IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	CRIM. NO. 3:04-CR-0240-P
	§	
HOLY LAND FOUNDATION FOR	§	
RELIEF AND DEVELOPMENT (1)	§	
SHUKRI ABU BAKER (2)	§	**ECF**
MOHAMMAD EL-MEZAIN (3)	§	
GHASSAN ELASHI (4)	§	
HAITHAM MAGHAWRI (5)	§	
AKRAM MISHAL (6)	§	
MUFID ABDULQADER (7)	§	
ABDULRAHMAN ODEH (8)	§	

MEMORANDUM OPINION AND ORDER

Now before the Court is Defendants' Motion to Dismiss the Superseding Indictment on Double Jeopardy Grounds, filed May 30, 2008. For the reasons stated herein, Defendants' motion is hereby DENIED.

Defendants argue that the Double Jeopardy Clause bars retrial of Defendants Baker, El-Mezain, Elashi, Abdulqader and Odeh because the prosecution caused a mistrial by intentionally giving the jury demonstrative and non-admitted government exhibits for its consideration during deliberations. Defendants argue that the Double Jeopardy Clause bars re-trial of these Defendants because there was no manifest necessity for the mistrial.

The standard for determining whether the Double Jeopardy Clause bars re-trial of a defendant after mistrial differs depending on whether the defendant moved for/consented to the mistrial or objected to the mistrial. As a general rule, when a defendant consents to a mistrial before the jury reaches a verdict, double jeopardy will not bar re-prosecution. *See U.S. v. Palmer*, 122 F.3d 215,

218 (5th Cir. 1997). This consent can be either express or implied. *See id.* If a defendant does not timely and explicitly object to the trial court's *sua sponte* declaration of a mistrial, that defendant will be held to have impliedly consented to the mistrial and may be retried in a later proceeding. *See id.*

The record in this case shows that Defendants consented both expressly and impliedly to the mistrial. With respect to Defendants Baker, Elashi, and the Holy Land Foundation ("HLF"), defense counsel either expressly agreed verbally or acquiesced by silence with the Court's stated intention to declare a mistrial.

> MR. DRATEL (El-Mezain): I think we all agree, as we did on Thursday, that we don't think further deliberation is fruitful. We just want to see whether we have an actual verdict as to some of the defendants.
> MS. HOLLANDER (HLF and Baker): The way your Honor seeks to proceed from my prospective makes sense.
> THE COURT: Well, to spell it out again, to be sure there was no misunderstanding as to those defendants from whom we received some verdicts, I will poll the jury individually about those. As to others for who there were no verdicts recorded, I'm not going to question them about those.
> MR. CLINE (Elashi): Does your Honor intend to declare a mistrial as to those three defendants?
> THE COURT: I think that is the only choice I have.
> MR. CLINE: We agree. I wanted to be clear.

(Tr. 10/22/07, p. 20-21).

With respect to Defendants Odeh and Abdulqader, counsel for Odeh acquiesced to the mistrial by silence and counsel for Abdulqader consented to the mistrial with the condition that the judge poll the jurors with respect to her client – which he did. (Trans. Vol. 33 at 20 (CADDEDU (Abdulqader): "Your honor, I would make a specific request to poll jurors as to my client. I think clearly he has the most to lose from mistrying this case, and I think that at least is warranted based

on the facts."). The record reflects that during discussions with the Court, Defendants agreed further deliberations were pointless and none of the Defendants objected to the Court declaring a mistrial *sua sponte*.

Defendants' motion is based on the presumption that Defendants objected to the mistrial, and all arguments contained therein derive from that premise. Instead of addressing the obvious issue of consent in their motion, Defendants move the Court to file a reply – which is not permitted as a matter of course – wherein they seek to address the consent analysis for the first time. The vast majority of Defendants' reply brief is spent arguing that even if a defendant does consent to a mistrial, the law prohibits re-trial where the prosecution engaged in misconduct for the purpose of avoiding an acquittal the prosecutor knew was likely to occur. (*See* Reply at 2-14 (citing *U.S. v. Wallach*, 979 F.2d 972 (2d Cir. 1991) and *U.S. v. Catton*, 130 F.3d 805 (7th Cir. 1997).) As Defendants are well-aware, a party may not use a reply brief as a mechanism for raising new issues or introducing new evidence. *See, e.g., Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 551 (N.D. Tex. 2006). The arguments raised in Defendants' reply could have and should have been raised in their motion. Defendants' motion for leave to file reply [Docket # 1078] is hereby DENIED.

Even if the Court was to consider the arguments made in Defendants' reply, Defendants' motion would be denied. Defendants accuse the prosecution of engaging in two instances of misconduct: (1) including non-admitted and demonstrative exhibits among the exhibits given to the jury at the beginning of jury deliberations and (2) continually misrepresenting to defense counsel and the Court that the government had not given any non-admitted or demonstrative exhibits to the jury in response to the jury's note inquiring whether the "demonstrative exhibits are in the jury

room." (Jury Note, Sept. 26, 2007 [Docket # 870].) The prosecution maintains that the inclusion of this extraneous evidence was "unintentional and inadvertent." (Resp. at 7.)

There is no evidence – only pure speculation – that the prosecution deliberately submitted the extraneous exhibits because it knew or believed there would be an acquittal for all Defendants and sought to avoid the acquittal by seeking a mistrial. There is no evidence that at the time it submitted its exhibits (the beginning of jury deliberations), the prosecution believed there would be acquittals.[1] In fact, the jury struggled for nineteen days to come to unanimous decisions for all Defendants – decisions the jury was ultimately unable to make. Additionally, the fact that the prosecution represented repeatedly to the Court and counsel that it had not given any non-admitted or demonstrative exhibits to the jury is no more evidence of willful misrepresentation than it is of the prosecution's conviction (albeit, erroneous) that it had submitted only proper exhibits.[2]

The fact that the jury may have relied on the improper evidence is irrelevant to this analysis. The issue is not whether the jury relied on the improper evidence, but whether the prosecution deliberately engaged in the act of delivering the improper evidence to the jury with the intent of

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[1] Defendants argue that the prosecutors "knew without question" that an acquittal was likely based on one juror's comments to the judge:

> JUROR: But then it started getting personal. When you go in there and try to make a point and they sit up there and say no, where you going to show that up. They don't even have a clue where HAMAS started from, because they don't even want to hear it. They want to hear nothing about terrorism. They don't want to hear that. But when you got three or four that already has their mind made up, it's not served.

(Tr. of Conference Regarding Juror, Sept. 26, 2007 at 6.) This argument is flawed because the juror's comments were evidence of a hung jury and conflict among jurors, it does not establish that the prosecutors knew that an acquittal was likely. (Reply at 10.)

[2] Defendants contend the jurors' notes and comments should have put the prosecution on notice that it had given the jury extraneous material. (Reply at 9.) However, neither the Court nor any of the eight defense lawyers voiced concern about the possibility of extraneous evidence in the jury room as a result of the jury's communications. The likely reason the communications did not trigger anyone's concerns about extraneous exhibits is that no one believed the jury had those exhibits in its possession.

obtaining a mistrial. The record establishes that Defendants consented to the mistrial and Defendants have not shown that the prosecution deliberately engaged in misconduct for purposes of avoiding an acquittal and obtaining a mistrial Therefore, Defendants motion is hereby DENIED.

It is SO ORDERED, this 3rd day of July 2008.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE