UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v. -	:	04 Cr. 356 (KBF)
MUSTAFA KAMEL MUSTAFA, a/k/a "Abu Hamza," a/k/a "Abu Hamza al-Masri," a/k/a "Mostafa Kamel," a/k/a "Mostafa Kamel Mostafa,"	:	
Defendant.	:	

MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA IN RESPONSE TO DEFENDANT'S PRETRIAL MOTION

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I. PRELIMINARY STATEMENT

The Government respectfully submits this memorandum of law in response to the pre-trial motion of the defendant Mustafa Kamel Mustafa ("Mustafa" or the "defendant"): (i) to dismiss Counts One, Two, Seven – Ten, and Count Eleven of the Indictment 04 Cr. 356 (KBF) (the "Indictment" or "Ind.") because the charged conduct lacks a sufficient nexus to the United States; (ii) to dismiss all counts of the Indictment for failure to state an offense; (iii) to dismiss Counts Three, Four, Seven, and Eight for failure to adequately identify the underlying conspiracy in violation of Title 18, United States Code, Section 956, in connection with the alleged violations of Title 18, United States Code, Section 2339A; (iv) for a bill of particulars; (v) to strike surplusage in the Indictment; and (vi) to dismiss certain counts on multiplicity grounds or, in the alternative, to compel the Government to elect among various allegedly multiplicitous counts. For the reasons set forth below, the defendant's motion should be denied in its entirety.

First, each count in the Indictment charges conduct with a sufficient nexus to the United States to satisfy the requirements of due process. Second, the defendant's motion to dismiss the

Indictment in its entirety for failing to adequately allege the elements of the charged offenses is entirely without merit. With respect to each of the eleven counts, the Indictment alleges all required elements of the charged offenses and makes detailed and specific factual allegations as to the illegal conduct of the defendant and his co-conspirators. Third, the defendant's motion to dismiss certain counts for failing to identify the underlying conspiracy lacks any legal foundation and should be denied. Fourth, the defendant's request for a bill of particulars also should be denied because the Government has provided the defense with sufficient information about the nature of the charges to permit the defendant to prepare his defense and to avoid any risk of double jeopardy. Moreover, the defendant's motion to strike surplusage from the Indictment should be denied because the contested language is relevant to the case against the defendant. Finally, the defendant's motion to dismiss certain counts of the Indictment on multiplicity grounds is premature. Because the Double Jeopardy Clause protects against successive prosecutions and sentences, it is inappropriate to reach the merits of a multiplicity motion before trial under Second Circuit precedent. In any event, even were the Court to reach the merits of the defendant's multiplicity argument, it should be denied because each count of the Indictment plainly alleges a separate and distinct offense.

II. BACKGROUND

On April 19, 2004, a federal Grand Jury in this District returned the Indictment against Mustafa. The Indictment charges Mustafa in eleven counts. Counts One and Two respectively charge Mustafa with conspiracy to take hostages and substantive hostage-taking, in violation of Title 18, United States Code, Section 1203, in connection with Mustafa's participation in a hostage-taking in Yemen in December 1998. (Ind. ¶¶ 1-4). Counts Three through Six charge Mustafa with providing material support to terrorists and to a designed foreign terrorist

organization, al Qaeda, and conspiring to do the same, in connection with Mustafa's role in establishing a jihad training camp in Bly, Oregon, in violation of Title 18, United States Code, Sections 371, 2339A, and 2339B. (Ind. ¶¶ 5-12). Counts Seven through Ten also charge Mustafa with violating Sections 2339A and 2339B by providing material support to terrorists and a foreign terrorist organization, al Qaeda, and conspiring to do the same, in connection with Mustafa's facilitation of violent jihad in Afghanistan. (Ind. ¶¶ 13-20). Finally, Count Eleven also charges Mustafa with conduct relating to his support of violent jihad in Afghanistan by conspiring to supply goods and services to the Taliban, in violation of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1705(b), and certain regulations promulgated thereunder. (Ind. ¶¶ 21-26).

A. The December 1998 Hostage-Taking in Yemen

As alleged in the Indictment, in or about late 1998, Mustafa provided a co-conspirator ("CC-1"), the leader of the Abyan faction of the Islamic Army of Aden, an Islamic militant group based in Yemen, and a group of co-conspirators (hereafter, the "hostage-takers") with a satellite phone. (Ind. ¶ 3(a)). On or about December 27, 1998, Mustafa received three telephone calls at his home from the satellite phone he had previously provided to the hostage-takers. (Ind. ¶ 3(b)). On or about December 28, 1998, the hostage-takers stormed a caravan of sport utility vehicles carrying sixteen tourists and took the tourists hostage by force. (Ind. ¶ 3(c)). On or about December 28, 1998, Mustafa spoke to CC-1 on the satellite phone after the hostage-taking was already underway. During that telephone call, Mustafa agreed to act as an intermediary for CC-1 and the hostage-takers, and gave CC-1 certain advice related to the hostage-taking. (Ind. ¶ 3(d)). On or about December 29, 1998, after the hostage-taking was underway, Mustafa ordered five hundred British pounds worth of additional airtime for the satellite phone being used by the

hostage-takers. (Ind. ¶ 3(e)). On or about December 29, 1998, the Yemeni military attempted to rescue the hostages. During the rescue attempt, the hostage-takers used the hostages as human shields and attempted to fight off the Yemeni military. Although the military ultimately overpowered the hostage-takers, during the rescue attempt four of the hostages were killed and several others wounded. (Ind. ¶ 3(f)).

B. The Efforts to Create a Jihad Training Camp in Bly, Oregon

As elicited during the trial of co-defendant Oussama Kassir, in or about 1998 or 1999, co-conspirator Ernest James Ujaama (denoted "CC-2" in the Indictment), a United States citizen, traveled to London, where he became one of Mustafa's followers at the Finsbury Park Mosque. (AH 525 - 527).[1] Ujaama subsequently returned to his residence in Seattle, Washington, and learned about a ranch in Bly, Oregon, which Ujaama identified as a prime location for a jihad training camp for use by Mustafa and his followers. (AH 528 - 529).

On several occasions in or about October 1999, Mustafa discussed with Ujaama the creation of that jihad training camp in Bly, Oregon. (Ind. ¶ 7(a)). On or about October 25, 1999, Ujaama communicated to Mustafa that he and other co-conspirators were stock-piling weapons and ammunition in the United States. (Ind. ¶ 7(b)). On or about October 25, 1999, Mustafa received a facsimile proposal regarding the creation of a jihad training camp in Bly, Oregon. (Ind. ¶ 11(a)). Around December 1999, two of Mustafa's followers – co-defendants Oussama Kassir and Haroun Aswat – flew to New York and then traveled to Seattle to help Ujaama establish the jihad training camp in Bly. (AH 556).

[1] The letters "AH" followed by numbers denote the bates stamp assigned to the discovery that is being referenced.

C. Facilitating Violent Jihad in Afghanistan

In or about June 2000, Ujaama traveled from London, England, to New York. Ujaama's trip was intended, in part, to raise money for the Finsbury Park Mosque's hijrah (or migration) fund from worshipers at local mosques. During this trip, Ujaama traveled through Manhattan, New York, on his way to attempt to collect money at a mosque in Long Island, New York. The money collected by Ujaama during this trip was added to the Finsbury Park Mosque's hijrah fund when Ujaama returned to London. (Ind. ¶ 15(a)). In or about November 2000, Mustafa asked Ujaama, a U.S. citizen, to escort another co-conspirator ("CC-3"), who was one of the defendant's followers, from London, England, to a jihad training camp in Afghanistan operated by a "front-line commander." (Ind. ¶ 15(b)). In or about November 2000, Ujaama took money out of the Finsbury Park Mosque's hijrah fund, which was to be used for certain travel expenses relating to the trip to Afghanistan with CC-3. (Ind. ¶ 15(c)). In or about November 2000, Mustafa introduced Ujaama to another co-conspirator ("CC-4") for purposes of arranging safehouses and lodging in Pakistan and safe passage and transportation into Afghanistan. (Ind. ¶ 15(d)). In or about November 2000, Ujaama and CC-3 traveled together from London, England, to Pakistan. Both men separately entered Afghanistan shortly thereafter. (Ind. ¶ 15(e)). In or about March or April 2001, Mustafa sent directions to CC-3, who was in Afghanistan at the time, to seek out the "front-line commander" in Afghanistan who was expecting CC-3. (Ind. ¶ 19(a)).

