

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

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MIDDLE DISTRICT OF FLORIDA  
TAMPA, FLORIDA

UNITED STATES OF AMERICA :  
:  
v. :  
:  
SAMI AMIN AL-ARIAN :

CASE NO: 8.03-CR-77-T-30 TBM

**UNITED STATES' MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S HATIM NAJI FARIZ'S MOTION TO DISMISS  
COUNTS THREE AND FOUR OF THE INDICTMENT**

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, submits the following Memorandum in Opposition to Defendant Hatim Najj Fariz's Motion to Dismiss Counts Three and Four of the Indictment:

**INTRODUCTION**

Defendant HATIM NAJI FARIZ is charged in Count Three with conspiring to violate the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter "AEDPA"), Pub. L. 104-132, 110 Stat. 1214, 1319 (1996), which prohibits, in relevant part, the knowing provision of "material support and resources" to designated foreign terrorist organizations. See, 18 U.S.C. §2339B(a)(1)). Defendant Fariz is charged in Count Four with conspiring to violate Executive Order 12947, which prohibits transactions with designated terrorist groups and individuals who threaten to disrupt the Middle East Peace Process. These charges stem from the defendant's role as a member of the Palestinian Islamic Jihad ("PIJ") in the United States, a terrorist group that has indiscriminately killed civilians overseas, including U.S. citizens. The indictment alleges among other things that defendant FARIZ and his co-defendants secretly established PIJ cells in different countries, participated in the management of PIJ affairs, and solicited and raised monies

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and funds to support the PIJ and its operatives in the Middle East. The indictment reflects that the defendant was an integral part of the conspiracies and was fully aware and did intend to further the PIJ's goal of committing violent acts in an effort to destroy Israel, obtain its land, and end all Western influence in the Middle East.

The defendant challenges Counts Three and Four of the Indictment on a variety of common grounds. Despite having been provided with an abundance of detail in the lengthy indictment, the defendant claims that both counts fail to sufficiently state the charge, and at the same time that some of the information provided is prejudicial and should be stricken. He also complains that the designation processes at the core of both charges violate his due process rights. For the reasons set forth below, these arguments are without merit. Accordingly, the defendant's motion to dismiss Counts Three and Four should be denied.

### **The Indictment**

In Count Three of the Indictment, the defendant is charged with conspiring to provide material support and resources to the PIJ, a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B. Count Three expressly realleges and incorporates by reference the general allegations (¶¶ 1-23) and the overt acts (¶¶ 43(197) - 43(255)) of Count One. Count Three also includes a section entitled "Means and Methods of the Conspiracy," (¶¶ 3(a)-(v)). The critical part of the charging language reads as follows:

From in or about 1988 . . .and continuing to the date of this indictment, in the Middle District of Florida and elsewhere. . . , the defendant[], . . .HATIM NAJI FARIZ [and six others] . . .did knowingly conspire with each other and with persons known and unknown to the Grand Jury, to knowingly provide material support and resources, as that term is defined in Title 18, United States Code, Section 2339A(b), to a designated foreign terrorist

organization, namely the Palestinian Islamic Jihad, all in violation of Title 18 United States Code, Section 2339B.

Count Four of the Indictment alleges a conspiracy to violate the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 et seq. The language of Count Four includes a detailed explanation of the IEEPA, Executive Order 12947, the implementing regulations (31 C.F.R. Part 595), and corresponding designations of PIJ, AWDA and SHALLAH as Specially Designated Terrorists (SDTs). (Ind., Count IV, ¶¶ 1-8). The key portion of the charging language also states that:

From a date unknown to the Grand Jury, but not later than January 25, 1995, and continuing to the date of the indictment, in the Middle District of Florida and elsewhere, the defendant[] . . . HATIM NAJI FARIZ [and five others] . . . did combine, conspire, confederate, and agree with other persons, known and unknown to the Grand Jury, to commit offenses against the United States, that is, knowingly and willfully to violate Executive Order 12947, by making and receiving funds, goods, services to or for the benefit of the Palestinian Islamic Jihad, ABD AL AZIZ AWDA, Fathi Shiqaqi, and RAMADAN ABDULLAH SHALLAH, in violation of Title 50, United States Code, Sections 1701 et seq., and Title 31, Code of Federal Regulations, Section 595, et seq. . . . all in violation of Title 18, United States Code, Section 371.

Count Four incorporates by reference and realleges the general allegations (¶¶ 1-23) and overt acts from Count One (¶¶ 122-255). Count Four also realleges and incorporates by references the Means and Methods section of Count Three.<sup>1</sup>

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<sup>1</sup> The defendant asserts in his memorandum that Count Four does not include a means and methods section. His argument is based on a mere typographical error in the drafting of the indictment. Under the subheading of part C, Count Four, entitled "Means and Methods of the Conspiracy," paragraph 10 refers the reader to "Part B of Count Three" which is "incorporated by reference and realleged herein." Part "B" of Count Three, however, is the overt acts section, not the means and methods section, which is found at Part C. A common sense reading of Counts Three and Four indicates that the government has made a typographical error in referring the reader to Part B of Count Three instead of Part C. This type of error, however, may easily be

**I. COUNTS THREE AND FOUR DO NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS.**

**A. The Defendant Cannot Assert the Purported Due Process Rights of the PIJ Because He Has No Standing and There Are No Such Rights to Assert.**

The § 2339B charges at issue are based on the Secretary of State's designation of the PIJ as a foreign terrorist organization ("FTO"), which occurred in October 1997 and again in October 1999 and October 2001.<sup>2</sup> In enacting the AEDPA, Congress unequivocally mandated that all challenges to an FTO designation be filed with the Court of Appeals for the D.C. Circuit within 30 days of publication in the Federal Register, and precluded a criminal defendant from challenging the validity of the FTO designation during the course of the prosecution -- all in the interests of consistency and finality. See 8 U.S.C. §§ 1189(b)(1); 1189(a)(8). Although the defendant is accused of engaging in specific conduct that has been barred by statute and publicized by federal notice, he nonetheless argues that the Due Process Clause of the Fifth Amendment prevents his prosecution here because the PIJ was not provided with notice before it was designated as an FTO. (Doc. 301 at 13). He makes a similar argument with respect to the PIJ's designation as a specially designated terrorist ("SDT") under Executive Order 12947. See Doc. 301 at 25-26. The defendant's due process argument essentially boils down to the assertion

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remedied by an amendment of the indictment, because it is merely a matter of form which neither alters the essential substance of the charged offense nor misleads the defendant. See Russell v. United States, 369 U.S. 749, 770 (1962); United States v. Willoughby, 27 F.3d 263, 266 (7<sup>th</sup> Cir. 1994); United States v. Kegler, 724 F.2d 190, 194 (D.C. Cir. 1983).

