (3) with the intent to promote the carrying on of a specified unlawful activity." *U.S. v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2005) (quoting *U.S. v. Krasinksi*. 545 F.3d 546, 550 (7th Cir. 2008)). In addition to the defects in the conspiracy theory discussed above, this aspect of the money laundering charge also fails as a legal matter in the fabricated Gabon scenario.

Specifically, the Superseding Indictment does not allege (and two trials have now revealed the Gabon scenario did not include) any transport of (or agreement to transport) funds between the United States and Gabon, or anywhere else outside the United States. To the contrary, the evidence affirmatively shows that the only actual transfers occurred wholly within the United States. On this point, the Superseding Indictment specifically asserts that "[t]he defendants would pay a 'commission' into Latour's bank account ***in the United States*** in connection with Phase One …." Superseding Indictment, ¶¶ 30(h) and 30(i) (emphasis added). The indictment goes on to allege that the defendants "believed" that "half of the 'commission' was intended to be paid outside the United States as a bribe to the [Gabon] Minister of Defense," *id.*; however, there has never been evidence in all the tapes played in the case of discussion or reference to international money transfers.

The scripted statements of Bistrong and the other government agents stated the fake Latour's intent to pay some part of his commission to "Ali Bongo," but the government has repeatedly taken the position that those statements are not offered for their truth. Moreover, these statements specify no international transportation of money. There is no reference at all to

where Mr. Bongo would be paid. Neither has there been evidence of such international money transfers or any of the defendants' agreement to transfer any money abroad. Certainly, there is no evidence that Mr. Goncalves ever discussed international money transfers. This is yet another basis to dismiss Count 44, as was done in the prior trials.

III. THE SUBSTANTIVE FCPA CHARGE IN COUNT 2 FAILS BECAUSE IT RELIES ON MR. GONCALVES' CONDUCT PRIOR TO LEARNING OF THE SUPPOSED PAYMENT TO ALI BONGO

Mr. Goncalves contends that the evidence in this case cannot sustain any of the substantive FCPA charges against him as a matter of law, but reserves this argument as to Counts 3 and 4. As to Count 2, Mr. Goncalves asks that the Court dismiss that count now. This is because, as was the case for Counts 5 and 6 against the Mushriquis in the Group 2 trial, Count 2 against Mr. Goncalves is premised on his travel to Washington, D.C. to hear the Gabon "pitch". Superseding Indictment, ¶ 33. At that juncture, as the government is well aware, there was no reason for Mr. Goncalves to know of anything untoward at all about the Gabon scenario. This was the basis for the Court's dismissal of Counts 5 and 6 against the Mushriquis. 12/22/2011 PM Tr. at 8-9. The same rationale supports dismissal of Count 2 against Mr. Goncalves in this case.

CONCLUSION

The government had literally years, and spent hundreds of thousands of dollars, to concoct, structure and script the Gabon scenario. The government is properly held in this context to an exacting standard to satisfy the legal requisites to convict those whom it targeted. In this case, on this indictment, the government cannot satisfy that standard as a matter of law – certainly not as to Counts 1, 2 and 44. Those counts are properly dismissed in advance of trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2012, the foregoing **MOTION TO DISMISS COUNTS 1, 2 & 44 IN THE SUPERSEDING INDICTMENT** was served electronically via the District Court's electronic filing system on all parties of record.

/s/ Robert M. Andalman