UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 09-335 (RJL)
	:	
v.	:	
	:	
AMARO GONCALVES, *et al.*,	:	
	:	
Defendants.	:	
	:	

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION FOR MISTRIAL

The United States of America, by and through its undersigned attorneys, submits this response in opposition to defendants John Mushriqui, Jeana Mushriqui, R. Patrick Caldwell, John Gregory Godsey, and Marc Morales's motion for mistrial. As a consequence of the Court's ruling granting judgment of acquittal as to the conspiracy charged in Count 1, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, the defendants argue that without the conspiracy count they were improperly joined. The defendants also argue that even if joinder were proper, they have suffered prejudice from the evidence admitted as to the conspiracy count entitling them to severance, which, at this stage of the proceedings, would have the practical effect of requiring a mistrial. The defendants alternatively argue that if the Court does not declare a mistrial, the dismissal of the conspiracy count requires the Court to strike the coconspirator statements and other evidence introduced pertaining to the conspiracy, and to provide explicit jury instructions explaining the prohibition on the use of that evidence.

The defendants' arguments are unavailing. First, a mistrial is a severe remedy that is neither required nor warranted under the circumstances, especially given the less drastic alternatives available, such as an appropriate jury instruction. Second, the mid-trial dismissal of the conspiracy count does not make joinder improper under Rule 8, and the defendants cannot

show the requisite prejudice warranting severance under Rule 14. Finally, the Court's Rule 29 ruling does not render the coconspirator statements or other evidence admitted at trial for purposes of the conspiracy retroactively inadmissible. Accordingly, as set forth below, the defendants' motion for mistrial should be denied.

ARGUMENT

The D.C. Circuit has repeatedly warned that "[a] mistrial is a severe remedy – 'a step to be avoided whenever possible, and one to be taken only in circumstances manifesting a necessity therefor.'" *United States v. Clarke*, 24 F.3d 257, 270 (D.C. Cir. 1994) (quoting *United States v. Anderson*, 509 F.2d 312, 325 (D.C. Cir. 1974)); *see also United States v. Foster*, 557 F.3d 650, 655 (D.C. Cir. 2009); *United States v. McLendon*, 378 F.3d 1109, 1112 (D.C. Cir. 2004). A mistrial should not be declared without the Court giving prudent consideration of reasonable alternatives. *See United States v. Martin*, 756 F.2d 328 (4th Cir. 1985) ("Before granting a mistrial, the court should always consider whether the giving of a curative instruction or some alternative less drastic than a mistrial is appropriate."); *United States v. Smith*, 1991 WL 158699, at *13 (6th Cir. 1991) (same); *United States v. Rivera*, 384 F.3d 49, 56 (3d Cir. 2004) ("the District Court must exercise prudence and care, giving due consideration to reasonably available alternatives to the drastic measure of a mistrial."); *see also* Fed. R. Crim. P. 26.3 ("Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest *alternatives*." (emphasis added)).

The Supreme Court has addressed, and rejected, the notion that a mid-trial dismissal of an overarching conspiracy linking the other offenses requires a mistrial. *See Schaffer v. United*

States, 362 U.S. 511, 513-16 (1960); *see also United States v. McDaniel*, 538 F.2d 408, 410 n.4 (D.C. Cir. 1976). Absent a showing of prejudice, the mere fact that a conspiracy count is dismissed at the close of the government's case does not entitle the defendants, as a matter of law or as a matter of right, to a new trial on the substantive charges. *See Schaffer*, 362 U.S. at 513-16. In this case, as shown below, the defendants cannot overcome the extremely high burden necessary to show prejudice that would warrant the severe remedy of a mistrial.

I. The Defendants and Offenses Were Properly Joined

The defendants argue that the entry of judgment of acquittal on the conspiracy count, together with the government's pretrial representations concerning the conspiracy, demonstrates that they were improperly joined under Rule 8. (*See* Defendants' Motion for Mistrial ("Defs.' Mot.") at 4-7.) Because the defendants and offenses were properly joined at the beginning of trial – regardless of whether sufficient evidence supported the conspiracy count – there can be no misjoinder at this stage of the case.

Joinder involving multiple defendants is governed by Federal Rule of Criminal Procedure 8(b), which permits the government to charge defendants together when "they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses."[1] Fed. R. Crim. P. 8(b). In accordance with that rule, as explained by the Supreme Court and the D.C. Circuit, "'there is a preference . . . for joint trials

[1] "When multiple defendants are tried together, the joinder of counts is governed by Rule of Criminal Procedure 8(b), even though Rule 8(a) would appear exclusively to deal with the joinder of offenses." *United States v. Carson*, 455 F.3d 336, 374 n.34 (D.C. Cir. 2006) (citing *United States v. Brown*, 16 F.3d 423, 427 (D.C. Cir. 1994); *United States v. Halliman*, 923 F.2d 873, 882-83 (D.C. Cir. 1991); *United States v. Perry*, 731 F.2d 985, 989 (D.C. Cir. 1984); *United States v. Jackson*, 562 F.2d 789, 793-94 (D.C. Cir. 1977)).

of defendants who are indicted together' because joint trials 'promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" *United States v. Wilson*, 605 F.3d 985, 1015 (D.C. Cir. 2010) (quoting *Zafiro v. United States*, 506 U.S. 534, 537 (1993)). This preference for joint trials "is 'especially strong' when 'the respective charges require presentation of much the same evidence, testimony of the same witnesses, and involve . . . defendants who are charged, *inter alia*, with participating in the same illegal acts.'" *Id.* at 1016 (quoting *United States v. Ford*, 870 F.2d 729, 731 (D.C. Cir. 1989)); *see also United States v. Richardson*, 167 F.3d 621, 624 (D.C. Cir. 1999) (same). In short, a substantial public interest supports joint trials. *See Richardson v. Marsh*, 481 U.S. 200, 210 (1987); *United States v. Long*, 905 F.2d 1572, 1581 (D.C. Cir. 1990) ("The judicial system has a strong and legitimate interest in efficient and expeditious proceedings, and hence the system favors the joint trial of codefendants.").

In addressing misjoinder claims at the trial stage, the D.C. Circuit has explained: "the only issue under Rule 8 is whether joinder was proper at the beginning of trial." *Carson*, 455 F.3d at 372 (quoting *United States v. Clarke*, 24 F.3d 257, 262 (D.C. Cir. 1994)). "The propriety of joinder is determined as a legal matter by evaluating only the 'indictment [and] any other pretrial evidence offered by the Government.'" *Carson*, 455 F.3d at 372 (quoting *United States v. Spriggs*, 102 F.3d 1245, 1255 (D.C. Cir. 1996) (quoting *United States v. Wilson*, 26 F.3d 142, 153 (D.C. Cir. 1994) (internal quotation marks omitted))). "The government need only allege 'the facts necessary to sustain joinder,' not prove them." *Carson*, 455 F.3d at 372 n.32 (quoting *United States v. Halliman*, 923 F.2d 873, 883 (D.C. Cir. 1991)). "After counts are joined, 'subsequent severance [is] controlled by Rule 14.'" *Carson*, 455 F.3d at 372 (quoting *Schaffer v.*

United States, 362 U.S. 511, 515 (1960)).