D. The Conspiracy to Provide Goods and Services to the Taliban

From in or about the Spring of 2000, up to and including at least September 6, 2001, Mustafa posted messages on the website of Supporters of Shariah ("SOS"), an Islamic organization led by Mustafa, with the assistance of Ujaama, a U.S. citizen, urging the defendant's followers to donate money, goods, and services to Taliban-sponsored programs in

the area of Afghanistan controlled by the Taliban. (Ind. ¶ 26(a)). In or about late 2000, at the request of Mustafa, Ujaama agreed to deliver CC-3, a person desiring to undergo violent jihad training, to an individual located in the territory of Afghanistan controlled by the Taliban. (Ind. ¶ 26(b)). In or about late 2000, at the request of Mustafa, Ujaama delivered compact discs containing the defendant's statements to certain individuals located in the territory of Afghanistan controlled by the Taliban. (Ind. ¶ 26(c)). From in or about March 2001, up to and including at least September 6, 2001, Mustafa and Ujaama discussed plans to establish a computer lab in Afghanistan. (Ind. ¶ 26(d)). During these discussions, Mustafa stated that he wanted the computer lab to be located in Kandahar and to service Taliban officials and the Afghan people located in Kandahar, which was then controlled by the Taliban. (*Id.*). On or about September 6, 2001, Ujaama departed London, England for Pakistan, and then Afghanistan. Prior to his departure, Mustafa gave Ujaama approximately six thousand British pounds which were, in part, to be used to lease a building which would house the computer lab and to pay for some of the start-up expenses for the computer lab. (Ind. ¶ 26(e)).

E. Extradition

On May 27, 2004, pursuant to an extradition request from the United States, Mustafa was arrested by the Metropolitan Police at New Scotland Yard. Mustafa was then prosecuted for various British offenses. Mustafa was subsequently extradited to the United States on October 4, 2012. Trial is scheduled for March 31, 2014.

III. ARGUMENT

A. The Defendant's Motion to Dismiss Count Ones, Two, Seven through Ten, and Eleven for Failure to Allege a Sufficient Nexus to the United States Should Be Denied

The defendant has moved to dismiss Counts One, Two, Seven through Ten, and Eleven of the Indictment on the ground that these counts fail to allege a sufficient nexus between the charged conduct and the United States to satisfy the Due Process Clause. As set forth below, all of these counts allege a sufficient nexus to the United States and accordingly, the defendant's motion to dismiss these counts should be denied.

1. Applicable Law

Where Congress has stated an intent to apply a statute extraterritorially, federal courts are "'bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.'" *United States* v. *Ramzi Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (quoting *United States* v. *Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983)). Extraterritorial application of federal criminal statutes does not violate due process where there is "a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." *See United States* v. *Ramzi Yousef*, 327 F.3d at 111 (citing *United States* v. *Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990)).[2]

[2] The Government is aware of only two cases in which a federal court has dismissed a criminal prosecution on the ground that a statute's extraterritorial application violated the Due Process Clause. Neither is applicable here. In *United States* v. *Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006), the Ninth Circuit found that a prosecution of the foreign crew of a foreign vessel loaded with cocaine that was intercepted off the coast of South America violated the due process clause where the Government offered no evidence that the crew, vessel or narcotics had any connection to the United States. In *United States* v. *Ali*, 885 F. Supp. 2d 55, 61 (D.D.C. 2012), the district court dismissed hostage taking counts against a defendant who had seized a Bahamian-flagged ship and where the only connection to the U.S. was the presence of cargo owned by an American company on board the ship.

The Second Circuit has recently held that with respect to foreign nationals who are acting "entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests" or when the "criminal activity . . . targets U.S. citizens or interests or threatens the security or government functions of the United States." *United States* v. *Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011). The Court dismissed as "irrelevant" that, in the context of the "sting" operation at issue in that case, "the defendants' conduct never came close to harming any U.S. person or property," finding that "[j]urisdictional nexus is determined by the aims of the conspiracy, not by its effects." *Id.* at 118-19. Furthermore, a number of courts in this District have emphasized that the defendant need not act with "the specific purpose of harming interests of or related to the United States." *United States* v. *Jamal Yousef*, No. S3 08 Cr. 1213 (JFK), 2010 WL 3377499, at *4 (S.D.N.Y. Aug. 23, 1010) (Keenan, J.). Rather, the requisite nexus is established where "the evidence supports the conclusion that [the defendant] was aware that the charged conduct would have such an effect." *Id.*; *see also United States* v. *Bout*, No. 08 Cr. 365 (SAS), 2011 WL 2693720, at *4 (S.D.N.Y. July 11, 2011) (Scheindlin, J.).

In *Bout*, for example, the District Court found that the indictment sufficiently alleged a nexus to the United States where it charged that Bout, after being advised that a designated foreign terrorist organization – the Revolutionary Armed Forces of Colombia (the "FARC") – needed anti-aircraft weapons to kill American pilots, agreed to prepare everything the FARC needed, and stated that he (Bout) shared FARC's goal to kill American forces in Colombia. *See Bout*, 2011 WL 2693720, at *3. In *United States* v. *Jamal Yousef*, the District Court found the requisite nexus where the weapons the defendant agreed to sell to the FARC in exchange for FARC-supplied cocaine were stolen from a U.S. military arsenal (and the defendant knew that,

based on the statements of a co-conspirator), the defendant's co-conspirators were aware that the FARC transported narcotics into the United States and the defendant's co-conspirators expressed concerns about U.S. law enforcement intervention. *See Jamal Yousef*, 2010 WL 3377499 at *5; *see also United States* v. *Al Kassar*, 660 F.3d at 118 (defendants conspired to sell arms to individuals they believed to be members of the FARC, who represented that the weapons were to be used by the FARC against the U.S. military in Colombia).

Another court in this District also found sufficient nexus where the indictment alleged that the defendant conspired to support a foreign terrorist organization but did "not allege that the defendant engaged or intended to engage in specific acts either within the United States or directed at its citizens or property here or in other countries." *United States* v. *Ahmed*, 10 Cr. 131 (PKC), 2011 WL 5041456, at *1 (S.D.N.Y. Oct. 21, 2011). In that case, the District Court found that because the statutes at issue required that the organization in question – Al Shabaab – was designated by the Secretary of State as a foreign terrorist organization and that the defendant knew the organization was so designated or that it engaged in terrorism or terrorist activity, the defendant's prosecution in the U.S. would be "neither arbitrary nor fundamentally unfair." *Id.* at *2.

A number of courts in this District have further explained that the "nexus requirement 'ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being haled into court in this country.'" *United States* v. *Al Kassar*, 582 F. Supp. 2d 488, 494 (S.D.N.Y. 2008) (quoting *United States* v. *Klimavicius-Viloria*, 144 F.3d 1239, 1257 (9th Cir. 1998)); *see also Bout*, 2011 WL 2693720, at *2; *Jamal Yousef*, 2010 WL 3377499, at *3. The Second Circuit has not adopted this standard however, and its decision in *Al Kassar* has substantially undermined its applicability. In *Al Kassar*, the defendants claimed, in

addition to their argument that the requisite nexus was lacking, that U.S. jurisdiction was fundamentally unfair because they "lacked fair warning that their conduct exposed them to U.S. criminal prosecution." *Al Kassar*, 660 F.3d at 119. The Second Circuit rejected that claim, holding that the concept of fair warning requires only that "no man . . . be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* (quoting *Bourie* v. *City of Colombia*, 378 U.S. 347, 351 (1964)). The Second Circuit held that "[f]air warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." *Id.* (emphasis in original).

2. Discussion

a. The Charged Conduct Has a Sufficient Nexus to the United States

Counts One and Two concern a hostage-taking that occurred in Yemen in 1998, in violation of Title 18, United States Code, Section 1203 ("Section 1203"). As an initial matter, the defendant's reliance on *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869, 2878, 2881 (2010) (concerning Section 10(b) of the Securities Exchange Act of 1934, which the Court found did not apply extraterritorially because the statute "gives no clear indication of an extraterritorial application"), is misplaced. As the Second Circuit has held, "[t]he ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes." *United States* v. *Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012) (citing *Al Kassar*, 660 F.3d at 118); *see also United States* v. *Bowman*, 260 U.S. 94, 98 (1922) ("But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government

to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.").[3]

In any event, unlike the statute at issue in *Morrison*, Congress clearly expressed its intent to apply Section 1203 extraterritorially. At the time of the charged offense, Section 1203 criminalized conduct that occurred "whether inside or outside the United States." 18 U.S.C. § 1203(a). Moreover, the statute explicitly stated, as relevant here: "It is not an offense under this section if the conduct required for the offense occurred outside the United States unless—(A) the offender or the person seized or detained is a national of the United States." 18 U.S.C. § 1203(b). In short, the statute unambiguously applies to conduct occurring outside the United States if a victim of the crime is a national of the United States. Therefore, there can be no serious dispute that Section 1203 applies extraterritorially. *See United States* v. *Yunis*, 681 F. Supp. 896, 905 (D.D.C. 1988) ("Therefore, the plain language of the statute [18 U.S.C. § 1203] coupled with its legislative history and purpose clearly support a finding that Congress intended to assert extraterritorial jurisdiction over offenders such as [the defendant] who allegedly seized Americans hostage in foreign territory.").