<sup>2</sup> The Government respectfully refers the Court to the Government's Memorandum of Law in Opposition to Defendant Sami Amin Al-Arian's Motion to Dismiss Counts One Through Four of the Indictment, at 3-7, for a discussion of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the designation of foreign terrorist organizations, as well as the International Emergency Economic Powers Act ("IEEPA"), the statute upon which Executive Order 12947 is based.

the he cannot be prosecuted under § 2339B or Executive Order 12947 because he contends someone else's due process rights were violated. His arguments are baseless.

At the outset, the government notes that the defendant's due process argument is based entirely on a district court decision from the Central District of California in United States v. Rahmani, 209 F. Supp. 2d 1045 (C.D.Cal. 2002), in which the court held that, despite limitations relating to FTO challenges contained in the AEDPA, a criminal defendant could raise the constitutionality of an underlying FTO designation in a criminal proceeding for a violation of § 2339B.<sup>3</sup> Not only does the court's decision in Rhamani contravene well-established standing rules discussed infra, as well as legislative restrictions concerning such collateral challenges and the forum in which they can be entertained, it appears to be inconsistent with the Ninth Circuit's own jurisprudence on this issue. See Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9<sup>th</sup> Cir 2000) (noting that a challenge to an FTO designation "must be raised in an appeal from a decision to designate a particular organization").

Indeed, the defendant's attempt to vicariously assert the PIJ's due process rights must be rejected at the outset because it disregards the fundamental standing principle that a "plaintiff generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975); see, e.g., Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 809 (D.C. Cir. 1987) (because due process rights do not protect a relationship between a third party and a litigant, "[a] litigant can never have standing to challenge a statute solely on the ground that it failed to provide due process to third

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<sup>3</sup> The government notes that it has appealed that decision. See No. 02-50355 (9<sup>th</sup> Cir. ), and that the Ninth Circuit has entertained argument. We are awaiting a decision.

parties not before the court”). This was one of the reasons cited by the court in United States v. Sattar, 272 F. Supp. 2d 348 (S.D.N.Y. 2003), in finding that the Rahmani decision was “unpersuasive” in the context of an identical challenge to the FTO designation procedure by defendants charged with a violation of § 2339B. See id. at 363-64. In Sattar the court reasoned that

it is for [the FTO], not the defendants, to raise [the FTO’s] due process concerns before a court as provided for under the statute. Litigants, including the defendants, ‘never have standing to challenge a statute solely on the ground that it failed to provide due process to third parties not before the court.

Id. at 364 (quoting, Center for Reproductive Law and Policy v. Bush, 304 F.3d 183, 196 (2d. Cir. 2002)). See also Humanitarian Law Project v. Reno, 205 F.3d at 1137.<sup>4</sup>

Moreover, both the Rahmani decision and the defendant rely on a gross misunderstanding of the D.C. Circuit’s opinions surrounding the FTO designation process. See Doc.301 at 15-17. Specifically, in National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001) (hereafter “NCRI”), the D.C. Circuit determined that an FTO, known as “The National Council of Resistance of Iran” (NCRI), was denied due process under the designation scheme because it was not afforded notice of its impending designation and the opportunity to present information to the Secretary to demonstrate that the designation was unwarranted. The

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<sup>4</sup> The fact that designations under the AEDPA and IEEPA may deter individuals, such as the defendant, from making contributions of goods, services, and other material support to FTOs and SDTs is of no moment for standing purposes. “[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” Wrath, 422 U.S. at 499. See Palestine Information Office v. Shultz, 853 F.2 932, 943 (D.C. Cir. 1988) (denying right of Palestine Liberation Organization employees to challenge closure of PLO office in Washington on the ground that action infringed on employment termination rights).

court therefore remanded the case to the Secretary for the purpose of affording NCRI such opportunities. Significantly, however, the D.C. Circuit's decision was predicated on the fact that the NCRI had established substantial connections to the United States that afforded the organization constitutional protection. Id. at 201-02. (finding that the NCRI had, *inter alia*, an overt presence in Washington D.C. and claimed an interest in a U.S. bank account). To that end, in NCRI the D.C. Circuit carefully distinguished its prior holding in People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000), in which the D.C. Circuit had rejected an earlier appeal of the group's 1997 designation. In that earlier case, the D.C. Circuit held that "a foreign entity without property or presence in this country has no constitutional rights, under the Due Process Clause or otherwise." People's Mojahedin, 182 F.3d at 22.

The D.C. Circuit's holding in the People's Mojahedin, supra, was subsequently re-affirmed in a post-PMOI decision wherein an off-shot of the Real IRA (a designated FTO) attempted to challenge its FTO designation. In 32 County Sovereignty Committee v. Dept. of State, 292 F.2d 797 (D.C. Cir. 2002), the D.C. Circuit observed "32 County and the Association have demonstrated neither a property interest nor a presence in this country" and, therefore, "[t]hey cannot rightly lay claim to having come within the United States and developed substantial connections with this country." Id. at 799 (internal quotation and citation omitted). As a result, the court concluded, the Secretary of State "did not have to provide 32 County or the Association with any particular process before designating them as foreign terrorist organizations." Id. The reasoning underlying the D.C. Circuit's decision is well-established. See Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001) (finding that it is well-established that

certain constitutional protections available to persons inside the United States are unavailable to aliens outside our borders); United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1989) (“aliens receive constitutional protections [only] when they have come withing the territory of the United States and developed substantial connections to this country”).