As the D.C. Circuit found, in *Schaffer*, "the Supreme Court held that if a conspiracy count makes initial joinder of defendants permissible, the mid-trial dismissal of that count does not render joinder improper under Rule 8(b)." *United States v. Gbemisola*, 225 F.3d 753, 760 (D.C. Cir. 2000) (citing *Schaffer*, 362 U.S. at 514-16; *Clarke*, 24 F.3d at 262). *Schaffer* involved an indictment charging seven defendants with three counts of transporting stolen property in interstate commerce and one count of conspiracy to commit those offenses. The conspiracy count, alleging a connection among the three substantive counts, provided a basis for joinder under Rule 8(b). At the conclusion of the government's case, the trial court dismissed the conspiracy count for insufficient evidence and submitted the remaining counts to the jury.

The Supreme Court ruled that, despite the mid-trial dismissal of the count that had initially justified joinder, there had been no misjoinder under Rule 8(b). The dismissed conspiracy count had been alleged in the good faith belief that it could be proved and therefore provided a valid basis for joinder at the point when compliance with the rule must be assessed, *i.e.*, the beginning of the trial. Since joinder had been proper, the question was not one of misjoinder but rather whether the defendants could show prejudice under Rule 14. Finding no prejudice, the Court affirmed the convictions on the three substantive counts. *See Schaffer*, 362 U.S. at 514-16.

Despite the fact that the defendants cite *Schaffer*, they attempt to argue, in direct contravention of its holding, that "the Court's acquittal of the defendants on the conspiracy charge, when considered together with pretrial representations by the government regarding the basis for its overarching conspiracy theory, demonstrates that the initial joinder was improper."

(Defs.' Mot. at 4.) A proper analysis of *Schaffer*, however, defeats their claim that the mid-trial dismissal of the conspiracy retroactively creates improper joinder of the substantive counts. As the D.C. Circuit has specifically held, the inquiry does not focus on the evidence at trial, but rather on the pretrial allegations in the indictment. *See Moore*, 651 F.3d at 69 ("If the indictment establishes proper joinder under Rule 8(b), trial evidence cannot render joinder impermissible and is thus irrelevant to our inquiry."); *United States v. Spriggs*, 102 F.3d 1245, 1255 (D.C. Cir. 1996) ("Rule 8(b) can be satisfied . . . by the indictment alone . . . ."); *Perry*, 731 F.2d at 990 (explaining that "[q]uite obviously, the indictment might satisfy th[e] requirement" for Rule 8(b) joinder).

Here, all of the defendants were charged in the conspiracy count in the indictment. "[J]oinder of offenses under Rule 8(b) is satisfied by the face of an indictment alleging conspiracy." *United States v. Eiland*, 406 F. Supp. 2d 46, 55 (D.D.C. 2005); *see also United States v. Gray*, 173 F. Supp. 2d 1, 19 (D.D.C. 2001). In conspiracy cases, joinder is presumptively proper where, as here, the allegations in the indictment link all of the defendants. *See Spriggs*, 102 F.3d at 1255 ("Rule 8(b) can be satisfied . . . 'for instance when a conspiracy charge links all the offenses and defendants . . . .'") (quoting *Perry*, 731 F.2d at 990); *see also United States v. Friedman*, 854 F.2d 535, 561 (2d Cir. 1988) ("mere allegation of a conspiracy presumptively satisfies Rule 8(b)") (quotation omitted). The defendants essentially concede as much by admitting that "[o]n its face the Superseding Indictment arguably contains sufficient allegations of an overarching conspiracy." (Defs.' Mot. at 4.) The Court's inquiry can end with that concession alone.

Nevertheless, even without the conspiracy count, joinder of the defendants on the

substantive counts was proper because the allegations in the indictment demonstrate that the defendants "participated in the same act or transaction, or in the same series of acts or transactions" constituting the charged offenses. Fed. R. Crim. P. 8(b). "Acts or transactions form a 'series' within the meaning of the rule if they 'constitut[e] parts of a common scheme or plan.'" *Halliman*, 923 F.2d at 883 (quoting *Perry*, 731 F.2d at 990). Even though not all of the remaining defendants were charged in common substantive counts, each of the counts allege acts taken by the defendants constituting part of a common scheme – the Gabon deal – that was similar in nature, time and location. *See Gbemisola*, 225 F.3d at 760 ("even if there had never been a conspiracy count in this case, joinder of the remaining counts was proper because the government 'presented evidence that [defendants'] offenses arose out of their participation in the same drug distribution scheme.'") (quoting *Halliman*, 923 F.2d at 883). As a result, the substantive counts bear a logical relationship to one another such that a joint trial of the defendants is appropriate. *See Perry*, 731 F.2d at 990 (to satisfy Rule 8 "there must be a logical relationship between the acts or transactions within the series.").

Here, the indictment alleges that all of the defendants participated in a scheme to outfit Gabon's Presidential Guard with $15 million in military-related products and pay a representative of the Gabonese Minister of Defense a 20% "commission" – totaling $3 million – in connection with the deal, believing that half of the "commission" would be paid as a bribe to the Gabonese Minister of Defense. The very same allegations are realleged and incorporated by reference in the substantive counts. In addition, the indictment alleges that all of the acts giving rise to the substantive counts are also overt acts in furtherance of the conspiracy. The D.C. Circuit has considered this same issue and found that because the indictment alleges facts that

link all of the offenses and defendants, joinder is proper under Rule 8. *See Carson*, 455 F.3d at 373 ("The indictment alleged that all of these [allegedly misjoined] counts were overt acts in furtherance of the narcotics conspiracy and predicate acts in furtherance of the RICO conspiracy. This provided the necessary link to satisfy Rule 8(b).").[2]

For all of these reasons, the defendants and offenses were properly joined at the beginning of trial and the judgment of acquittal on the conspiracy count does not render joinder improper under Rule 8(b).[3]

II. The Defendants Fail to Show Any Prejudice Requiring Severance

The defendants argue that even if joinder were proper, they have suffered prejudice from the evidence admitted as to the conspiracy count entitling them to severance. The defendants maintain that severance at this stage of the proceedings would have the practical effect of requiring a mistrial. (*See* Defs.' Mot. at 7-9.) Because there is an absence of any dramatic disparity of evidence between the defendants and the evidence against each defendant is easily

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[2] In their motion, the defendants rely upon the baseless assertion that prior to trial, in defending the proper joinder of the defendants, the government made misrepresentations that the evidence would support the allegations in the conspiracy count, even though the government knew that the evidence would not provide sufficient support for that charge. (*See* Defs.' Mot. at 5-7.) The government has argued in good faith – and, we believe, correctly – that the evidence introduced at trial was sufficient to support the conspiracy count. The Court concluded otherwise. Neither that ruling, however, nor the history of this case, provides any support for the defendants' contention that the government chose to proceed with a charge that it knew it would not be able to prove. That allegation is patently false and simply belied by the record.