The extraterritorial application of Section 1203 to the conduct alleged in Counts One and Two would not violate due process. Both counts charge that Mustafa participated in the kidnapping of two U.S. nationals in Yemen. As the Second Circuit has held, "[f]or non-citizens

[3] The defendant also cites *Morrison* for the proposition that extraterritorial application may generate potential conflicts with the laws of other nations, and asserts that this is problematic here, because some of the conduct alleged in the Indictment was not illegal in the United Kingdom. (Def. Mem. at 5, fn. 1). However, this argument has been expressly rejected by the Second Circuit in the context of criminal statutes. *See Ramzi Yousef*, 327 F.3d at 86 ("[I]n fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.") (quotations and citations omitted).

acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States *or to U.S. citizens* or interests." *Al Kassar*, 660 F.3d at 118 (citing *United States* v. *Peterson*, 812 F.2d 486, 494 (9th Cir. 1987)) (emphasis added). The harm to U.S. citizens that is alleged in Counts One and Two is clearly sufficient to satisfy due process, and there simply is no credible argument that application of the statute would be "arbitrary or fundamentally unfair" under these circumstances. *See Ramzi Yousef*, 327 F.3d at 111 (citing *Davis*, 905 F.2d at 245-49).

The defendant claims that it was "mere coincidence" that two U.S. nationals were victims of the kidnapping and that the defendant had "no expectation" that U.S. interests would be harmed, Def. Mem. at 7-8. On that basis, the defendant asserts that application of Counts One and Two would be unfair. However, even assuming these factual assertions are accurate, Mustafa's claim still fails, as there is no requirement that the defendant intend to harm the United States or U.S. nationals by his actions, *see Ahmed*, 2011 WL 5041456, at *1 (finding sufficient nexus where "[t]he indictment does not allege that the defendant engaged or intended to engage in specific acts either within the United States or directed at its citizens or property here or in other countries"), or that the defendant specifically foresaw prosecution in the United States, *see Al Kassar*, 660 F.3d at 119. In any event, the Government expects that, at trial, one of the kidnapping victims will testify that the hostage-takers collected the passports of the hostages, which included one American passport, and one of the hostage-takers repeatedly asked the hostages if there were any more Americans in the group. That victim is expected to further testify that this hostage-taker later told the group of hostages, in substance, that the hostage-takers were mujahideen; that the hostages had been taken because the hostage-takers' friends of were in prison; and that the hostages were not responsible for the bombings in Iraq, but their

governments were. Thus the evidence easily supports an inference that the hostage-takers were targeting U.S. victims.

Accordingly, Mustafa's motion to dismiss Counts One and Two should be denied.[4]

b. Counts Seven Through Ten Allege a Sufficient Nexus

With respect to Counts Seven through Ten, which concern the defendant's efforts to facilitate violent jihad in Afghanistan from June 2000 to December 19, 2001, the Indictment alleges that the defendant violated the statutes that prohibit providing, and conspiring to provide, material support to terrorists, *see* 18 U.S.C. § 2339A, and that prohibit providing, and conspiring to provide, material support to a designated foreign terrorist organization, *see* 18 U.S.C. § 2339B. The defendant does not dispute, nor could he, that both statutes can be applied extraterritorially.

The application of both of these statutes to the defendant's conduct is consistent with due process. Counts Seven and Eight allege violations of Title 18, United States Code, Section 2339A. Both counts allege that the defendant conspired to, and did, provide material support, knowing and intending that the support was to be used in connection with a conspiracy to kill, kidnap, and harm persons and to damage property in a foreign country. Count Seven alleges that in furtherance of such a conspiracy, in or about June 2000, Ujaama (who is alleged to be a U.S. citizen) traveled from London to New York, in part to raise money for the hijrah fund of the Finsbury Park Mosque. The Indictment alleges that Ujaama collected money during Ujaama's

[4] Defense counsel cites multiple cases in support of his assertion that this case is unlike every case in which a court found there to be sufficient nexus. (Def. Mem. at 7-8). First, the cases cited by the defendant set forth circumstances that were sufficient but not necessary to establish nexus. Second, the defendant's list is not exhaustive and indeed omits one case in this District in which the court found sufficient nexus where the indictment did "not allege that the defendant engaged or intended to engage in specific acts either within the United States or directed at its citizens or property here or in other countries." *Ahmed*, 2011 WL 5041456, at *1.

trip, and this money was later added to the Finsbury Park Mosque's hijrah fund. (Ind. ¶ 15(a)). Later, in November 2000, the Indictment alleges that the defendant asked Ujaama to escort CC-3 from London to a jihad training camp in Afghanistan. (Ind. ¶ 15(b)). Ujaama subsequently withdrew money from the hijrah fund of the Finsbury Park Mosque in order to pay for certain travel expenses related to Ujaama's trip to Afghanistan with CC-3. (Ind. ¶ 15(c)).

The Indictment thus alleges that significant activity – the raising of funds – took place in the United States by a U.S. citizen, in connection with the defendant's provision of material support for terrorist activity, as charged in Counts Seven and Eight. The alleged activity within the United States in furtherance of these counts is in itself a sufficient basis for establishing the requisite nexus with the United States. *See Jamal Yousef*, 2010 WL 3377499, at *4 ("In determining whether a sufficient nexus exists, courts also have considered factors such as the 'defendant's citizenship or residency, the location of the acts allegedly giving rise to the suit and whether those acts could be expected to or did produce an effect in the United States.'") (quoting *Goldberg* v. *UBS AG*, 690 F. Supp. 2d 92, 106 (E.D.N.Y. 2010)).

In addition, the Government anticipates that it will prove at trial that the jihad training camp to which the defendant sent CC-3 provided, among other things, military and weapons training, training in assassinations, hand-to-hand combat, and explosives. Attendees of the jihad training camp were schooled in jihad in support of goals including the expulsion of non-believers, including Americans, from the Arabian peninsula. In view of the activities and purpose of the jihad training camp, as well as the reasonably foreseeable results of sending individuals to such camps, the defendant's conduct charged in Counts Seven and Eight – his

efforts to arrange for CC-3's terrorist training – has a sufficient nexus to the United States and therefore his prosecution here is not arbitrary or unfair.[5]

Counts Nine and Ten allege violations of Title 18, United States Code, Section 2339B. Specifically, both counts allege that the defendant conspired to, and did, provide material support to al Qaeda. Al Qaeda's primary purpose and defining philosophy is its commitment to attack the United States, its allies, and its interests, and to kill Americans anywhere in the world they may be found. Indeed, the conduct alleged in these counts occurred around the time of the al Qaeda attacks on September 11, 2001 and numerous other attacks intended to kill Americans around the world, including the bombings of the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, in August 1998, and the October 2000 bombing of the *USS Cole* in Aden, Yemen. The defendant's conduct also occurred a few years after unambiguous statements by al Qaeda leadership announcing the terrorist group's agenda of terror against the United States. For instance, in 1996, Usama Bin Laden ("Bin Laden") issued a public "Declaration of Jihad Against the Americans," which called for the murder of United States military personnel serving on the Arabian peninsula. In February 1998, Bin Laden and his then-deputy, Ayman al Zawahiri, issued a purported *fatwah*, which is a ruling on Islamic law, calling all Muslims able to do so to kill Americans, whether civilian or military, anywhere in the world. In light of al Qaeda's unambiguous agenda to attack the United States, the charges against the defendant for his support of al Qaeda have a sufficient nexus to the U.S. and pose no problem under the Due Process Clause.

[5] Should the defendant renew his challenge at the close of the Government's case, the Court could at that point determine whether the Government had demonstrated a sufficient nexus between the United States and its interests and the defendant's actions such that due process was satisfied.

First, it was natural and foreseeable that the defendant's actions, though committed outside the United States, would further the activities of al Qaeda, and would therefore detrimentally impact the United States and its citizens and interests, either within the United States or elsewhere. Given the timeframe of the charged conduct, it was entirely foreseeable that al Qaeda would use the defendant's support to further its goal to attack America and its interests. That foreseeable result of the defendant's provision of support is alone sufficient to establish the requisite nexus to satisfy due process. *See Jamal Yousef*, 2010 WL 3377499 at *4-5 ("CS-1 represented to Defendant's co-conspirators that the FARC relies on Mexican drug cartels to transport narcotics into the United States. . . . With such knowledge, it follows that in conspiring to provide weapons to the FARC, Defendant knew that arming an international drug-trafficking organization which smuggles narcotics across United States borders would have a considerable effect on United States interests."). By providing support to al Qaeda, the defendant supported a terrorist organization seeking to harm America's most paramount interests: the safety and security of its citizens, either in the United States or abroad. The nexus between the United States and its interests and the defendant's alleged acts is therefore self-explanatory, and is more than sufficient to satisfy the due process requirement that the Court's exercise of jurisdiction not be arbitrary or fundamentally unfair.