Thus, although any alleged violation of the PIJ’s due process rights are irrelevant in this prosecution, the PIJ was not entitled to notice or a pre-deprivation hearing under the Due Process Clause in the first place before it was designated an FTO under the AEDPA, or an SDT under IEEPA and Executive Order 12947. In any event, the AEDPA clearly provides a procedure by which the PIJ could challenge its designation as an FTO in the Court of Appeals for the District of Columbia. See 8 U.S.C. 1189(b). In fact, organizations designated as FTOs have availed themselves of this process. See, e.g., People’s Mojahedin Org. Of Iran, 327 F.3d 1238, 1241-44 (D.C. Cir. 2003); 32 County Sovereignty Committee v. Dept. of State, 292 F.2d at 799; National Council of Resistance of Iran, 251 F.3d at 209; People’s Mojahedin Org. Of Iran, 182 F.3d at 21-25. Significantly, the government notes that the PIJ itself has failed to file any challenges to its designations.

**B. The Defendant’s Own Due Process Rights Are Not Violated by His Inability to Challenge the PIJ’s Designations**

Similarly, the fact that the defendant is not allowed to challenge the designation of the PIJ as an FTO in this prosecution lacks any constitutional import. The criminal case before this court does not involve, and could not involve, the propriety or constitutionality of designating the PIJ. Under § 2339B, it is the fact of designation, rather than its validity, that triggers the criminal ban on provision of material support. See Sattar, 272 F. Supp. 2d at 364 (noting that the “element at

issue in this case is simply whether IG was designated as an FTO, and the defendants thereafter knowingly provided, or conspired to provide, material support or assistance to it, not whether the Secretary of State correctly designated IG as an FTO”). If a particular organization has not been designated by the Secretary of State, an individual cannot violate § 2339B by furnishing that organization with material support, no matter how clear it might be that the organization actually satisfies the statutory criteria for designation as a Foreign Terrorist Organization. Conversely, provision of material support to an organization that has been designated is categorically barred, without regard to the validity of the underlying designation. In this respect, the statute is similar to a statute that prohibits providing a gun to a convicted felon; it is the fact of the underlying felony conviction, and not its underlying validity or the constitutionality of the predicate felony statute, that is at issue. See Lewis v. United States, 445 U.S. 55 (1980).

Moreover, a criminal defendant charged with the violation of an administrative determination to which he was not a party has no independent due process right to collaterally attack its validity on the basis of an alleged constitutional violation. Decisions construing and applying United States v. Mendoza-Lopez, 481 U.S. 828 (1987), upon which the court in Rhamani and the defendant in this case place primary reliance for the contrary proposition, illustrate this principle. In Mendoza-Lopez, supra, two defendants charged with reentering the United States following deportation were allowed to argue the invalidity of the underlying deportation order, i.e., that they were denied fundamentally fair deportation proceedings because the immigration judge inadequately informed them of their right to counsel and accepted unknowing waivers of their right to seek suspension. Although the Court acknowledged that there was no evidence of congressional intent to allow such challenges in criminal proceedings, it

approved the decision of the district court to permit the defendants to challenge the validity of the underlying deportation proceeding. In particular, it reasoned that:

where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the [underlying] administrative proceeding. This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.

Id. at 837-88.

The courts, however, have repeatedly refused to construe Mendoza-Lopez to afford criminal defendants a broad right to launch a due process challenge to administrative determinations they are charged with violating, even in cases where no one could obtain judicial review of the underlying administrative proceedings. For example, in United States v. Mandel, 914 F.2d 1215 (9<sup>th</sup> Cir. 1990), a prosecution for exporting items placed on the Commodity Control List (CCL) by the Secretary of Commerce, the court held that Mendoza-Lopez provided no basis for challenging -- during the criminal trial -- the propriety of the Secretary's determination. It reasoned that Mendoza-Lopez is inapplicable "where \* \* \* the prior administrative proceeding does not involve the defendant's individual rights and is not an element of the offense in the pending case." Id. at 1221 (emphasis supplied). Similarly, in United States v. Bozarov, 974 F.2d 1037, 1045 (9<sup>th</sup> Cir. 1992), the court likewise rejected the claim that Mendoza-Lopez entitled a criminal defendant to claim that his inability to challenge the propriety of a CCL designation violated his due process rights, inter alia, because such an administrative determination does not involve the defendant's individual rights. And in United States v. Helmy, 712 F. Supp. 1423, 1432-33 (E.D.Cal. 1989), the court rejected a Mendoza-

Lopez claim in the context of a violation of the Arms Export Control Act (AECA) because “listing determinations made under the AECA . . . affect at the outset, not individuals but commodities [and thus] are, with respect to a given individual, passive and remain so until [] violated.”

More recently, in United States v. Sattar, the court rejected, in the context of § 2339B, a claim identical to that presented by the defendant here. In addition to noting that in Mendoza-Lopez the defendants who had been subject to the underlying proceedings were the sole parties who could challenge the validity of those proceedings, and could do so only in the context of the criminal case, the Sattar court observed that, in the context of an FTO designation under the AEDPA, “it is clear that Congress provided [an FTO] with judicial review of its own designation. The administrative determination of an FTO is potentially subject to extensive judicial review but that review is not to occur as a defense in a criminal proceeding.” 272 F. Supp. 2d at 366.