[3] The defendants request that the Court conduct an *in camera* review of the grand jury transcript to determine whether the evidence and instruction properly support allegations of an overarching conspiracy in the indictment. (*See* Defs.' Mot. at 7 n.7.) The defendants have cited no authority, and none exists, to warrant the requested relief under the circumstances. *See United States v. Williams*, 504 U.S. 36, 46, 54 (1992); *United States v. Mechanik*, 475 U.S. 66, 75 (1986); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988).

compartmentalized, the defendants cannot show prejudice warranting severance, especially given that the Court can cure the risk of any such prejudice by a appropriate jury instruction.

Because joinder was proper under Rule 8, Rule 14 provides the only possible avenue for the defendants' requested relief. Rule 14 states that "[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant . . . the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). The court "has a continuing duty at all stages of the trial" to guard against any risk of prejudice. *Schaffer*, 362 U.S. at 516; *see also Carson*, 455 F.3d at 374. In reviewing the exercise of the court's discretion in carrying out that duty, the D.C. Circuit has indicated that it must "keep in mind that '[t]he balance has been struck in favor of joint trials.'" *Moore*, 651 F.3d at 95 (quoting *United States v. Hines*, 455 F.2d 1317, 1334 (D.C. Cir. 1972)). As a starting point for its analysis, the D.C. Circuit recently explained:

> As is clear from the text of the rule, district courts have significant flexibility to determine how to remedy any potential risk of prejudice posed by the joinder of multiple defendants in a single trial. *See United States v. Lane*, 474 U.S. 438, 449 n.12 [ ] (1986). Thus "Rule 14 does not require severance even if prejudice is shown," *Zafiro v. United States*, 506 U.S. 534, 538-39 [ ] (1993), and in many circumstances district courts may order lesser forms of relief to cure any prejudice.

Moore, 651 F.3d at 95.

The D.C. Circuit has also recognized that the Supreme Court has held that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* (quoting *Zafiro*, 506 U.S. at 539); *see also United States v. Wilson*, 605 F.3d 985, 1016 (D.C. Cir. 2010). This is an "extremely difficult

burden," which requires the defendant to show that he would be so prejudiced by the joinder that he would be denied a constitutionally fair trial. *See United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989) (citation omitted). It is insufficient for the defendant to merely show that he may suffer some prejudice or may have a better chance for acquittal at a separate trial. *See Zafiro*, 506 U.S. at 539; *Carson*, 455 F.3d at 374. Even in those rare instances "[w]hen the risk of prejudice is high . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Zafiro*, 506 U.S. at 539.

The D.C. Circuit has held that "severance is required when the evidence against one defendant is 'far more damaging' than the evidence against the moving party." *Moore*, 651 F.3d at 95 (quoting *United States v. Bruner*, 657 F.2d 1278, 1290 (D.C. Cir.1981) (quoting *United States v. Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976) (en banc))). However, "[a]bsent a *dramatic* disparity of evidence, any prejudice caused by joinder is best dealt with by instructions to the jury to give individual consideration to each defendant." *Moore*, 651 F.3d at 95 (quoting *United States v. Slade*, 627 F.2d 293, 309 (D.C. Cir. 1980) (emphasis in original)). "In other words, some disparity in evidence does not compel severance; rather, when there is 'substantial and independent evidence of each [defendant's] significant involvement in the conspiracy,' severance is not required." *Moore*, 651 F.3d at 95-96 (quoting *United States v. Tarantino*, 846 F.2d 1384, 1399 (D.C. Cir. 1988)); *see also Slade*, 627 F.2d at 310 (finding severance not required despite disparity in evidence because evidence against defendant was "independent and substantial").

The D.C. Circuit has indicated that "[t]he few cases in which we have overturned a trial court's denial of a motion to sever have involved clear disparities between the weight, quantity,

or type of the evidence against the movant and against the other defendants." *Tarantino*, 846 F.2d at 1398. In these cases, "[t]he critical determination [has been] . . . whether a jury could reasonably compartmentalize the evidence introduced against each individual defendant." *Halliman*, 923 F.2d at 884 (quoting *United States v. Hernandez*, 780 F.2d 113, 119 (D.C. Cir. 1986)); *Perry*, 731 F.2d at 992 (upholding the denial of severance, finding "none of the recognized bases for severance due to prejudice – drastic disproportionality of the evidence, and likely inability of the jury to compartmentalize the evidence against the respective defendants – was present in this case.").

Here, the defendants cannot satisfy the onerous standard compelling severance of the defendants. The defendants cannot point to anything in the record demonstrating that there is a "*dramatic* disparity of evidence" such that the evidence against one defendant is "far more damaging" than the evidence against another defendant. *Moore*, 651 F.3d at 95 (emphasis in original). Indeed, there has been almost no appreciable disparity in the evidence among the defendants. Except for Tom O'Dea and FBI Special Agents Lenhart and Reynolds, who provided testimony that was specific as to certain defendants, the evidence has been similar in weight, quantity and type as to all of the defendants. The government introduced virtually the same testimony and recordings demonstrating how each defendant was told about the essential nature of the Gabon deal, and how each defendant agreed to the deal and then took steps in furtherance of it. The evidence between the defendants is quite similar even though the trial record is replete with individual evidence of each of the defendants' different steps that they took to further the charged Gabon deal.

In addition, the evidence is readily subject to being compartmentalized by the jury. The

evidence consists primarily of recordings, emails and related testimony that separately relate to a particular defendant or pair of defendants grouped by company. This evidence, which clearly and specifically applies to certain defendants and not others, would not present difficulty for the jury to segregate it by defendant. As the Court recognized in the preliminary arguments on the mistrial motion: "I have a – kind of a holistic sense, as I think back on the evidence over the last 12 weeks, that a fair amount evidence, if not the majority of the evidence, is really very targeted or specific as to the individual defendants, or certainly as to the groups. Either individual or groups." (Trial Transcript of January 3, 2012 AM at 11-12.)