That the defendant did not specifically intend to harm the United States, its citizens, or its interests, as the defendant claims, is irrelevant. Because a defendant need not "act with the specific purpose of harming interests of or related to the United States," where, as here, "the evidence supports the conclusion that [the defendant] was aware that the charged conduct would have such an effect." *Jamal Yousef*, 2010 WL 3377499, at *4. Al Qaeda's public statements and history of terrorist attacks make clear its intent to harm the United States. Where, as here, it

is alleged that the defendant supported al Qaeda, his activity plainly strengthened the organization and furthered its goals, and thus harmed the interests of the United States. No more is required to establish the requisite jurisdictional nexus, and therefore the defendant's due process challenge should be rejected. *See Ahmed*, 2011 WL 5041456, at *1-2 (finding sufficient nexus in case where defendant was charged with conspiring to provide material support to a foreign terrorist organization but where indictment did not allege that defendant engaged in acts within U.S. or directed at U.S. citizens).[6]

c. Count Eleven Alleges a Sufficient Nexus

Count Eleven concerns Mustafa's participation in a conspiracy to provide goods and services to the Taliban from Spring 2000 to late 2001, in violation of Title 50, United States Code, Section 1705(b) and Executive Order 13129. The terms of that Order make clear that it applies to conduct occurring outside the United States where such conduct involves a U.S. person. *See* Executive Order 13129, Sec. 2(a) (prohibiting "any transaction or dealing by United States persons *or* within the United States in property or interests in property blocked pursuant to this order") (emphasis added); Sec. 2(b) (prohibiting "the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, *wherever located*, of any goods, software, technology (including technical data), or services to the territory of Afghanistan controlled by the Taliban or to the Taliban or persons designated pursuant to this

[6] Notwithstanding the Second Circuit's rejection of the foreseeability standard, to the extent the defendant claims a due process violation because he did not expect to be prosecuted in the United States, his claim of unfair surprise must fail. At the time of the defendant's alleged offenses, al Qaeda had launched numerous terrorist attacks against the United States, including the August 1998 bombing of American Embassies in East Africa, the October 2000 attack on the *USS Cole*, and the attacks on September 11, 2001. It was therefore entirely foreseeable that the United States would prosecute those who supported al Qaeda, and thus that the defendant's conduct could result in a U.S. prosecution.

order") (emphasis added); Sec. 2(d) ("[A]ny transaction by any United States person *or* within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order is prohibited.") (emphasis added).

Extraterritorial application of Title 50, United States Code, Section 1705(b), would be consistent with due process. As President Clinton found in connection with Executive Order 13129:

> I, WILLIAM J. CLINTON, President of the United States of America, find that the actions and policies of the Taliban in Afghanistan, in allowing territory under its control in Afghanistan to be used as a safe haven and base of operations for Usama bin Ladin and the Al-Qaida organization who have committed and threaten to continue to commit acts of violence against the United States and its nationals, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and hereby declare a national emergency to deal with that threat.

Exec. Order No. 13129, 64 Fed. Reg. 36759 (July 4, 1999). In light of the findings set forth in Executive Order 13129, the allegations set forth in Count Eleven are sufficient such that application of the statute to the defendant would not violate due process. The defendant is charged with conspiring with a U.S. citizen to supply funds, goods, and services to the Taliban, an organization that was well-known during the commission of the offense – both within Afghanistan and throughout the world – for supporting and sheltering al Qaeda. *See also supra* III.A.2.b (discussing al Qaeda's longstanding agenda of violence and murder against the United States and its citizens). The provision of support to the Taliban therefore would have the clear effect of harming the interests of the United States, such that the defendant's prosecution here is neither arbitrary nor fundamentally unfair. *See Ahmed*, 2011 WL 5041456, at *3.

B. The Defendant's Motion to Dismiss All Counts of the Indictment for Failure to State an Offense Should Be Denied

Mustafa also moves to dismiss the entire Indictment on the ground that each of the counts fails to sufficiently allege an offense. (Def. Mem. at 15-32). While acknowledging that each of the eleven counts "dutifully tracks the statutory language," the defense nonetheless contends that the counts lack "sufficient factual particularly" to satisfy the Fifth and Sixth Amendments. (Def. Mem. at 15-16). This argument is entirely without merit. All eleven counts of the Indictment far exceed what is necessary to sufficiently allege an offense because they state the essential elements of the charges against the defendant and describe with enough particularity the conduct on which those charges are based.

1. Applicable Law

"A criminal defendant is entitled to an indictment that states the essential elements of the charge against him." *United States* v. *Pirro*, 212 F.3d 86, 91 (2d Cir. 2000) (citing *Jones* v. *United States*, 526 U.S. 227, 232 (1999)). Little more is required. *See* Fed. R. Crim. P. 7(c)(1) (describing indictment as a "concise . . . statement of the essential facts."). Indeed, the Second Circuit has "consistently upheld indictments that 'do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.'" *United States* v. *Walsh*, 194 F.3d 37, 44 (2d Cir. 1999) (quoting *United States* v. *Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975)); *see also United States* v. *Yannotti*, 541 F.3d 112, 127 (2d Cir. 2008).

2. Discussion

As an initial matter, the defendant does not appear to contest, nor could he, that all eleven of the counts in the Indictment accurately track the language of each of the statutes charged.

Instead, the defendant appears to make two other, related arguments. First, the defendant views each count in the Indictment in isolation and argues that each count fails to provide sufficient factual details to inform the defendant of the nature of the charges. (Def. Mem. at 17). Second, the defendant argues that the overt acts alleged do not themselves establish the crime charged. (Def. Mem. at 17). The defendant's arguments should be rejected.

First, even when viewed in isolation, each count provides sufficient factual particularity. Aside from tracking the language of the applicable statute, each Count specifies "the time and place (in approximate terms) of the alleged crime." *United States* v. *Walsh*, 194 F.3d at 44 (quoting *United States* v. *Tramunti*, 513 F.2d at 1113). The defendant's argument is even less compelling when viewing the Indictment as a whole, as is appropriate when considering such a claim. *See Walsh*, 194 F.3d at 45 ("[The defendant's] main contention, that he was unable to distinguish the counts because of the broad and sometimes overlapping dates, is unavailing when the Indictment as a whole is examined."). The counts are clearly grouped to correspond to various courses of conduct, including "The Attack in Yemen" (Counts One and Two); "The Bly, Oregon Jihad Training Camp" (Counts Three through Six); "Facilitating Violent Jihad in Afghanistan" (Counts Seven through Ten); and "IEEPA Violations" (Count Eleven). Thus, the Indictment faithfully tracks the relevant statutory language and provides sufficient factual details.[7]

Second, it is of no import that some of the overt acts alleged in the Indictment are not by their nature criminal. As the defense concedes, overt acts "no doubt need not themselves be criminal in nature." (Def. Mem. at 17). Where, as here, the otherwise lawful overt acts alleged

[7] To the extent the defendant is simply requesting more information about the charged conduct, as set forth below, such information is readily available in the discovery that has been produced.

in the Indictment were committed in furtherance of the illegal conspiracies alleged, they do not, as the defendant contends, "simply 'fall beyond the scope of the relevant criminal statute[.]'" (Def. Mem. at 18 (quoting *United States* v. *Panarella*, 277 F.3d 678, 685 (3d Cir. 2000))). To the contrary, these acts were part of, and in furtherance of, the charged conspiracies. Accordingly, the defendant's motion to dismiss the Indictment for failure to state an offense is entirely without merit, and should be denied.

C. The Defendant's Motion to Dismiss Counts Three, Four, Seven, and Eight for Failure to Identify the Requisite Conspiracy Should Be Denied

The defendant next moves to dismiss Counts Three, Four, Seven, and Eight, which allege conspiracy and substantive violations of Title 18, United States Code, Section 2339A, and which each allege that the material support and resources were to be used in connection with a violation of Title 18, United States Code, Section 956. The defendant argues that these counts should be dismissed because they "fail[] to articulate the underlying § 956 conspiracy that constitutes an essential element of the offense charged." (Def. Mem. 29). The defendant's argument has no basis in law and can be swiftly rejected.[8]

The defendant contends that the disputed counts do not contain sufficient information about the details of the Section 956 conspiracy that is referenced in each count. This argument can be rejected principally for two reasons. First, as set forth above, *see supra* III.B., Counts

[8] The sole case cited by the defendant purportedly in support of his position, *United States* v. *Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004), is inapposite. In that case, the district court rejected the argument that Title 18, United States Code, Section 2339A was vague as applied to the defendant. *Sattar*, 314 F. Supp. 2d at 303. The district court further held that the alleged violation of Section 956 was adequately pled and noted that "an indictment need do little more than track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *Id.* (quoting *United States* v. *Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992)). The defendant's requested remedy – that the counts be dismissed – is without support.

Three, Four, Seven, and Eight are adequately pled. Second, the defendant's argument is, in essence, a claim that the information contained in the Indictment is insufficient to adequately apprise him of the charged conduct. However, as set forth below, *see infra* III.D, the defendant has been provided sufficient information about the charges against him through the Indictment and discovery in this case.