These decisions also reflect another reason why -- in the context of administrative determinations made by the Executive for the purpose of depriving foreign entities of certain resources -- the reasoning of Mendoza-Lopez cannot accord criminal defendants charged with violating such strictures the right to litigate their validity during such a proceeding. As the Ninth Circuit noted in United States v. Bozarov, *supra*, in upholding the Export Administration Act’s general preclusion of judicial review, “the need for uniformity in the realm of foreign policy is particularly acute; it would be politically disastrous if the Second Circuit permitted the export of computer equipment and the Ninth Circuit concluded that such exports were not authorized by the [statute].” See also Mandel, 914 F. 2d at 1222 (expressing similar concerns); Helmy, 712 F.

Supp. at 1431 (same). It would be no less politically disastrous for the D.C. Circuit to uphold the Secretary's designation of the PIJ and other entities as FTOs, only to have this Court subsequently rule that all foreign terrorist organization designations are unconstitutional and that the designation statute is invalid on its face. Congress clearly intended to avoid any such result when it mandated that a request for a review of a designation be filed with the D.C. Circuit. See 8 U.S.C. 1189(b). The considerations leading to this result in the context of the designation of an FTO are equally relevant to designations of SDTs made pursuant to Executive Order 12947.

## **II. COUNT THREE OF THE INDICTMENT SUFFICIENTLY CHARGES THE DEFENDANT WITH VIOLATING 18 U.S.C. § 2339B.**

### **A. The Legal Standard Applicable to a Motion to Dismiss for Insufficiency of an Indictment.**

In moving to dismiss Counts Three and Four of the Indictment for insufficient notice of the charges against him, the defendant invokes Fed. R. Crim. P. 7(c)(1), but then neglects to address both the case law interpreting Rule 7 and the legal standard applicable to a motion to dismiss. As a general matter, on a motion to dismiss an indictment before trial, review of an indictment is governed by Rule 7(c)(1) of the Federal Rules of Criminal Procedure, which requires that “[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”

The Eleventh Circuit has repeatedly held that: “An indictment is sufficient ‘if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution of the offense.’” United States v. Steele, 147 F. 3d 1316, 1320 (11<sup>th</sup> Cir. 1998) (quoting United States v. Dabbs, 134 F.3d 1071,

1079 (11<sup>th</sup> Cir. 1998)). If an indictment sets forth the essential elements of the crime and includes a reference to the statute being charged, the indictment will sufficiently inform the defendant of the nature and cause of the accusations against him, as required by the Sixth Amendment of the Constitution (the so-called “notice” requirement). See United States v. Fern, 155 F.3d 1318, 1325 (11<sup>th</sup> Cir. 1998); United States v. Chilcote, 724 F.2d 1498, 1505 (11<sup>th</sup> Cir. 1984); United States v. Mosquera, 192 F. Supp 2d 1334, 1338 (M.D. Fl. 2002). When adjudicating challenges to the validity and sufficiency of the indictment, courts construe the indictment as a whole. See United States v. Strauss, 285 F.2d 953, 955 (5<sup>th</sup> Cir. 1960).

Indeed, the Eleventh Circuit has held that “ordinarily, the pleading of the allegations in terms of the statute is sufficient.” United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1082 (5<sup>th</sup> Cir. 1978). The law, however, does not “compel that the indictment track the statutory language.” Chilcote, 724 F.2d at 1505. The Eleventh Circuit has explained that when courts analyze a challenge to the sufficiency of an indictment, they give the indictment “a common sense construction” and the validity of the indictment is to be determined by practical, rather than technical, considerations. United States v. Poirier, 321 F.3d 1024, 1029 (11<sup>th</sup> Cir. 2003) (indictment sufficient because a common sense interpretation of indictment indicated that relevant documents were confidential despite express statement that they were so)(quoting United States v. Gold, 743 F.2d 800, 812 (11<sup>th</sup> Cir. 1984)). Moreover, “[a]llegations in a conspiracy count need not be stated with the specificity required of a substantive count.” See, e.g., United States v. Clark, 649 F.2d 534, 539 (7<sup>th</sup> Cir. 1981).

The Federal Rules of Criminal Procedure allow a defendant to submit, by pre-trial motion, “any defense, objection, or request that the court can determine without a trial of the general issue.” Fed. R. Crim. P. 12. The validity of an indictment therefore is tested by its allegations, not by whether the government can prove its case. See Costello v. United States, 350 U.S. 359, 363 (1956). The Eleventh Circuit has specifically held that “[i]n judging the sufficiency of the indictment, the court must look to the allegations and, taking the allegations to be true, determine whether a criminal offense has been stated.” United States v. Fitapelli, 786 F. 2d 1461, 1463 (11<sup>th</sup> Cir. 1986). In other words, “[i]t follows that a pretrial motion to dismiss the indictment cannot be based on a sufficiency of the evidence argument because such an argument raises factual questions embraced in the general issue.” United States v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11<sup>th</sup> Cir. 1987) (“Rule 12 is not intended to authorize ‘speaking motions’ through which the truth of the allegations in an indictment are challenged.”); United States v. Brandon, 150 F. Supp. 2d 884, 884 (E.D.Va. 2001) (“In general, if an indictment sets forth the essential elements of the offense in sufficient detail so as to fairly inform the defendant of the nature of the charge, then it is immune from attack on a motion to dismiss.”); United States v. Triumph Capital Group Inc., 260 F. Supp. 2d 444, 458 (D. Conn. 2002) (denying motion to dismiss RICO conspiracy charge because defendants’ argument that the government could not prove the existence of an agreement between or among the defendants amounted to a challenge of proof, not to the sufficiency of the allegations).<sup>5</sup>

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<sup>5</sup>All of the cases cited on page 19 (regarding Count One) of the Defendant’s brief discuss the sufficiency of evidence at trial, not the sufficiency of the allegations in the indictment. The Defendant also relies on these cases in his argument on page 25 for dismissing Count Two.

**B. Count Three Adequately States a §2339B Conspiracy.**

With respect to Count Three, the defendant claims that the indictment fails to provide him with adequate notice for the following reasons: (1) Count Three does not specify which types of material support were provided by the defendants (Def.'s Mot. at 7); (2) the "means and methods" and "overt acts" sections do not cure the problem because they include allegations, "such as pure speech" that do not constitute material support or resources (*id.* at 8); and (3) the "means and methods" section is vague (*id.* at 8-9). Each of these claims is without merit.