In determining how difficult it is for a jury to separate allegations against multiple defendants, the D.C. Circuit has examined a similar factual situation and found in the context of a variance that "the danger of spillover prejudice is minimal when the Government presents tape recordings of individual defendants." *United States v. Celis*, 608 F.3d 818, 846 (D.C. Cir. 2010) (quoting *United States v. Gaviria*, 116 F.3d 1498, 1533 (D.C. Cir. 1997)); *see also United States v. Baugham*, 449 F.3d 167, 180, 371 (D.C. Cir. 2006). Where, as here, "the government presents an audio or video recording of the defendant discussing criminal acts, the risk of prejudicial spillover is minimal because the jury has 'no need to look beyond each defendant's own words in order to convict.'" *Celis*, 608 F.3d at 846 (quoting *United States v. Anderson*, 39 F.3d 331, 348 (D.C. Cir. 1994) (internal quotation marks omitted), *rev'd in part on other grounds*, 59 F.3d 1323 (D.C. Cir. 1995) (en banc) ("the appellants cannot claim prejudice from the admission of co-conspirators' statements since in each case the bulk of the incriminating evidence consisted of statements by the individual appellant himself or by someone with whom he in fact conspired (most notably Anderson)")). In other words, the recordings are unique to each defendant, thus

minimizing the risk that the jury will attribute the statements of one defendant to another.

Even if that were the case and the defendants were able to show some potential risk of prejudice from a joint trial, any such risk can be effectively cured by a jury instruction. The D.C. Circuit has approved jury instructions similar to those proposed by the government and given by the Court in the first trial. *See* D.C. Red Book Instruction 2.404.[4] In *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), for example, the district court instructed the jury:

> Unless I have instructed you otherwise, you should consider each instruction that the Court has given you to apply separately and individually to each defendant on trial. Likewise, you should give separate consideration and render separate verdicts with respect to each defendant. Each defendant is entitled to have his guilt or innocence of the crime for which he is on trial determined from his own conduct and from the evidence that applies to him as if he were being tried alone. The guilt or innocence of any one defendant should not control or influence your verdict as to the other defendants. You may find any one or more of the defendants guilty or not guilty.

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[4] The jury instruction given by the Court reads:

> Each count of the indictment charges a separate offense. Moreover, each defendant is entitled to have the issue of his guilt as to each of the crimes for which he is on trial determined from his own conduct and from the evidence that applies to him as if he were being tried alone. You should, therefore, consider separately each offense, and the evidence which applies to it, and you should return separate verdicts as to each count of the indictment, as well as to each defendant unless I specifically instruct you to do otherwise.
>
> The fact that you may find any one defendant guilty or not guilty on any one count of the indictment should not influence your verdict with respect to any other count of the indictment for that defendant. Nor should it influence your verdict with respect to any other defendant as to that count or any other count in the indictment. Thus, you may find any one or more of the defendants guilty or not guilty on any one or more counts of the indictment, and you may return different verdicts as to different defendants and as to different counts. At any time during your deliberations you may return your verdict of guilty or not guilty with respect to any defendant on any count.

Jury Instruction No. 23.

Id. at 96. On appeal, the D.C. Circuit found the instruction proper: "Although we do not ignore the possibility that some 'spillover' prejudice may have resulted to Handy and Nunn from being tried together with their codefendants, the district court's jury instructions, by explaining that each defendant's guilt should be considered individually based upon the evidence that pertained to him, were sufficient to cure any such prejudice." *Id.* In *United States v. Carson*, 455 F.3d 336 (D.C. Cir. 2006), the district court similarly instructed the jury:

> [I]t "should give separate consideration and render separate verdicts with respect to each defendant," and that "[e]ach defendant is entitled to have his guilt or innocence of the crime . . . determined from his own conduct and from the evidence that applies to him as if he were being tried alone." . . . . "Each offense and the evidence that applies to it should be considered separately, and you should return separate verdicts as to each . . . . [T]he fact that you may find a defendant guilty or not guilty of any one count of the indictment should not control or influence your verdict with respect to any other count of the indictments."

Id. at 374-75. On appeal, the D.C. Circuit held: "As in *Zafiro*, 506 U.S. at 540-41 [ ] and *Schaffer*, 362 U.S. at 516 [ ], these instructions cured any possible risk of prejudice." *Id.* at 375; *see also Spriggs*, 102 F.3d at 1256 ("the district court cured any vestigial risk of such prejudice by repeatedly instructing the jury to consider the evidence against each defendant separately.").

Here, the defendants cannot demonstrate the "*dramatic* disparity of evidence" such that the evidence against one defendant is "far more damaging" than the evidence against another defendant. Nor can the defendants show that the jury would be unable to compartmentalize the evidence against the respective defendants. This is especially true given that the evidence consisted heavily of recordings of the defendants' own words. Simply put, the defendants cannot satisfy their burden that severance is necessary to cure any potential prejudice.

To the extent any such potential risk of prejudice exists, the Court can appropriately

instruct the jury to address those concerns. The Court did so at the last trial, and the defendants have provided no reason for the Court not to follow that procedure here. As a result, severance is unwarranted and inappropriate under the circumstances.

III. Coconspirator Statements Remain Admissible

The defendants alternatively argue that because the conspiracy count has been dismissed, the Court is required strike the evidence they argue was introduced solely as to the conspiracy, including the testimony of Jonathan Spiller and any other coconspirator statements. (*See* Defs.' Mot. at 2-3.) Contrary to the defendants' argument, the Court's Rule 29 ruling does not render inadmissible coconspirator statements and other evidence admitted at trial for purposes of the conspiracy.

A. Coconspirator Statements Are Admissible Even if Uncharged

The Court should not strike the coconspirator statements simply because a criminal conspiracy could not be proven beyond a reasonable doubt. The D.C. Circuit has made clear that for purposes of admitting coconspirator statements, pursuant to Federal Rule of Evidence 801(d)(2)(E), the court does not have to find that the defendants were part of the conspiracy charged in the indictment. *See United States v. Brockenborrugh*, 575 F.3d 726, 735 (D.C. Cir. 2009). It is sufficient for the court to "find by a preponderance of the evidence that *a* conspiracy existed and that the defendant and declarant were members of that conspiracy." *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006) (emphasis added). Indeed, "[t]he government need not charge the defendant with conspiracy in order to admit hearsay statements into evidence under the co-conspirator exception." *United States v. Beckham*, 968 F.2d 47, 51 (D.C. Cir. 1992); *see also United States v. Perholtz*, 842 F.2d 343, 356 (D.C. Cir. 1988); *United States v.*

Washington, 952 F.2d 1402, 1407 (D.C. Cir. 1991) ("In this Circuit the statements of 'joint venturers' may be admitted under Rule 801(d)(2)(E), even though no conspiracy is formally charged . . . .").