D. The Defendant's Motion for a Bill of Particulars Should Be Denied

The defendant also moves for a bill of particulars. On April 3, 2013, the defense sent the Government a letter detailing the items sought in the bill of particulars – a list that is recited in the defense's brief. The defense argues that, unless he is provided with a bill of particulars, he will be forced to "proceed to trial without sufficient notice of precisely what charges he faces, and without ample time to locate witnesses and conduct a meaningful investigation of the offenses alleged." (Def. Mem. at 33). As an initial matter, the defendant requests a plethora of information to which he is not entitled. Moreover, the defendant's request should be denied because ample information has already been provided to the defense through the Indictment and the Government's production of discovery.

1. Applicable Law

It is well-established that the proper scope and function of a bill of particulars is to provide sufficient information about the nature of the charge to enable a defendant to prepare for trial, to avoid unfair surprise, and to preclude a second prosecution for the same offense. *See* Fed. R. Crim. P. 7(f); *United States* v. *Torres*, 901 F.2d 205, 234 (2d Cir. 1990), *abrogated on other grounds, United States* v. *Marcus*, 628 F.3d 36 (2d Cir. 2010); *United States* v. *Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987). A bill of particulars is required "only when the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is

accused." *Torres*, 901 F.2d at 234 (citation omitted); *see also United States* v. *Cephas*, 937 F.2d 816, 823 (2d Cir. 1991); *United States* v. *Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984). In addition, if the information needed to serve those purposes is provided through some other means, a bill of particulars is not necessary. *See Bortnovsky*, 820 F.2d at 574; *United States* v. *Morales*, 280 F. Supp. 2d 262, 274 (S.D.N.Y. 2003); *United States* v. *Sattar*, 314 F. Supp. 2d 279, 318-319 (S.D.N.Y. 2004).

A bill of particulars is not appropriate where the bill is sought to obtain evidentiary detail useful to the defendant but not necessary to apprise him of the charges. *See Torres*, 901 F.2d at 234. "A bill of particulars is not a general investigative tool, a discovery device or a means to compel the government to disclose evidence or witnesses to be offered prior to trial." *United States* v. *Gibson*, 175 F. Supp. 2d 532, 537 (S.D.N.Y. 2001) (citation omitted). The Government is not required to "particularize all of its evidence," *Cephas*, 937 F.2d at 823, disclose the precise manner in which the crimes charged in the indictment were committed, *see Torres*, 901 F.2d at 233-34, or provide a preview of the Government's case or legal theory, *see United States* v. *Muyet*, 945 F. Supp. 586, 599 (S.D.N.Y. 1996); *United States* v. *Taylor*, 707 F. Supp. 696, 699 (S.D.N.Y. 1989). The ultimate test is whether the information sought is necessary to give notice of the charge against the defendant, not whether it would be helpful to him. *See United States* v. *Trippe*, 171 F. Supp. 2d 230, 240 (S.D.N.Y. 2001); *United States* v. *Conley*, No. 00 Cr. 816, 2002 WL 252766, at *4 (S.D.N.Y. Feb. 21, 2002).

Applying these principles, courts routinely deny motions for bills of particulars that are, at bottom, demands for additional details of the manner in which the offense was committed. *See United States* v. *Mitloff*, 165 F. Supp. 2d 558, 569 (S.D.N.Y. 2001) (noting that Government may not be compelled to provide bill of particulars disclosing manner in which it will prove

charges, manner in which defendant committed the crime charged, or a preview of Government's evidence or legal theories). Courts also "routinely den[y]" demands for bills of particulars setting forth the identities of co-conspirators. *Trippe*, 171 F. Supp. 2d at 240; *see also United States* v. *Bin Laden*, 92 F. Supp. 2d 225, 242 (S.D.N.Y. 2000) ("[R]equests, such as those made by the Defendants here, for particulars as to when, where, how, and with whom each individual defendant joined an alleged conspiracy have 'almost uniformly been denied.'") (citation omitted); *Torres*, 901 F.2d at 233-34 (demands for "whens" and "wheres" and "by whoms" within charged conspiracy are improper attempts at general pre-trial discovery). Courts faced with requests for such disclosures consider, among other factors, the number of co-conspirators, the duration and breadth of the charged conspiracy, whether revealing the identity of co-conspirators would pose a risk to co-conspirator witnesses, whether other materials provide adequate notice of the charges, and the voluminousness of pretrial disclosures. *See United States* v. *Nachamie*, 91 F. Supp. 2d 565, 572 (S.D.N.Y. 2000) (setting forth factors).

2. Discussion

A bill of particulars is unwarranted because the Indictment and discovery materials provide sufficient information about the nature of the charges in this case to enable the defendant to prepare for trial, to avoid unfair surprise, and to preclude a second prosecution for the same offense. *See* Fed. R. Crim. P. 7(f); *Torres*, 901 F.2d at 234 (2d Cir. 1990); *Bortnovsky*, 820 F.2d at 574. In view of the information contained in the Indictment, coupled with the significant volume of discovery produced by the Government, the defendant simply cannot claim that he is unaware of the specific acts with which he is charged. In short, there is no danger in this case that the defendant will suffer from unfair surprise at trial. Moreover, the extensive information

already made available to defense counsel provides a sufficiently detailed picture of the charged offenses to eliminate any risk of double jeopardy.

Tellingly, the defendant's motion dwells almost exclusively on the allegations in the Indictment and makes no reference to information disclosed in the Government's production of discovery. This omission is fatal to the defendant's motion, as discovery is an acceptable form through which information can be provided to the defense. *See, e.g.*, *United States* v. *Chen*, 378 F.3d 151, 163 (2d Cir. 2004) (declining to find abuse of discretion where district court denied motion for bill of particulars and where "extensive discovery furnished defendants with significant insight into the government's case"); *United States* v. *Binday*, No. 12 Cr. 152 (CM), 2012 WL 6135013, at *11 (S.D.N.Y. Dec. 10, 2012) ("If the information the defendant seeks 'is provided in the indictment or in some acceptable alternate form,' *such as discovery* or other correspondence, no bill of particulars is required.") (quoting *Bortnovsky*, 820 F.2d at 572) (emphasis added); *Bin Laden*, 92 F. Supp. 2d at 233-34 ("in deciding whether a bill of particulars is needed, the court must determine whether the information sought has been provided elsewhere, *such as in other items provided by discovery*, responses made to requests for particulars, prior proceedings, and the indictment itself.") (quoting *United States* v. *Strawberry*, 892 F. Supp. 519, 526 (S.D.N.Y. 1995)) (emphasis added).[9]

Indeed, the Government has produced a significant volume of discovery so far. This discovery has included, among other things, an interview of the defendant concerning his

[9] The defendant's citation to *United States* v. *Davidoff*, 845 F.2d 1151, 1155 (2d Cir. 1988) (Def. Mem. at 37), is misguided. There, the Second Circuit considered whether a defendant in a criminal RICO case "preparing to meet charges of extorting funds from one company had a fair opportunity to defend against allegations of extortions against unrelated companies, allegations not made prior to trial." *Davidoff*, 845 F.2d at 1154. In this case, the defendant is simply seeking more evidentiary detail with respect to the charged offenses.

involvement in the conduct charged in Counts One and Two, the trial testimony of witnesses in the trial of co-defendant Kassir encompassing the conduct charged in Counts Three through Eleven, search warrant affidavits that include additional details of the defendant's criminal conduct, and a significant volume of recordings of the defendant that reflect his criminal intent. This discovery gives the defendant a clear picture of the conduct underlying the charges that he is facing.

For instance, the trial testimony of one cooperating witness, Ernest James Ujaama (who is referred to in the Indictment as "CC-2"), from the trial of co-defendant Oussama Kassir, which was produced to the defense on October 11, 2012, includes extensive information about both Ujaama's and the defendant's involvement in the Bly, Oregon jihad training camp, which forms the basis for the charges in Counts Three through Six. Among other things, Ujaama detailed his involvement in establishing the jihad training camp and explained the contents of a fax that Ujaama had sent to the defendant on October 25, 1999. (AH 530).

The testimony of Ujaama also contained extensive details about the conduct charged in Counts Seven through Eleven. For instance, Ujaama testified that towards the end of 2000, the defendant asked Ujaama to take an individual, Feroz Abbasi, to Ibn Sheikh, who was a "front line commander" in Afghanistan. (AH 560 - 561). Ujaama also testified that Mustafa had arranged for Mutawakil, the foreign minister for the Taliban, to receive Ujaaama in Afghanistan and ensure that Ujaama arrived safely. (AH 561). Ujaama then provided details about his travel to Afghanistan. (AH 562 - 564). Ujaama also testified that he had scheduled another trip to Afghanistan prior to September 11, 2001. In advance of this trip, the defendant gave Ujaama six thousand British pounds to take to Afghanistan. (AH 568).