First, on its face, the language of Count Three suffices to allege a violation of 18 U.S.C. § 2339B. Title 18, United States Code, Section 2339B, provides criminal penalties for "[w]hoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so."<sup>6</sup> The statute further provides that the definition of "material support or resources" has the same meaning as in Section 2339A. 18 U.S.C. §2339B(g)(4). Section 2339A in turn defines material support and resources as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. 2339A(b).<sup>7</sup>

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<sup>6</sup>Contrary to the defendant's contention that the indictment does not track the language of the statute (Doc. at 7), a comparison of both Count Three and the statute demonstrates that in fact Count Three does indeed track that language.

<sup>7</sup>This section was amended by the USA PATRIOT Act in October 26, 2001, but those amendments are not at issue in the defendant's motion.

Count Three of the Indictment sets forth all the essential elements of the offense, and provides sufficient detail to put the defendant on notice of the crimes charged against him so that he can properly prepare a defense. In United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002), the so-called “American Taliban” case, the court addressed the defendant’s challenge to several Section 2339B conspiracy and substantive charges. The court noted that the second paragraph of each count recited “all the essential elements of the 2339B offenses, the approximate dates on which Lindh allegedly committed the offenses, and the foreign terrorist organization he is alleged to have assisted.” Id. at 576. The language of the 2339B charges in the Lindh indictment is identical in all material respects to the language in Count Three. See id. at 576 n. 83. Significantly, the §2339B charge in the Lindh case likewise *did not specify the “type” of material support* alleged, and instead referred to the definition found in 18 U.S.C. § 2339A(b). The Lindh court concluded that the language of the 2339B counts was sufficient and met the applicable legal standards. Id. (“In the second paragraph of each Count may be found all the essential elements of the Section 2339B offenses, the approximate dates on which Lindh allegedly committed the offenses, and the foreign terrorist organization he is alleged to have assisted.”) See also United States v. Fern, 155 F.3d 1318, 1326 (11<sup>th</sup> Cir. 1998) (rejecting argument that indictment failed to identify false statements with sufficient particularity for Fifth Amendment purposes because it was an “entirely sensible inference the false statements referred to in the indictment related to the specific allegations described earlier in the indictment.”). Similarly, the language in Count Three of the instant indictment meets the legal standard.<sup>8</sup>

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<sup>8</sup>The defendant’s arguments also appear to neglect the fact that the crime charged in count three is a conspiracy. As such the government will be not required to prove that the defendant himself provided a certain type of material support on a given day to the PIJ; rather the

As in Lindh, the instant indictment incorporates and realleges general allegations and overt acts that provide the defendant with additional particulars to rely upon in preparing for trial. Id. (“These general allegations describe HUM and Al-Qaeda in some detail, and specifically allege their respective designations as foreign terrorist organizations”). The indictment, therefore, goes far beyond the minimum necessary allegations and informs the defendants of the statute, the elements, and the facts. Nothing more is required.<sup>9</sup>

The defendant’s reliance on United States v. Bobo, 344 F.3d 1076 (11<sup>th</sup> Cir. 2003), is misplaced. In Bobo, the Eleventh Circuit held that an indictment charging conspiracy and attempt to defraud the United States and any health care program, in violation of 18 U.S.C. §371 and 1347(1), was legally insufficient because it did not specify what the alleged scheme was designed to deprive the victim “of” (benefits, items, services, or money), did not indicate what the government contended was unlawful about the defendant’s conduct, and did not charge all the essential elements of the fraud. Id. at 1084-85. The court explained that because of these many factual and legal deficiencies, it could not discern what “scheme” the jury found the defendant had committed. Id. at 1085-86. In short, the indictment in Bobo was woefully

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government will be required to prove only that he knowingly agreed to join or associate himself with the objective of the conspiracy. . .to provide material support and resources to the PIJ. See United States v. Gold, 743 F.2d 800, 824 (11<sup>th</sup> Cir. 1984).

<sup>9</sup>A reading of the “Means and Methods” section of Count Three illuminates how specious the defendant’s argument is. These allegations actually refer to such forms of assistance/resources/material support as: “funds,” “offices,” “joint terrorism operations,” “financial operations,” “communicat[ion] through telephone calls and facsimiles,” “extensive advice on PIJ organization, structure, personnel and financing,” “raising funds,” “fraudulent manipulation of United States immigration laws,” “logistical assistance in terrorist activities,” “financial assistance,” “communicat[ion] with persons in Iran and Syria about the possibility of procuring encrypted communications equipment,” “purchasing telephones,” “editing a Charter of the PIJ,” and “financial support and advice.”

inadequate in numerous respects. In the instant case, there is no confusion about what conduct the government alleges is unlawful—namely, conspiring to provide material support and resources to the PIJ. Unlike Bobo, there is also no ambiguity in Count Three as to what actions the defendants took in furtherance of the conspiracy to achieve the objective of the conspiracy.

Second, the allegations in the indictment belie the defendant’s claim that the government is attempting to target acts of “pure speech.” At the outset, it bears emphasizing that “it has never been deemed [a violation of the First Amendment] to make a course of conduct illegal because the conduct was in part, initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978). For example, “violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.” Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984). Even a cursory review of the charges in this case reveals that the defendant’s activities went beyond “pure” expressions of belief. The overt acts alleged in Part E of Count One of the indictment (some of which are re-alleged in Counts Two through Four), include allegations that the defendant raised money for the PIJ, see, e.g., Ind. ¶¶ 43(6), (62), (197), (200), (201), (219), (235); sent money and financial support to relatives of convicted PIJ terrorists and PIJ “martyrs,”<sup>10</sup> see, e.g., Ind. ¶¶ 43(19), (31), (62), (97); provided logistical support to the PIJ by organizing its finances and activities on the