Moreover, the government does not even have to prove that the relationship between the declarant and the defendant was unlawful. *See Brockenborrugh*, 575 F.3d at 735; *Gewin*, 471 F.3d at 202; *United States v. Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983). The D.C. Circuit has held that, "despite its use of the word 'conspiracy,' Rule 801(d)(2)(E) allows for admission of statements by individuals acting in furtherance of a lawful joint enterprise." *Brockenborrugh*, 575 F.3d at 735 (citing *Gewin*, 471 F.3d at 201-02); *see also Weisz*, 718 F.2d at 433 (stating that the rule, which derives from agency and partnership law, "embodies the longstanding doctrine that when two or more individuals are acting in concert toward a common goal, the out-of-court statements of one are . . . admissible against the others, if made in furtherance of the common goal")). Therefore, the coconspirator relationship giving rise to the statements can be a completely lawful venture and as simple as a "business relationship." *Brockenborrugh*, 575 F.3d at 735.

Thus, the Court can easily find that there was not sufficient evidence of a "criminal conspiracy" for purposes of Rule 29 but find that evidence was sufficient by a preponderance of the evidence that the defendants were all involved in furtherance of a common goal: the sale of military supplies to Gabon for profit using a common business mechanism – the Richard Bistrong Group and the sales agent Pascal Latour. The statements at issue are simply statements of those acting in a business relationship and in furtherance of a common goal. The D.C. Circuit makes clear that in circumstances such as this, when defendants are acting towards a common

goal, the legal requirement is not based on criminal conspiracy law, but on agency law. *See Weisz*, 718 F.2d at 433. Thus, the Court should not strike the testimony of the defendants' business partners that were admitted pursuant to Rule 801(d)(2)(E) based on the stated concerns, such as the $2.4 million versus $3 million commission, which focus only on the illegal aspect of the Gabon deal and not the undisputed larger common business purpose. The statements are independently admissible as statements in furtherance of a joint venture even though the charged criminal conspiracy was found not to be proven.

B. Statements Proven By a Preponderance of the Evidence

The Court's Rule 29 ruling does not require or warrant it to strike the coconspirator statements because the standard for admissibility of coconspirator statements, pursuant to Rule 801(d)(2)(E), is different than the standard used to determine whether a criminal conspiracy has been proven beyond a reasonable doubt.

1. Different Legal Standard for Admissibility and Guilt

Under Rule 801(d)(2)(E), admissibility of a statement is not dependent upon whether a criminal conspiracy has been proven (or can be proven) beyond a reasonable doubt, but rather by a preponderance of the evidence. A statement is admissible, and not hearsay, if it is offered against the defendant and is a statement by a coconspirator of the defendant during the course of and in furtherance of the conspiracy. *See* Fed. R. Evid. 801(d)(2)(E). Accordingly, when the government shows that a conspiracy existed of which the defendant was a member, and the coconspirator's statements were made during the course and in furtherance of the conspiracy, the statements are admissible. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Carson*, 455 F.3d 336, 365 (D.C. Cir. 2006). The party seeking to introduce the

coconspirator statement bears the burden of establishing these preliminary facts for admissibility, but, unlike the standard used to prove guilt, the government need only do so by a preponderance of the evidence. *See Bourjaily*, 483 U.S. at 176; *United States v. Brockenborrugh*, 575 F.3d 726, 735 (D.C. Cir. 2009); *United States v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996). In resolving these preliminary factual questions for admissibility, the Court may consider all evidence before it, whether admissible at trial or not, including the coconspirator statements sought to be admitted. *See Bourjaily*, 483 U.S. at 176-81; Fed. R. Evid. 104(a).

Where, as here, the government has made such a showing and coconspirator statements are admitted by the Court, those statements do not become inadmissible merely because the Court has found the conspiracy insufficient under Rule 29. While it does not appear that the D.C. Circuit has specifically addressed the issue, every circuit that has done so has explained, the fact that a conspiracy count has been found insufficient (by the court or a jury) does not affect the admissibility of a coconspirator statement. This is because admissibility of the coconspirator statements and the sufficiency of the conspiracy are judged by two different standards: the former, by a preponderance of the evidence, and the latter, beyond a reasonable doubt. *See United States v. Hernandez-Miranda*, 78 F.3d 512, 513 (11th Cir. 1996); *United States v. Patino-Rojas*, 974 F.2d 94, 96 (8th Cir. 1992); *United States v. Barksdale-Contreras*, 972 F.2d 111, 114-15 (5th Cir. 1992); *United States v. Anthon*, 648 F.2d 669, 678 (10th Cir. 1981); *United States v. Stanchich*, 550 F.2d 1294, 1299 (2d Cir. 1977); *see also United States v. Peralta*, 941 F.2d 1003, 1007 (9th Cir. 1991); *United States v. Carroll*, 860 F.2d 500, 506 (1st Cir. 1988); *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979).

In *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977), for instance, the district

court allowed the statements of coconspirators to be admitted at trial after dismissing conspiracy charges against the defendant and the coconspirator at the end of the government's case. *See id.* at 1298-99. In upholding the ruling, the Second Circuit reasoned:

> Appellant argues that the same considerations that led the judge to dismiss the conspiracy count required him to hold the declarations inadmissible on the substantive counts. The argument overlooks the difference in the standards governing the two determinations. In deciding whether the evidence is sufficient to warrant submission of a conspiracy count to a jury, the judge must determine . . . "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." A judge may thus consistently find that the evidence (even including admissible hearsay declarations) did not meet the higher test required for submission of a conspiracy count to a jury, although the independent evidence did meet the lower [preponderance of the evidence] test required for admission of the declaration.

Id. at 1299 (citations and footnote omitted).

In *United States v. Anthon*, 648 F.2d 669 (10th Cir. 1981), the defendant was charged with conspiracy to distribute cocaine and possession with intent to distribute cocaine. The jury found the defendant guilty of possession with intent to distribute, but found the defendant not guilty of conspiracy. On appeal, the defendant argued that the district court erred in admitting evidence of acts and statements of the defendant's alleged coconspirators. The Tenth Circuit disagreed:

> [W]e hold the trial court did not err in admitting evidence of acts and statements of Anthon's alleged co-conspirators as charged in Count I. In our view, the trial court properly admitted the challenged evidence inasmuch as the Government established by a preponderance of the evidence, and more likely than not, that a conspiracy existed. The fact that the jury subsequently did not find Anthon guilty of conspiracy as charged beyond a reasonable doubt, does not vitiate the efficacy of the trial court's prior determination that the conspiracy was established by a preponderance of the evidence, rendering the acts and statements of alleged coconspirators admissible. Furthermore, the admission of evidence relative to the alleged conspiracy did not "fatally infect" Anthon's conviction on the substantive count of distribution in view of the overwhelming evidence presented relative

> thereto. *See United States v. Alanis*, 611 F.2d 123 (5th Cir. 1980). . . .
>
> The distinctions as to what must be proved to invoke the coconspirator hearsay exception, *vis a vis*, admissibility, and what must be proved in order to convict a person of the crime of conspiracy must always be recognized in cases such as the one at bar. *See United States v. Gil*, 604 F.2d 546 (7th Cir. 1979). Once the Government has made a proper showing of admissibility, the admission of testimony under the coconspirator exception to the hearsay rule is not rendered retroactively improper by the subsequent acquittal of the alleged coconspirator.