Setting aside the comprehensive scope of discovery, the Indictment in this case encompasses a well-defined and narrow scope of conduct occurring over a relatively limited time period. The Indictment charges the defendant with offenses that are alleged to have occurred in the three-year time period between approximately December 1998 and December 2001. Furthermore, each of the counts in the Indictment is extremely specific with respect to time and place of the conduct alleged in each count.[10]

While the defendant seeks other evidentiary detail – from the contents of communications to the granular details of overt acts – this is not a case where the charges as set forth in the Indictment and in the materials subsequently produced to the defendant are "so general that they do not advise the defendant of the specific acts of which he is accused," *Torres*, 901 F.2d at 234 (citation omitted). Accordingly, the defendant is not entitled to the additional details he seeks from the Government regarding the overall conspiracy, which pertain to "the precise manner in which the defendant committed the crime charged." *Mitloff*, 165 F. Supp. 2d at 569. These requests seek information that, while potentially useful to the defendant, are not necessary to apprise him of the charges. Therefore, the defendant's motion for a bill of particulars is meritless and should be denied.

E. The Defendant's Motion to Strike Surplusage Should Be Denied

Mustafa moves for the Court to strike certain language in the Indictment as surplusage. He contends that the Indictment contains two types of surplusage that should be stricken. First,

[10] The defendant's reliance on *Bin Laden*, 92 F. Supp. 2d at 227-28 (holding that Government required to provide limited bill of particulars), is misplaced. In that case, the indictment charged 15 defendants with 267 offenses spanning a timeframe of approximately ten years. *Id*. at 227-28, 237. Some of the overt acts alleged in that indictment did not contain specific dates or locations and only included general allegations of certain types of activity. *Id.* at 239.

the defense asks the Court to strike the references to fact that Bin Laden was the leader of al Qaeda in Counts Five (at Paragraph 10) and Six (at Paragraph 12), on the grounds that these references are unnecessary and irrelevant. (Def. Mem. at 55, 57-60). Second, the defense requests that the Court strike such phrases in the Indictment as "others known and unknown," "among others," and "elsewhere," claiming that this language impermissibly expands the charges against Mustafa. (Def. Mem. at 55, 60-61).[11] The challenged language is plainly relevant to this case, and the defense's motion to strike should be denied

1. Applicable Law

"'Motions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged and are inflammatory and prejudicial.'" *United States* v. *Mulder*, 273 F.3d 91, 99-100 (2d Cir. 2001) (emphasis added) (quoting *United States* v. *Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990)). Therefore "[i]t has long been the policy of courts within the Southern District to refrain from tampering with indictments." *United States* v. *Tomero*, 496 F. Supp. 2d 253, 255 (S.D.N.Y. 2007) (quotation marks omitted) (citing *United States* v. *Bin Laden*, 91 F. Supp. 2d 600, 601 (S.D.N.Y. 2000)); *accord United States* v. *Jimenez*, 824 F. Supp. 351, 369 (S.D.N.Y.1993). "'If evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken.'" *Scarpa*, 913 F.2d at 1013 (quoting *United States* v. *DePalma*, 461 F. Supp. 778, 797 (S.D.N.Y. 1978)).

2. Discussion

[11] These very same arguments were raised by Mustafa's co-defendant, Kassir, and were properly rejected by Judge Keenan. *See United States* v. *Kassir*, No. S2 04 Cr. 356 (JFK), 2009 WL 995139, *2-4 (S.D.N.Y. Apr. 9, 2009).

a. The Court Should Not Strike the References to Usama Bin Laden in the Indictment

The defendant moves to strike the references to Bin Laden as the leader of al Qaeda in Counts Five and Six of the Indictment, which allege that Mustafa conspired to provide and provided material support to al Qaeda, in connection with Mustafa's alleged efforts to establish a jihad training camp in Bly, Oregon. Both counts, when identifying the designated foreign terrorist organization that the defendant supported, contain the language: "a foreign terrorist organization, to wit, a terrorist organization known as 'al Qaeda' and led by Usama Bin Laden, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and was redesignated as such on or about October 5, 2001, and October 2, 2001." (Ind. ¶¶ 10, 12).[12] Mustafa argues that these references to Bin Laden are irrelevant because proof of al Qaeda's leadership is not an element of Counts Five or Six (Def. Mem. at 58-59); that the references to Bin Laden are unfairly prejudicial "because of the toxic impact the mere mention of Usama Bin Laden would likely have on a jury" (Def. Mem. at 59-60); and that the references to Bin Laden violate Mustafa's rights to due process and a fair trial by "invit[ing] the jury to conclude that Mr. Mostafa is guilty of material support to al Qaeda simply by association with Bin Laden" (Def. Mem. at 60).

Each of the references to Bin Laden in the Indictment comes in the context of a count that charges Mustafa with conspiring to provide, or providing, material support to al Qaeda. The fact that Bin Laden was the leader of al Qaeda at the time of the charged conduct is plainly relevant

[12] Counts Nine and Ten, which also charge substantive and conspiracy counts of providing material support to al Qaeda, contain similar language regarding Bin Laden's leadership of al Qaeda. (Ind. ¶¶ 18, 20).

to these charges of material support to al Qaeda. Accordingly, the references to Bin Laden need not be stricken. *See Mulder*, 273 F.3d at 99-100 ("[m]otions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged") (internal quotation marks and citation omitted).

To point to one example, the Indictment charges that, with respect to Counts Five and Six, Mustafa acted to support al Qaeda by attempting to establish a training camp in the United States. Among other things, Mustafa sent two of his followers – Kassir and Aswat – from London to the United States to help establish that camp and provide jihad training. In support of these allegations, the Government will, among other things, offer into evidence an electronic copy of a letter from "Abu Abdullah" to Bin Laden. The Government expects to prove at trial that Kassir (known by the alias Abu Abdullah) carried this letter to the United States when Mustafa sent Kassir to support the Bly training camp. That letter says, among other things: "we love you here," and "I ask God to help you here, and support you to fulfill His desire." Based in part on these statements in the letter, the Government intends to argue that Kassir's actions in the United States – taken on behalf of Mustafa – were knowingly carried out in support of al Qaeda. This argument is plainly relevant to the Government's charges of material support to al Qaeda in Counts Five and Six. Even though the letter does not make mention of al Qaeda by name, because Bin Laden was the leader of al Qaeda, such expressions of loyalty to Bin Laden are indistinguishable from expressions of loyalty to al Qaeda.

In any event, the Indictment's references to Bin Laden are not inflammatory and unfairly prejudicial. Given the charges in this case, the Government's evidence will necessarily include material relevant to al Qaeda and al Qaeda's then-leader, Bin Laden. And given that evidence, the references to Bin Laden pose no real risk of unfairly prejudicing or inflaming the jury.

Indeed, Judge Keenan adopted this very analysis when rejecting Kassir's argument that the indictment's references to Bin Laden would unduly inflame the jury for two reasons: (1) "the leadership of the organization that Defendant is charged with supporting is relevant and admissible as background information," *Kassir*, 2009 WL 995139, at *2 (citing *Mulder*, 273 F.3d at 100); and (2) "the Government plans to offer evidence that [Kassir] committed the charged conduct with the intent to support Bin Laden, which is relevant for the inference that [Kassir] also intended to support al Qaeda," *id.*; *see id.* at *3 (Kassir's "express intent to support al Qaeda's leader would lead a strong inference of support for the organization itself and would not be unfairly prejudicial in the least"). Accordingly, Judge Keenan in *Kassir* denied the motion to delete the references to Bin Laden in the indictment, finding such evidence to be relevant and admissible. *See id.* *3. The same analysis employed by Judge Keenan in *Kassir* should apply here.

b. The Court Should Not Strike from the Indictment Such Phrases as "Others Known and Unknown," "Among Others," and "Elsewhere"

Like many indictments, throughout the Indictment are such phrases as "the defendant, and others known and unknown" (Ind. ¶¶ 1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 14, 16, 17, 18, 20, 24, 25), "the following overt acts, among others" (Ind. ¶¶ 3, 7, 11, 15, 19, 26), and "in the Southern District of New York and elsewhere" (Ind. ¶¶ 5, 7, 8, 9, 11, 12, 13, 15, 16, 17, 19, 20, 24, 26). Mustafa moves to strike these phrases, contending that they "impermissibly expand the charges against Mr. Mostafa beyond the specific charges returned by the jury." (Def. Mem. at 61).

Judge Keenan in *Kassir* also ruled squarely against the argument Mustafa makes here, rejecting Kassir's request to strike such words as "others known and unknown," "among others," and "and elsewhere." *Kassir*, 2009 WL 995139, at *3. With the exception of one phrase that the

Government consented to remove (and is not present in the Indictment charging Mustafa),[13] Judge Keenan concluded that that challenged phrases did "not impermissibly broaden the charges against" Kassir, and were neither irrelevant nor inflammatory. *Id.* at *4.