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<sup>10</sup> In its consideration of a constitutional challenge to § 2339B, the Ninth Circuit specifically noted that “even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts.” Humanitarian Law Project, 205 F.3d at 1136.

ground in the Occupied Territories, see, e.g., Ind. ¶¶ 43(24)-(28), (33), (185), (227); and, worked with other terror organizations such as HAMAS to accomplish acts of violence, see, e.g., Ind. ¶¶ 43(29), (49), (84), (95), (107). These overt acts underscore that the conduct giving rise to liability under § 2339B and Executive Order 12947 encompasses the defendant's provision of valuable goods, services, and material support to the PIJ, and not the defendant's beliefs, speech, or mere membership in the PIJ.<sup>11</sup> As the Courts of Appeals for the D.C., Seventh, and Ninth Circuits have held in the context of First Amendment challenges to § 2339B, this type of conduct does not implicate speech rights: there is no constitutional right to provide weapons and explosives to terrorists, nor is there any right to provide the resources with which the terrorist can purchase weapons and explosives. See People's Mojahedin Organization of Iran, 327 F.2d at 1244-45; Boim, 291 F.3d at 1026; Humanitarian Law Project, 205 F.3d at 1133. See also Holyland Foundation for Relief and Development v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003) ("the law is established that there is no constitutional right to fund terrorism").<sup>12</sup>

Third, the defendant's complaint that the "means and methods" section is vague is likewise without merit. As noted above, the "means and methods" section of Count Three very

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<sup>11</sup> Some of the overt acts alleged in the indictment refer to telephone conversations, speeches, and writings whereby the defendants expressed their support for the PIJ. These overt acts, however, were included to show the defendants' motive and intent to provide financial and logistical support to the PIJ. While the First Amendment protects the defendant's right to express his hostility to the United States and its foreign policy, "it does not prevent the use of [his] speeches or writings in evidence when relevant to prove a pertinent fact in a criminal prosecution." United States v. Rahman, 189 F.3d 88, 118 (S.D.N.Y. 1999). See also Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) ("The First Amendment \* \* \* does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent").

<sup>12</sup>The United States has more fully addressed a First Amendment-based challenge to the indictment in its Memorandum in Opposition to Defendant AL-ARIAN's Amended Motion to Dismiss, and hereby incorporates that response.

specifically informs the defendant of many different types of material support and resources that the defendants and others conspired to provide to the PIJ. (Supra at fn. 9). Moreover, the claim that the government could have drafted the indictment with more clarity will not render it insufficient. Rather, the test is whether the indictment conforms to minimal constitutional standards. Poirier, 321 F.3d at 1029 (citing United States v. Varkonyi, 645 F.2d 453, 456 (5<sup>th</sup> Cir. Unit A May 1981)). Finally, assuming arguendo that the “means and methods” section in the instant indictment are vague, Count Three would still not be subject to dismissal because it nevertheless states the essential elements of the crime charged and includes detailed overt acts. In United States v. Recognition Equipment Inc., 711 F. Supp. 1, 5 (D.C. Dist. 1989), the court addressed a similar challenge to the vagueness of the means and methods section of a standard 18 U.S.C. § 371 conspiracy and held that since the indictment alleged the essential elements of the offense and one overt act in furtherance of the conspiracy, there were no grounds to dismiss because the listed “means and methods” were laid out vaguely.<sup>13</sup> The Court in Glasser v. United States, 315 U.S. 60, 66 (1942), also opined that “the particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy for which petitioners contend is not essential to an indictment.” In Glasser, the court suggested that if an indictment contained vague allegations of manner and means, the appropriate method to challenge the lack of detail was by a bill of particulars. Id. Here, neither the means and methods nor the overt acts are vague; a bill of particulars is therefore not warranted.

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<sup>13</sup>The court also noted that since 18 U.S.C. §371 placed no limitation on the “methods” which could be used to commit the crime charged, the fact that vague means were alleged does not mean that the nature of the conspiracy was improperly alleged. 711 F. Supp. at 4.

For all these reasons, Count Three provides the defendant with adequate notice of the charges and gives him more than enough information to prepare for trial. The defendant's motion to dismiss on "notice" grounds should therefore be denied.

**C. Factual Errors in an Indictment Do not Render it Subject to Dismissal.**

The defendant contends that because Count Three incorporates overt acts 236, 240, 247, and 253, the indictment is "insufficient" and should be dismissed, "otherwise [his] Fifth Amendment right to have charges brought against him by a grand jury would be violated." Doc. 301 at 9-11. This argument is neither supported by the law nor a thorough reading of the allegations in Count Three.<sup>14</sup>

At the outset, it is of no moment that the United States has admitted the inadvertent misidentification to the grand jury of AWDA in Overt Acts 236, 240, 247, and 253. Courts have long refused to permit challenges to an indictment based on the grand jury's consideration of false evidence, absent a showing of prosecutorial misconduct – which FARIZ does not and cannot allege occurred in this case. See United States v. DiBernardo, 775 F.2d 1470, 1475 (11th Cir. 1985) (reversing dismissal of indictment for inadvertent provision of false testimony to grand jury because there was no evidence of government misconduct); see also United States v. Cruz, 478 F.2d 408, 412 (5th Cir. 1973) (refusing to review a grand jury indictment although the defendant claimed it was not based on *any* probative evidence). "That an allegation of the indictment may be false does not render it surplusage so as to permit it to be stricken pretrial." United States v. Johnson, 585 F. Supp. 80, 81 (M.D. Tenn. 1984). Thus, FARIZ cannot

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<sup>14</sup>Defendant FARIZ has filed a separate motion to strike these overt acts. The government respectfully refers the Court to its response to that motion for a fuller exposition of the law on this issue.

challenge the relevancy or validity of the allegations stated in Overt Acts 236, 240, 247, and 253 merely by asserting that they are false.