Id. at 678.

In *United States v. Hernandez-Miranda*, 78 F.3d 512 (11th Cir. 1996), the defendant argued that his acquittal of a conspiracy charge established that he and Martin Mercado were not coconspirators and, therefore, evidence of Mercado's statements had been improperly admitted under Rule 801(d)(2)(E). Rejecting that argument, the Eleventh Circuit explained:

> Several criminal defendants have invoked this reasoning in our cases. We have regularly rejected this reasoning and continue to do so. As we noted in *United States v. Kincade*, "once the court has determined that the government has made the requisite showing of a conspiracy, 'the admission of testimony under the co-conspirator exception to the hearsay rule is not rendered retroactively improper by subsequent acquittal of the alleged co-conspirator.'"

Id. at 513 (quoting *United States v. Kincade*, 714 F.2d 1064, 1065 (11th Cir. 1983) (quoting *United States v. Cravero*, 545 F.2d 406, 419 (5th Cir. 1976))).

2. The Statements Are Admissible By a Preponderance of the Evidence

The statements at issue in this case should not be stricken based on established law and the facts of this case. As the above authority clearly supports, the fact that the Court found at Rule 29 that "the Government has [not] produced sufficient evidence to enable a rational trier of fact to conclude *beyond a reasonable doubt* that each of these six defendants participated in the overarching conspiracy charged in the superseding indictment in this case," (Trial Transcript of December 22, 2011 PM at 5-6 (emphasis added)), does not effect the admissibility of the

coconspirator statements introduced at trial. Notwithstanding the Court's ruling on the higher standard of beyond a reasonable doubt at Rule 29, there is sufficient evidence in the record for the Court to find the charged conspiracy by the lower standard of a preponderance of the evidence for purposes of introducing coconspirator statements.

The defendants' argument that certain coconspirator statements were admitted "subject to connection" does not alter or effect that analysis.[5] (*See* Defs. Mot. at 2-3.) Where statements are admitted subject to connection, the D.C. Circuit has found that the requisite "connection" is still judged by a preponderance of the evidence standard. *See United States v. Gewin*, 471 F.3d 197, 201-02 (D.C. Cir. 2006) (affirming district court's admission of evidence "subject to connection" after ruling that a preponderance of the evidence established a conspiracy); *United States v. Geany*, 417 F.2d 1116, 1120 (2d Cir. 1969) (Friendly, J.) (noting that after a judge admits evidence "subject to connection" to a conspiracy, the judge must determine whether a conspiracy existed by a "fair preponderance of the evidence").

Given the argument over two days at the Rule 29 hearing, which the government will incorporate by reference and not repeat here, the government recognizes that it may have been a close call to the Court as to whether the conspiracy as charged was sufficiently proven beyond a reasonable doubt and, thus, could proceed to the jury – a call only made closer by the fact that the Court had denied three similar Rule 29 arguments in the first trial and had accepted the pleas of guilty to the conspiracy charge of three defendants, including Jonathan Spiller and Daniel Alvirez, whose statements the defendants now seek to strike. At that stage of the trial, the Court

[5] Although the defendants do not specifically identify which statements were conditionally admitted, the record reflects that a number of statements were admitted without limitation as to their use as coconspirator statements pursuant to Rule 801(d)(2)(E).

rightfully examined the evidence to determine whether the conspiracy had been proven in this trial beyond a reasonable doubt and, despite the government's arguments to the contrary, found that it had not.[6] The Court's Rule 29 order does not, and cannot, on the current record, preclude a finding that the conspiracy exists by a preponderance of the evidence for admission, pursuant to Rule 801(d)(2)(E), of coconspirator statements. In viewing the evidence at this lower standard of proof, the government has cleared the minimum threshold by a preponderance of the evidence – *i.e.*, that it was more likely than not – that the conspiracy existed. In particular, unlike what has been proven at trial, the Court can consider independent evidence in determining whether the government has met the preponderance of the evidence standard. This independent evidence includes, for example, all the testimony and documents that were in evidence during the first trial, evidence excluded during both trials pursuant to Rule 403 as too prejudicial, and the factual bases to the three guilty pleas accepted by this Court for Jonathan Spiller, Daniel Alvirez and

[6] The government would like to take this opportunity to clarify the record with respect to the Rule 29 motions. In granting the defendants' motions, the Court stated, in part: "[Defendants] argue – and *the Government does not disagree* – that even if the Court concluded, viewing it in the light most favorable to the Government, that there was sufficient evidence of conspiracy between the three sets of two defendants in this case, the Court could not legally permit the jury to consider that alternative conspiracy configuration." (Transcript of Trial on December 22, 2011 a.m. at 4-5 (emphasis added).) The Court may have misapprehended the government's argument resulting in an inaccurate characterization of its position. The government "does not agree" that it would have been legally impermissible to have the jury consider the "alternative conspiracy configuration" of three sets of two defendants in this case. To the contrary, the government indicated on several occasions that if there were sufficient evidence of conspiracy between the three sets of two defendants, the Court was *required* to permit the conspiracy count. The government's position was and is that if there is evidence of a conspiracy between the three sets of two defendants the jury, not the Court, should consider whether the government had proven the single conspiracy charged in the indictment or the "alternative conspiracy configuration." The government does not wish to relitigate the issue but rather seeks to clarify the record in order to make certain that the government's litigating position in this case and future cases is clear for the parties and the Court.

Haim Geri. As a result, the evidence demonstrates by a preponderance of the evidence that a criminal conspiracy existed, and defendants cannot demonstrate that the coconspirators statements, including those of Spiller and Alvirez, and the other exhibits identified in their motion, should be stricken from the record.

C. The Evidence Is Independently Admissible

Even assuming *arguendo* that the government were unable to establish the charged conspiracy by a preponderance of the evidence, the Court should not consider striking all the testimony of the witnesses. Indeed, the testimony of Spiller and the statements of Alvirez and Mishkin include more than just coconspirator statements admitted pursuant to Rule 801(d)(2)(E). The defendants' attempt to eliminate all coconspirator testimony does not adequately recognize the multiple legal bases for admission of various parts of the testimony.