With respect to the phrases of the Indictment alleging that Mustafa acted with "others known and known," the Government's proof at trial – as also made clear in the allegations contained in the Indictment – will establish that Mustafa conspired with others to commit the offenses charged. Here too, Judge Keenan's holding in *Kassir* is directly on point. Approving the language, "the defendant, and others known and unknown," Judge Keenan held: "[t]he allegation that [Kassir] committed the charged offenses with 'others known and unknown' does not insinuate other crimes not charged. That [Kassir] allegedly acted with other people plainly is relevant and is not inflammatory. Furthermore, there is no bar to an indictment's reference to anonymous, unindicted co-conspirators." *Kassir*, 2009 WL 995139, at *4 (citing *DePalma*, 461 F. Supp. at 800).

Mustafa's objection to the Indictment's use of the phrase "among others" in the overt act paragraphs flies in the face of clearly established Second Circuit precedent. The Government of course is under no obligation to list in an indictment each and every overt act undertaken in furtherance of a particular conspiracy, *see, e.g.*, *United States* v. *Cohen*, 518 F.2d 727, 733 (2d Cir. 1975) (collecting cases), and the Indictment's references to "the following overt acts, among others," simply makes it clear that the Government is supplying a non-exhaustive list of overt

[13] The charging language of two of the counts in the indictment in Kassir contained the phrase, "among other things," to describe the content of certain websites establish by Kassir. Because, under *United States* v. *Pope*, 189 F. Supp. 64 (S.D.N.Y. 1960), such language is to be avoided in an indictment's charging language, the Government consented to the defendant's motion to strike the phrase, "among other things," from those two counts. No similar concerns under *Pope* come into play in this case.

acts – as it is permitted to. *See Kassir*, 2009 WL 995139, at *4 ("'The Government need not, when charging conspiracy, set out with precision each and every act committed by the conspirators in the furtherance of the conspiracy.'") (quoting *United States* v. *Cohen*, 518 F.2d at 733); *see also United States* v. *LaSpina*, 299 F.3d 165, 182 (2d Cir. 2002) ("It is clear the Government may offer proof of acts not included within the indictment, as long as they are within the scope of the conspiracy.") (quoting *United States* v. *Bagaric*, 706 F.2d 42, 64 (2d Cir. 1983), *abrogated on other grounds by Nat'l Org. for Women, Inc*. v. *Scheidler*, 510 U.S. 249, 259-60 (1994)).

Nor is there any merit to Mustafa's challenge to the phrase, in the overt acts paragraphs, that the overt acts occurred "in the Southern District of New York and elsewhere." A conspiracy may be prosecuted in the Southern District of New York if one overt act in furtherance of the conspiracy took place in this District. *See, e.g.*, *United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007). The references in the Indictment to acts that occurred "in the Southern District of New York and elsewhere" simply make plain that the Government is charging a conspiracy in which some overt acts took place in the Southern District of New York and some did not – as the Government is entitled to do. Moreover, this language is simply an accurate description of where some of the enumerated overt acts alleged in the Indictment took place, as a number of them occurred outside this District, and outside the United States. If the phrase "and elsewhere" were stricken from the overt act paragraphs, the Indictment would be misleading by incorrectly suggesting that all of the listed overt acts occurred in the Southern District of New York. *See Kassir*, 2009 WL 995139, at *4 (rejecting Kassir's objection to the indictment's use of the phrase, "in the Southern District of New York and elsewhere," noting that to strike such

language would result in the indictment falsely stating that all overt acts in furtherance of an alleged conspiracy occurred within the Southern District of New York).

Finally, at a minimum, the defendant's motion is premature and potentially moot because the Court has not yet indicated whether, at trial, the Court intends to provide the jury with copies of the Indictment and/or read the Indictment to the jury. To the extent the Court only intends to summarize the Indictment for the jury, the defendant's motion would then be moot. If the Court does intend to provide or read the Indictment to the jury, the issue can then be raised with the Court and resolved.

F. The Defendant's Motion To Dismiss Various Counts of the Indictment As Multiplicitous Should Be Denied

The defendant argues that several of the counts in the Indictment – specifically, Counts Three and Five, Counts Four and Six, Counts Seven and Nine, and Counts Eight and Ten – are multiplicitous. (Def. Mem. at 61 to 64). The defendant argues that these pairs of counts fail to "articulate different conduct elements" and therefore violate the Fifth Amendment's prohibition against double jeopardy and should be dismissed. (Def. Mem. at 61). The defendant's argument should be rejected for two reasons. First, under Second Circuit precedent, a pre-trial multiplicity argument is premature. Second, in any event, a multiplicity argument in this case is entirely devoid of merit, because each of the counts of the Indictment plainly alleges offenses that will require distinct proof at trial.

1. Applicable Law

The multiplicity doctrine is predicated on the Double Jeopardy Clause of the Fifth Amendment, which, among other things, provides that no person shall "be subject for the same

offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Supreme Court has explained that the Double Jeopardy Clause consists

> of three separate guarantees: (1) It protects against a second prosecution for the same offense after acquittal. (2) It protects against a second prosecution for the same offense after conviction. (3) And it protects against multiple punishments for the same offense.

Illinois v. *Vitale*, 447 U.S. 410, 415 (1980) (quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969)) (internal alterations omitted). Thus, with regard to multiplicity issues, the constitutional safeguard of double jeopardy assures that a court does not "'exceed its legislative authorization by imposing multiple punishments for the same offense.'" *United States* v. *Fiore*, 821 F.2d 127, 129 (2d Cir. 1985) (quoting *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977)).

The Second Circuit has endorsed a three-step inquiry to determine whether Congress intended to authorize multiple punishments for conduct that violates two statutory provisions. *See Fiore*, 821 F.2d at 130. First, "[i]f the offenses charged are set forth in different statutes or in distinct sections of a statute, and each section unambiguously authorizes punishment for a violation of its terms, it is ordinarily to be inferred that Congress intended to authorize punishment under each provision." *Id.*

Second, a court should apply the test established by the Supreme Court in *Blockburger*, which considers whether each statutory "provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Under the *Blockburger* test, if "there is an element in each offense that is not contained in the other, they are not the same offenses for purposes of double jeopardy, and they can both be prosecuted." *United States* v. *Chacko*, 169 F.3d 140, 146 (2d Cir. 1999) (citations omitted); *see also United States* v. *Dixon*, 509 U.S. 688, 697 (1993). In this regard, it is "not determinative whether the same conduct

underlies the counts; rather, it is critical whether the 'offense' – in the legal sense, as defined by Congress – complained of in one count is the same as that charged in another." *Chacko*, 169 F.3d at 146. Stated another way, "the *Blockburger* test is to be applied to the statute alone, irrespective of the facts alleged in a particular indictment." *Fiore*, 821 F.2d at 131 n.5; *see United States* v. *Bradley*, 812 F.2d 774, 780 (2d Cir. 1987) ("[t]he [*Blockburger*] test is applied to the statutory definition, not to the proof in a particular case"); *United States* v. *Langella*, 776 F.2d 1078, 1081-82 (2d Cir. 1985) (focusing "on the provisions of the statutes involved, rather than on the evidence adduced at trial"); *United States* v. *Nakashian*, 820 F.2d 549, 552-53 (2d Cir. 1987) (finding, in evaluating multiplicity challenge, that it was inappropriate to look behind the statutory provisions themselves); *United States* v. *Thomas*, 757 F.2d 1359, 1371 (2d Cir. 1985) (statutory language, and "not the specific allegations," controls).

Blockburger's focus on the statutory elements rather than the underlying facts reflects the well-settled rule "that a single transaction can give rise to distinct offenses under separate statues without violating the Double Jeopardy Clause." *Albernaz* v. *United States*, 450 U.S. 333, 344 n.3 (1981) (citations omitted); *see, e.g.*, *United States* v. *Woodward*, 469 U.S. 105, 107 (1985) (single factual episode can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause); *Harris* v. *United States*, 359 U.S. 19 (1959) (consecutive sentences were permitted where single transaction violated two distinct statutory provisions); *Gore* v. *United States*, 357 U.S. 386 (1958) (same). Thus, the same conduct can constitute multiple offenses if each offense requires proof of a statutory element that the other does not. *See United States* v. *Jahedi*, 681 F. Supp. 2d 430, 434 (S.D.N.Y. 2009) (citing *Chacko*, 169 F.3d at 146).

Third, if the two offenses are distinct offenses under the *Blockburger* test, a defendant's multiplicity challenge fails unless the court finds clear congressional intent to bar punishing a defendant for both offenses. *See Fiore*, 821 F.2d at 130. The Second Circuit has explained that

> [t]he final step is to test [the tentative conclusion that multiple punishments are authorized] against the legislative history of the statutory provisions to discover whether a contrary congressional intention is disclosed. If the legislative history either reveals an intent to authorize cumulation of punishments or is silent on the subject, the court should conclude that Congress intended to authorize multiple punishments.