FARIZ's request that the Court adopt statements made by the Court when it evaluated the United States' evidence against him for purposes of detention, (see Doc. 256 ¶¶ 6, 10), is a thinly-veiled attempt to improperly challenge the weight and credibility of the evidence before trial. The Court's statements regarding the detention evidence were relevant only to that inquiry. The scope of a court's authority upon a pretrial motion to strike or dismiss an indictment differs markedly from that at a detention hearing held pursuant to 18 U.S.C. § 3142. In the latter situation, the court may independently evaluate the weight of the evidence against the defendant to determine whether the defendant has rebutted any presumption of detention created by 18 U.S.C. § 3142(e). See United States v. Hurtado, 779 F.2d 1467, 1479-80 (11th Cir. 1985); 18 U.S.C. § 3142(g).

Outside of a bail hearing, however, credibility of evidence is not to be considered until trial. Johnson, 585 F. Supp. at 81 ("The truth of the allegations in an indictment is tested at trial and not by pretrial motion."). This is true whether the pretrial motion is one to dismiss the indictment under Rule 12, see Fed. R. Crim. P. 12(b)(2), or one to strike surplusage under Rule 7, Johnson, 585 F. Supp. at 81. See also United States v. Garey, 813 F. Supp. 1069, 1074 (D. Vt. 1993). Thus, FARIZ's insinuation that the Court may determine the weight of the challenged overt acts or the credibility of the evidence supporting them should be rejected.

In asserting this basis for dismissal, the defendant also neglects to consider the "rest of the story" involving the misidentification of a speaker involved in the subject overt acts. Although the government acknowledged that co-defendant AWDA was misidentified in these

four overt acts, it also informed the court that the actual speaker was a PIJ activist. For purposes of criminal liability under 2339B, the identity of the spoke is irrelevant—what is controlling is the affiliation of the speaker with the PIJ and the fact that the speaker was involved in or referenced in discussions in which indicted defendants spoke about PIJ affairs.

Moreover, assuming, *arguendo* that the pertinent overt acts were subject to being stricken under Rule 7, because they comprise a very small portion of the entire universe of allegations against the defendant in Count Three, the remaining allegations would suffice to sufficiently state a conspiracy to violate 18 U.S.C. §2339B, a statute which on its face does not require the allegation and proof of an overt act. The defendant simply cannot assert that, considering all the overt acts and allegations in the indictment, the grand jury could not have found probable cause to believe that the defendant had conspired to provide material support to PIJ. It follows, then, that the Fifth Amendment's indictment requirement will be satisfied if the facts alleged in the indictment warrant an inference that the grand jury found probable cause to support all the necessary elements of the charge. United States v. Fern, 155 F.3d 1318, 1325 (11<sup>th</sup> Cir. 1998).

**D. References to Executive Order 12947 in Count Three are Relevant and Should Not be Stricken.**

The defendant argues that references to Executive Order 12947 in Count Three should be stricken because they are irrelevant and prejudicial. The defendant further claims that the government is confused when it refers to the Executive Order in Count Three, because criminal liability under 2339B is based on conspiring to provide material support to a foreign terrorist organization, which must be designated by the State Department, not by the Department of Treasury pursuant to the IEEPA. The defendant is wrong in all respects.

First, a motion to strike language from the indictment as surplusage under Federal Rule of Criminal Procedure 7(d) may not be granted unless it is clear that the language is *both* “not relevant to the charge” *and* “inflammatory and prejudicial.”<sup>15</sup> United States v. Awan, 966 F.2d 1415, 1426 (11th Cir. 1992). ‘Relevant evidence’ is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Allegations or evidence are not prejudicial simply because they are adverse to the defendant, but rather must tend to suggest a decision on an improper basis. See United States v. Ballou, 656 f.2d 1147, 1155 (5th Cir. 1981); Dollar v. Long Mfg., 561 F.2d 613, 618 (5th Cir. 1977).<sup>16</sup>

Under this standard, courts may not strike an allegation from the indictment if the allegation is admissible and relevant to the charges, regardless of how prejudicial the language is to the defendant. United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990); United States v. Edwards, 72 F. Supp. 2d 664, 667 (M.D. La. 1999). Similarly, if the language is information that the United States hopes to properly prove at trial and is relevant, it cannot be considered surplusage no matter how prejudicial it may be. United States v. Climatemp, Inc., 482 F. Supp. 376, 391 (N.D. Ill. 1979), aff’d sub nom, United States v. Reliable Sheet Metal Works, Inc., 705

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<sup>15</sup>Generally when adjudicating challenges to the validity and sufficiency of the indictment, courts construe the indictment as a whole. See United States v. Strauss, 285 F.2d 953, 955 (5th Cir. 1960). Thus, the suspect allegations must be considered in light of the rest of the indictment.

<sup>16</sup> In Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit Court of Appeals held that decisions of the United States Court of Appeals for the Fifth Circuit handed down on or before September 30, 1981 would be binding precedent in the Eleventh Circuit appellate, district and bankruptcy court. Id. at 1207.

F.2d 461 (7th Cir. 1983); United States v. Hill, 799 F. Supp. 86, 88-89 (D. Kan. 1992); United States v. Wecker, 620 F. Supp. 1002, 1007 (D. Del. 1985).

The standard for striking surplusage is “most exacting,” Awan, 966 F.2d at 1426, and has been “strictly construed against striking surplusage.” United States v. Rezaq, 134 F.3d 1121, 1134 (D.C. Cir. 1998). See also 1 Charles A. Wright, Federal Practice and Procedure § 127 (3d ed. 2003) (“only rarely has surplusage been ordered stricken”). Because Rule 7(d) is written in permissive and not mandatory language, district courts retain the discretion to deny such motions. See Rezaq, 134 F.3d at 1134; Fed. R. Crim. P. 7(d).