Spiller, for example, was not simply providing co-conspirator statements pursuant to Rule 801(d)(2)(E), but corroborating the testimony of the FBI agents about the nature of the pitch meeting and other features of the sting operation. (*See* Transcript of Trial 1, May 16, 2011 PM at 45-46 ("THE COURT: Well, I think I articulated [a proper purpose for Spiller's testimony] on an earlier occasion when I gave you the ruling as to why I will permit it. And that is that it corroborates the government's testimony, the agent's testimony. It's a form of corroboration that the pitch in fact was given to more than just these four defendants.")). Spiller also provided testimony about his conversation with Caldwell while they were in Las Vegas, before the arrests, which provides non-hearsay substantive evidence as to Caldwell and his hearing defense. (Transcript of Trial 2, November 9, 2011 AM at 75). Once this testimony is properly admitted – and the defendants proffer no reason why those non-coconspirator

statements would not be admissible – Spiller's credibility and bias automatically became relevant, and, in turn, so does his plea agreement. *See United States v. Abel*, 469 U.S. 45, 52 (1984).

In addition, other evidence the defendants seek to exclude is independently admissible for other purposes and not just as coconspirator statements admitted pursuant to Fed. R. Evid. 801(d)(2)(E). For example, emails and recordings of telephone calls between Bistrong and Mishkin, and Bistrong and Alvirez, likewise remain admissible evidence relevant to the integrity of the investigation and to corroborate the testimony of the agents, who were cross-examined at length about the propriety of their actions in the undercover operation. Specifically, the defendants seek to strike four recordings of telephone calls between Bistrong and Alvirez, and Bistrong and Mishkin from July 2009. Those calls were introduced by the government not as coconspirator statements for the truth of the matter asserted, but in order to explain the circumstances surrounding the recordings of telephone calls between Bistrong and Mishkin, and Bistrong and Alvirez from June 25, 2009. The June 25, 2009 telephone calls were introduced by one of the defendants, but the defendants are not now seeking to have those calls stricken, even though those calls also contain statements by Alvirez and Mishkin. (*See* Trial Transcript of October 20, 2011, at 64-80.) If the telephone calls from June 25, 2009, remain relevant and admissible after the Rule 29 ruling because they are not coconspirator statements admitted pursuant to Rule 801(d)(2)(E), as the defendants appear to maintain, then the Court cannot find that the surrounding telephone calls from July 2009 are inadmissible when they simply put the June 25, 2009 telephone calls into proper context.

Thus, even if the Court were to find that the testimony of Spiller and the statements of

Alvirez and Mishkin were not admissible under Rule 801(d)(2)(E) as coconspirators statements in furtherance of the charged conspiracy by a preponderance of the evidence, it does not warrant the wholesale exclusion of other admissible evidence as sought by the defendants. The defendants cannot selectively apply the rules of evidence. Rather, it would be necessary to parse the statements admitted pursuant to Rule 802(d)(2)(E) and those admitted pursuant to other rules of evidence in order to determine which evidence remains admissible.

D. Statements are Admissible Based on Smaller Conspiracies

The Court can also admit the statements based on the smaller criminal conspiracies that were not charged in the indictment. As noted above, for purposes of admitting coconspirator statements pursuant to Rule 801(d)(2)(E), the D.C. Circuit has found that the court does not have to find that the defendants were part of the conspiracy charged in the indictment. *See United States v. Brockenborrugh*, 575 F.3d 726, 735 (D.C. Cir. 2009). Thus, in addition to the conspiracy charged in the indictment, the evidence presented at trial establishes by a preponderance of the evidence the existence of smaller conspiracies, which provide an independent and proper basis for introducing coconspirator statements. As the Court explained in its Rule 29 ruling, there "may be sufficient evidence in some cases to overcome a Rule 29 Motion with regard to a theoretical conspiracy between two or three defendants who were working together to complete the sale of their particular equipment." (Trial Transcript of December 22, 2011 PM at 8). The Court further explained the rationale for its Rule 29 ruling during the preliminary arguments to the mistrial motion:

> I was very careful to distinguish with between whether or not, drawing all inferences favorable to the Government, there was sufficient evidence find beyond a reasonable doubt the overarching conspiracy charge – I didn't say that the Government could have had charged the individual conspiracies of the kinds

> that the evidence has potentially addressed here, that they would have – that would have survived a Rule 29 Motion. It would have. It would have survived it. But the Government didn't choose to charge it that way. That was the Government's choice; therefore, the Government had to deal with the higher, so to speak, burden of the overarching conspiracy.
>
> Drawing all inferences favorable to the Government, there would have been sufficient evidence, in my judgment, to send to the jury conspiracies of the three groups of two, but that wasn't what the Government chose. And that's why we spent all the time we spent during those arguments on Rule 29 talking about those cases that deal with the issue of essentially rewriting the indictment and whether or not you can – whether it would be effectively rewriting the indictment, in a situation where there is an overarching conspiracy charge, to let it go forward to the jury as to three individual conspiracies in this case here.
>
> So we spent a lot of time on that, and the Court certainly indicated I think in its ruling and in the discussions I had with the counsel very clearly that during that – that applying the standard, Rule 29 standard, it was sufficient to go to the jury as to three separate conspiracies. But that wasn't the issue.

(Trial Transcript of January 3, 2012 AM at 29-30.)

As the Court recognized, there was sufficient evidence in the record, not only by a preponderance of the evidence but potentially beyond a reasonable doubt, of conspiracies of three groups of two defendants, in this case, consisting of (1) John and Jean Mushriqui, (2) Mark Morales and Greg Godsey, and (3) Patrick Caldwell and Stephen Giordanella. Even though these smaller two-party conspiracies were not specifically charged in the indictment, each conspiracy operates to satisfy Rule 801(d)(2)(E) to admit coconspirator statements.

Here, as the Court has indicated, the evidence at trial supports a finding, well in excess of a preponderance of the evidence, that there were smaller two-party conspiracies. Therefore, even though these smaller two-party conspiracies were not specifically charged in the indictment, and even if they were completely lawful, the conspiracies more than satisfy Rule 801(d)(2)(E) to admit coconspirator statements. As a result, all of the statements identified by

the defendants in their motion, including those of Giordanella, that were made during and in furtherance of the Gabon deal, are admissible as coconspirator statements against their respective co-defendant.[7]

IV. Mistrial Is Unwarranted and Inappropriate

Throughout their motion, the defendants argue that the evidence admitted at trial pertaining to the now-dismissed conspiracy count has caused prejudice so severe that it requires a mistrial with respect to the remaining substantive counts. (*See, e.g.*, Defs.' Mot. at 2-3, 7-9.) The defendants cannot show that they suffered prejudice compelling a mistrial because the evidence pertaining to the conspiracy count is properly admissible as to the substantive counts, and would have been admissible against each individual defendant if the defendant had been tried alone on the conspiracy count and the substantive counts.