United States v. *Marrale*, 695 F.2d 658, 662 (2d Cir. 1982) (citing *Albernaz*, 450 U.S. at 340-42); *see Albernaz*, 450 U.S. at 339-42 (*Blockburger* test controls the multiplicity analysis absent a "clear indication of contrary legislative intent"). This presumption that, in the face of legislative silence Congress intended multiple punishments, stems from a recognition that members of Congress are sophisticated lawmakers who were "aware of the *Blockburger* rule and legislated with it in mind." *Id*. at 341-42 (internal citations omitted).

2. Discussion

a. The Defendant's Pre-Trial Multiplicity Argument Is Foreclosed By Governing Second Circuit Law

The Double Jeopardy Clause protects against multiple *convictions* for the same offense – not simultaneous *prosecutions* for the same offense. In view of this principle, the Second Circuit has expressly held that the time for a "multiplicity" challenge is post-trial (after multiple convictions have been returned), not pre-trial (before any convictions have been returned). *See United States* v. *Josephberg*, 459 F.3d 350, 355 (2d Cir. 2006) ("Where there has been no prior conviction or acquittal, the Double Jeopardy Clause does not protect against simultaneous prosecutions for the same offense, so long as no more than one punishment is eventually imposed."); *see also Jahedi*, 681 F. Supp. 2d at 436-37 (holding that defendant's pre-trial

multiplicity challenge was premature); *United States* v. *Ghavami*, No. 10 Cr. 1217 (KMW), 2012 WL 2878126, at *10-11 (S.D.N.Y. July 13, 2012) (same).

Because the concern of the Fifth Amendment's Double Jeopardy Clause is with the imposition of "multiple punishments for the same offense" and successive "prosecution for the same offense after conviction," the multiplicity doctrine is not implicated by simultaneous prosecution of multiple offenses that might arguably be the "same" for constitutional purposes. Therefore, the Second Circuit has flatly held that dismissal of multiplicitous counts should occur, if at all, after conviction, not before trial – when, by definition, there is no danger of either multiple punishment or successive prosecution. *See Josephberg*, 459 F.3d at 355.

While the defendant cites to *Josephberg* in his brief (Def. Mem. at 62), he neglects to mention, let alone address, the Second Circuit's clear guidance that multiplicity arguments should not be resolved prior to conviction. *See Josephberg*, 459 F.3d at 355 ("Where there has been no prior conviction or acquittal, the Double Jeopardy Clause does not protect against simultaneous prosecutions for the same offense, so long as no more than one punishment is eventually imposed.").[14]

While ignoring the relevant holding of *Josephberg* and its progeny, the defense argues that the rule against multiplicity protects against multiple convictions, not just multiple sentences, for the same offense, citing *Ball* v. *United States*, 470 U.S. 856 (1985). (Def. Mem. at 62). *Ball*, however, does not support the defendant's request for pre-trial resolution of his

[14] In the wake of *Josephberg*, it is crystal clear that the remedy in this Circuit for multiplicity is not pre-trial dismissal of counts; the remedy, if any, must be imposed after conviction. *See, e.g.*, *Jahedi*, 681 F. Supp. 2d at 437 (declining to decide the defendant's multiplicity motion pre-trial in light of *Josephberg*); *United States* v. *Treacy*, No. 08 Cr. 366 (RLC), 2009 WL 47496, at *3 (S.D.N.Y. Jan. 8, 2009) (finding defendant's pre-trial motion to compel Government to elect between counts to be premature under *Josephberg*).

multiplicity motion. Far from lending support to the defendant's position, the Supreme Court in *Ball* made clear that multiplicitous counts should be dismissed only after a conviction is returned. Noting "the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case," the Court found "no bar to the Government's proceeding with prosecution simultaneously under the two statutes," which the Court found to be multiplicitous. *Ball* v. *United States*, 470 U.S. at 859-60.

The defendant's pre-trial claim of multiplicity should therefore be rejected as premature.

b. The Challenged Counts Are Not Multiplicitous

For reasons discussed at *supra* III.F.2, the Court should deny the defendant's multiplicity motion as premature, in light of governing Second Circuit law. However, even if this Court were to reach the issue of whether the challenged counts are mutiplicitous, the counts as charged do not violate the Double Jeopardy Clause.

First, the sets of counts at issue allege different violations of different statutory sections, with each statutory provision contemplating its own punishment scheme. The multiplicity inquiry here thus begins with the inference that Congress intended to authorize separate punishments under each statutory provision. *See Fiore*, 821 F.2d at 130.

Second, the court should apply the *Blockburger* inquiry to determine whether each offense contains an element that the other does not. *See Blockburger*, 284 U.S. at 304; *Chacko*, 169 F.3d at 146. For each pair of challenged counts, each offense contains at least one statutorily-mandated element that is absent from the other count, and Congress has not expressed a clear intention that multiple punishments not be imposed. *See Blockburger* 284 U.S. at 304 (analysis considers whether each statutory "provision requires proof of a fact which the other

does not"); *see United States* v. *Estrada*, 320 F.3d 173, 180 (2d Cir. 2003) (finding that a claim of multiplicity cannot succeed unless the charged offenses are the same in fact and in law).

Counts Three and Five charge conspiracies in connection with Mustafa's alleged participation in the creation of a jihad training camp in Bly Oregon. Count Three alleges that Mustafa violated Title 18, United States Code, Section 371, by participating in a conspiracy to provide material support and resources to terrorists in violation of Title 18, United States Code, Section 2339A. Count Five charges a conspiracy to provide material support and resources to a designated foreign terrorist organization, namely, al Qaeda, in violation of Title 18, United States Code, Section 2339B. Each of these charges requires proof of an element absent in the other charge. For instance, among other differences, Count Five requires proof that the defendant participated in a conspiracy to provide material support or resources to a specific terrorist organization knowing that the organization is a designated terrorist organization or engaged in terrorist activity or terrorism as statutorily defined. Both counts therefore require different elements of proof concerning the object of material support provided by the defendant. The exact same analysis applies to the defendant's challenge to Counts Seven and Nine, which similarly allege a conspiracy to violate Section 2339A and a conspiracy to violate Section 2339B, respectively.

A similar analysis also applies to Counts Four and Six and Counts Eight and Ten. These counts charges, respectively, substantive violations of Sections 2339A and 2339B. As with the conspiracy counts, the Government must prove different elements to establish substantive violations of Section 2339A and 2339B. Specifically, Section 2339A requires the Government to prove that the defendant provided, or attempted to provide, material support and resources, knowing or intending that the material support and resources were to be used in preparation for,

or in carrying out, a violation of Section 956. Section 2339B, however, requires the Government to prove that the defendant provided, or attempted to provide, material support and resources to a designated foreign terrorist organization. Thus, under the *Blockburger* test, the defendant's challenge to these counts fails as well.

The Fourth Circuit squarely addressed this issue *United States* v. *Chandia*, 514 F.3d 365 (4th Cir. 2008). There, the court held that Sections 2339A and 2339B are not multiplicitous in violation of the Fifth Amendment's prohibition against double jeopardy. *See id.* at 372. The defendant in *Chandia* was charged with both substantive and conspiracy counts in violation of Sections 2339A and 2339B. He was alleged to have (1) attended a designated foreign terrorist organization's training camp, and (2) assisted an official of that organization with buying equipment for the FTO's use. *See id.* at 370. The defendant, who was convicted of all but the substantive Section 2339A count, argued on appeal that his convictions were multiplicitous and violated the Fifth Amendment. *See id.* at 370–71. The Fourth Circuit in *Chandia* conducted a *Blockberger* inquiry and found:

> The elements of the separate crimes charged under § 2339A and § 2339B do not overlap. Section 2339B requires proof that Chandia provided material support to an organization designated as a foreign terrorist organization. By contrast, § 2339A requires proof that Chandia provided material support or resources that he knew would "be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 956]," which prohibits conspiracies to injure persons or damage property outside the United States. Because each statute requires proof of an element that the other does not, we presume that Congress authorized multiple punishments.

Id. at 372. The instant case is functionally identical. Any double jeopardy concerns would pertain solely to the statutes under which the defendant is charged, and those statutes each clearly require proof of at least one distinct element not found in the other statute. *See id.*

Accordingly, even if this Court were to reach the merits of Mustafa's multiplicity motion, that motion should be denied.

IV. CONCLUSION

For all of the foregoing reasons, the Government respectfully submits that the defendant's motion should be denied in its entirety.

Dated: New York, New York
April 26, 2013

Respectfully submitted,

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AFFIRMATION OF SERVICE

EDWARD Y. KIM, pursuant to Title 28, United States Code, Section 1746, hereby declares under the penalty of perjury:

That I am an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York. That, on April 26, 2013, I caused copies of the Government's Memorandum of Law to be delivered by ECF and electronic mail to:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: New York, New York
April 26, 2013

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