The allegations pertaining to Executive Order 12947 are relevant to the conspiracy to provide material support under 2339B because they provide evidence of conspiratorial conduct. The indictment alleges that the defendant and six others agreed to participate in a conspiracy to provide material support and resources to the PIJ, and that this conspiracy began in or about 1988. The references in the means and methods section of Count Three referring to the SDT designations provide background evidence showing the conspiracy at work prior to the effective date of the FTO designation. The history of the PIJ, and its official recognition as a terrorist organization, whether in 1995 or 1997, are relevant to understanding the existence, purpose and conduct of the conspiracy in which the defendant is charged, and to understanding the nature of the conspiratorial agreement.<sup>17</sup> There is no question that it is permissible for the government to allege conduct occurring before the effective date of the statute to demonstrate the conspiracy’s genesis, its purpose and its operation over time, and to prove the intent and purpose of the

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<sup>17</sup>Assuming, arguendo, that at trial the defendant argued that the jury could be confused about which designation established the basis for criminal liability, the court could fashion a jury instruction to cure the problem.

conspirators' later acts. United States v. Monaco, 194 F.3d 381, 386 (2d. Cir. 1999); United States v. Ferrara, 458 F.2d 868, 874 (2d Cir. 1972); United States v. Hersh, 297 F.3d 1233, 1245 (11<sup>th</sup> Cir. 2002).<sup>18</sup> In United States v. Jimenez, 824 F. Supp. 351 (S.D.N.Y. 1993), the court analyzed a similar challenge to information in the "Means and Methods" portion of a conspiracy charge. Id. at 370. After discussing the general rule that motions to strike supposed surplusage are rarely granted, id. at 369, the court held that since the "Means and Methods" portion of the indictment explained the "alleged structure" of the conspiracy and the "alleged roles" of each defendant, it contained information that was both relevant and admissible, and therefore not subject to a motion to strike. Id. at 370.<sup>19</sup> Likewise, the "Means and Methods" section of the instant indictment describes the general framework and background for the charged conspiracy.

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<sup>18</sup> The Second Circuit has also held that pre-enactment conduct is admissible even if it is not otherwise illegal. "None of the cases permitting the court to consider pre-enactment behavior of the conspirators was based on the fact that it was violative of some other federal statute at the time. The reason it was admitted was to assist the trier of fact to determine the existence and purpose of the conspiracy and to illumine the intent and purpose of the post-enactment behavior." United States v. Smith, 464 F.2d 1129, 1133 (2d Cir. 1972). In Smith, the defendants entered into the conspiratorial agreement before the effective date of the statute. The court explained that

[t]he appellants were not charged or convicted of entering into an illicit agreement but rather of conspiring to collect extensions of credit by extortionate means. Mr. Justice Holmes a long time ago distinguished between the transitory character of an agreement and the continuous nature of the conspiracy which follows. In differentiating between a contract in restraint of trade and a conspiracy in restraint of trade, he pointed out, 'A conspiracy is constituted by an agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes.'

Id. at 1132-33, (quoting United States v. Kissel, 218 U.S. 601, 608 (1910)).

<sup>19</sup>The court also explained that although the "Means and Methods" section was not essential to the indictment, an "indictment need not be limited to statements specifying the elements charged but may, and generally does, describe the nature of the conspiracy charged and enumerate overt acts." Id. at 370.

Finally, the defendant implies in a footnote that references to the Executive Order in the language of Count Three should also be stricken because the government has charged two separate offenses in one count. Doc. 301 at 6, fn. 5. This contention ignores the charging language of Count Three, which clearly and unequivocally states only that the defendant is accused of conspiring to violate 2339B.

**III. COUNT FOUR SUFFICIENTLY STATES A VIOLATION OF CONSPIRING TO MAKE AND RECEIVE CONTRIBUTIONS OF FUNDS, GOODS OR SERVICES TO OR FOR THE BENEFIT OF SPECIALLY DESIGNATED TERRORISTS, IN VIOLATION OF 50 U.S.C. § 1701 ET SEQ., 31 C.F.R. 595, AND 18 U.S.C § 371.**

In challenging the sufficiency of Count Four, the defendant repeats the arguments he raised with respect to Count Three. The United States respectfully refers the court to its analysis of those issues, as set forth above.

The defendant claims that the misidentification of AWDA in overt acts 236, 240, 247 and 253 is particularly significant with respect to Count Four because AWDA is an SDT. If AWDA were the only SDT named in the indictment, the defendant's argument might carry some weight. Count Four, however, also alleges that the "PIJ" and co-defendant SHALLAH, as well as deceased former PIJ Secretary General Fathi Shiqaqi are SDTs.

As set forth above, because the subject overt acts comprise such a small portion of the indictment, and the many other overt acts establish a basis for inferring that the grand jury found probable cause to believe that the defendant conspired to violate the IEEPA, the defendant's arguments must fail.

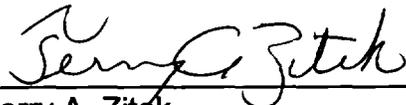
The defendant also fleetingly argues that the indictment is somehow deficient because all the allegations regarding him involve telephone conversations, and the IEEPA does not authorize

the President to regulate such communications. The indictment, however, does not seek to regulate the defendant's telephonic communications; rather, the indictment alleges the existence and substance of telephonic communications as evidence of the charged conspiracy. As set forth above, communications that are part of the fabric of conspiratorial conduct are not treated as protected conduct. The fact that telephonic communications may constitute "circumstantial" evidence is likewise of no moment. "Direct proof of a formal agreement is not necessary to establish the existence of a conspiracy since the 'very nature of conspiracy frequently requires that the existence of an agreement be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.'" Gold, 743 F.2d at 824. See also United States v. Hansen, 262 F.3d 1217, 1246 (11<sup>th</sup> Cir. 2002) (quoting United States v. Diaz, 190 F.3d 1247, 1254 (11<sup>th</sup> Cir. 1999)("An agreement may be proved either by direct or circumstantial evidence and a common scheme or plan may be inferred from the conduct of the participants or from other circumstances.")

WHEREFORE, for the foregoing reasons, defendant Fariz's Motion to Dismiss Counts three and Four should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by facsimile and U.S. mail this 27<sup>th</sup> day of October, 2003, to the following:

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