As an initial matter, despite the fact that the defendants made pretrial motions for relief from prejudicial misjoinder and for severance related to the joint trial of the defendants, they did not seek relief from prejudicial misjoinder as to any of the offenses. (*See* Minute Order of September 12, 2011, denying Mushriquis' Motion for Relief from Misjoinder (Docket Entry No. 471); Minute Order of September 19, 2011, denying Caldwell's Motion for Relief from Prejudicial Joinder (Docket Entry No. 467); Minute Order of September 19, 2011, denying Giordanella's Motion for Relief from Prejudicial Joinder (Docket Entry No. 476).) At no time prior to the Rule 29 order, did the defendants seek to sever any of the substantive offenses from

[7] Because Giordanella's post-arrest statement was not during or in furtherance of the conspiracy, the government agrees that the post-arrest statement, related exhibits and the testimony by Special Agent Reynolds regarding Giordanella's statement should be stricken from the record and the Court should give a limiting instruction that the jury should not consider that evidence.

the charged conspiracy count. As a result, they cannot now be heard to complain of the effects of a joint trial of all of the charged offenses when they previously had failed to complain of trying the conspiracy count with the substantive offenses. *See United States v. Taylor*, 1991 WL 214166, at *2 (D.C. Cir. 1991) (unpublished) ("In this case, because Taylor never asked the district court to order separate trials of the offenses, we must affirm Taylor's conviction unless the district court's failure to sever the offenses was 'plain error.'"); *United States v. Neill*, 964 F. Supp. 438, 453 (D.D.C. 1997) ("the defendant never moved to sever Count Six. In fact, he never uttered a whisper, either before trial or during trial (even when the Court dismissed Count Seven at the close of the government's case), that the joinder of Count Six with the other counts had caused or would cause him to suffer unfair prejudice. Having failed to preserve this claim, it has been waived."); *United States v. Deitz*, 577 F.3d 672, 692 (6th Cir. 2009) ("under Federal Rule of Criminal Procedure 12(b)(3)(D) . . . a defendant who fails to move for severance under Rule 14(a) prior to trial waives his objection.").

Such a complaint, in any event, would have been no more successful at the start of the trial than after the Court's ruling on Rule 29. As the D.C. Circuit has recognized, the Supreme Court has specifically rejected the premise advanced by the defendants that prejudice arises as a matter of law following dismissal of an overarching conspiracy count linking the substantive offenses. *See United States v. McDaniel*, 538 F.2d 408, 410 n.4 (D.C. Cir. 1976) (citing *Schaffer v. United States*, 362 U.S. 511, 515-16 (1960)). In *Schaffer*, the defendants argued that prejudice would be implicit in a continuation of the joint trial after dismissal of the conspiracy count and that the resulting prejudice could not be cured by any cautionary instruction. *See Schaffer*, 362 U.S. at 514-16. Rejecting that argument, the Court found that the defendants had failed to show

any prejudice. *See id.* at 515. Underlying the Court's explanation was that fact that "[t]he separate substantive charges of the indictment employed almost identical language and alleged violations of the same criminal statute during the same period and in the same manner." *Id.* at 514. As a result, the Court found that "[t]his made proof of the over-all operation of the scheme competent as to all counts." *Id.* at 514-15.

Here, the defendants cannot discharge their burden of demonstrating prejudice from evidence they claim was introduced solely for the conspiracy count. The evidence was not introduced solely for the conspiracy counts but was used to prove the substantive counts as well. In addition to the fact, as discussed above, that joinder of the offenses was authorized under Rule 8(b) and the coconspirator statements and other evidence of the conspiracy remain admissible, the evidence pertaining to the conspiracy was competent as to all of the substantive counts.[8]

The evidence identified by the defendants was not introduced at trial exclusively to prove the conspiracy. The government did not seek to admit the coconspirator statements identified by the defendants with any such limitation, nor is there any evidence in the record that the defendants attempted to restrict such evidence solely to the conspiracy charge. Indeed, such a request would have been unfounded given that the evidence, with extremely limited exceptions, applies to the Gabon deal as a whole and not only to the conspiracy to any particular substantive offense.

Most, if not all, of the evidence introduced as to the conspiracy, including the statements

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[8] Even if the Court were to find that joinder was improper, the defendants cannot logically argue that the evidence would not have been admissible if each individual was tried alone on the conspiracy and substantive counts. The coconspirator statements and other evidence of the conspiracy would remain admissible because the evidence pertaining to the conspiracy was relevant and admissible as to each of the substantive counts.

admitted pursuant to Rule 801(d)(2)(E), is equally relevant to the substantive counts because the substantive offenses were charged as part of a bribery scheme and not as unrelated, stand-alone acts. In such a situation, the defendant suffers no prejudice because all of the evidence admitted for the conspiracy would similarly be admitted for the substantive offenses. *See, e.g.*, *Taylor*, 1991 WL 214166, at *3 ("When the evidence of each offense would be admissible at a separate trial of the other offense, however, the defendant suffers no prejudice from a joint trial of the offenses."); *see also United States v. Gbemisola*, 225 F.3d 753, 761 (D.C. Cir. 2000) ("All of the evidence admitted at the joint trial could properly have been admitted at a separate trial to show the nature of the drug distribution scheme in which Gbemisola was an active participant. Hence, no prejudice arose from the joinder, and the court did not err in trying the defendants together."). Thus, even without the conspiracy, evidence showing the full extent of the Gabon deal was admissible to support the substantive charges. Indeed, just as the Supreme Court found in *Schaffer*, because "[t]he separate substantive charges of the indictment employed almost identical language and alleged violations of the same criminal statute during the same period and in the same manner . . . proof of the over-all operation of the scheme [was] competent as to all counts." *Schaffer*, 362 U.S. at 514-15.

Not only does evidence attributable to the conspiracy count show the nature and scope of the Gabon deal, which is essential to explaining the substantive charges, but it provides necessary context and detail as to each defendant. What the defendants have referred to as the conspiracy evidence, which goes to the defendants' knowledge, intent and understanding, is not just evidence of the conspiracy but equally applicable to and admissible for proving the substantive counts. Simply put, because the conspiracy and substantive counts emanate from the

same facts, the evidence introduced at trial is as admissible to the substantive counts as it was to the conspiracy count. *See United States v. Wapnick*, 60 F.3d 948, 954 (2d Cir. 1995) ("In cases where the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover.") (citing *United States v. Bailey*, 859 F.2d 1265, 1273 n.1 (7th Cir. 1988); *United States v. Odom*, 858 F.2d 664, 666-67 (11th Cir. 1988)).

CONCLUSION

For all of the foregoing reasons, the Court should deny the defendants' motion for mistrial. The Court, however, should properly instruct the jury to consider the evidence against each defendant individually in a manner similar to what it did it did in the first trial.

Respectfully submitted,

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