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

UNITED STATES OF AMERICA,	§	
	§	
v.	§	
	§	
HOLY LAND FOUNDATION FOR	§	CRIM. NO.
RELIEF AND DEVELOPMENT (1),	§	3:04-CR-0240-P
SHUKRI ABU BAKER (2),	§	
MOHAMMAD EL-MEZAIN (3),	§	
GHASSAN ELASHI (4),	§	
MUFID ABDULQADAR (7),	§	
ABDULRAHMAN ODEH (8).	§	

ORDER

Now before the Court are (1) Defendants' Joint Motion for Extension of Time to File Motions Regarding Testimony of Proposed Government Expert Daniel Olson, filed July 14, 2008 [Docket # 1103]; (2) Defendants' Joint Motion for Extension of Time for All Remaining Pre-Trial Deadlines and Trial, filed July 15, 2008 [Docket # 1105]; and (3) Government's Motion to Strike Exhibits Attached to Defendants' Reply in Support of their Motion for Extension of Time for All Remaining Pre-trial Deadlines and Trial, filed July 25, 2008 [Docket # 1124].[1]

In Defendants' Joint Motion for Extension of Time to File Motions Regarding Testimony of Proposed Government Expert Daniel Olson, Defendants move for an extension of time for filing a motion to exclude/*Daubert* motion of the Government's expert, Daniel Olson, until a reasonable time after the Fifth Circuit has approved the budget for this re-trial. In their motion, Defendants explain that the Government's deadline for designating its experts and complying with Fed. R. Crim.

[1] The defendants who filed this motion are Shukri Abu Baker, Mohammad El-Mezain, Ghassan Elashi, Mufid Abdulqader, and Abdulrahman Odeh.

P. 16 was June 23, 2008. Defendants' deadline for filing *Daubert* motions or motions to exclude the Government's experts was July 14, 2008. Defendants claim that the Government disclosed to Defendants on that same day (July 14) that the government intended to call an expert who was not identified on the June 23 disclosure – Daniel Olson, who will testify "about the security document found at Infocom and how that document is similar to other manuals used by terrorist organizations." (Mot. at 3.) In light of this recent disclosure, Defendants seek additional time to file a motion to exclude/*Daubert* motion regarding Daniel Olson. The Government does not object to such an extension as long as it is not open-ended.

For these reasons, Defendants' Joint Motion for Extension of Time to File Motions Regarding Testimony of Proposed Government Expert Daniel Olson is hereby GRANTED and Defendants have until August 15, 2008 to file said motion(s). The Government's response, if any, is due no later than August 22, 2008. Defendants may file a proper reply, if any, no later than August 26, 2008.

Defendants have also filed a Joint Motion for Extension of Time for All Remaining Pre-trial Deadlines and Trial. In their motion they argue that because certain fees and expenses remain unpaid from the first trial and because the budget has not yet been approved for the re-trial, "[D]efendants cannot be prepared for trial on September 8, 2008." (Mot. at 2.) "Too little time remains to do the work that must be done or to find the necessary additional witnesses to present during the defense case." (Mot. at 5.) In their reply brief, Defendants submit multiple sworn declarations from their experts and local criminal defense attorneys testifying that it is impossible to prepare for this trial in the time remaining. The Government moves to strike those exhibits from the reply brief because

Defendants provided no explanation why these declarations could not have been submitted in support of their original motion.

From the outset of their briefing, the tenor of Defendants' argument is misleading. First, Defendants complain that funding in this case "abruptly ceased" after October 2007. (Mot. at 1.) This case ended in a mistrial on October 22, 2007. The case was re-assigned to this Court for re-trial that same day. The Government made clear from that time that it would re-prosecute the case. However, Defendants did not submit a proposed budget for this case until March 28, 2008 – five months after the case ended in a mistrial and a mere four and one-half months before the original re-trial date (a date on which the Parties agreed) of August 18, 2008. Defendants were well-aware the Fifth Circuit would have to approve the budget before funding would become available for the re-trial. Defendants should have been aware that the district court and the Fifth Circuit would spend a significant amount of time scrutinizing the budget for reasonableness in light of the considerable amount of money spent trying this case the first time. Upon review, the Court realized that Defendants' March 28, 2008 proposed budget was in fact a partial budget, providing no budgeting for experts, consultants, travel, or miscellaneous expenses. Those expenses made up one-third of the budget from the first trial. Because the Court was unwilling to approve a budget that did not include these essential expenses, the Court instructed Defendants to submit a completed budget as soon as possible. Defendants submitted a revised budget in May 2008, which again contained deficiencies in that it lacked sufficient explanation for certain fees for experts, investigators and counsel and contained requests for funding the Court considered unreasonable. Again, the Court sent the incomplete budget back to Defendants for revision and specificity regarding the reasons for some of the requests. Additionally, the Court pointed out to defense counsel areas of budgeting the Court

considered unreasonable and requested that counsel revise some of these requests. Finally, on June 13, 2008 – two and a half months after they submitted their partial budget – Defendants submitted a complete and detailed budget request. The Court approved the budget and sent it to the Fifth Circuit for review and approval on June 24, 2008, where it remained pending for one month. Some of counsels' filings suggest the Fifth Circuit has had the proposed budget under consideration since March 28, 2008. This is simply not true. The Circuit received the proposed budget for the first time late in June 2008. The Circuit approved the budget on August 1, 2008. Defendants' allegations that the courts have been dilatory in approving Defendants' "detailed budgets" and their "budget-related motions" are disingenuous. (Mot. at 2.) Their accusation that the courts are "not acting" on their requests for funding is misleading at best. Defendants' statements that "defendants ought not be compelled to suffer the consequences of . . . confusion [in transmission of CJA paperwork from the first trial]" "[t]o deny the defendants funding to mount a defense and then force them to trial anyway is to make a mockery of the Constitution" are hyperbolic and inaccurate. (Resp. to Mot. to Strike at 5.) Any delay in funding for the second trial is not the result of confusion and miscommunication in the transmission of CJA paperwork. Defendants helped create the budget crunch they find themselves in by not submitting a complete budget proposal until June 13, 2008.

Defendants repeatedly mention that one attorney on the defense team has not been compensated for work done in the first trial. The implication is that the courts have simply refused to pay this attorney. What Defendants fail to mention is that the attorney did not submit any voucher for payment of fees until March 2008. Unlike other counsel from this case, who submitted vouchers periodically throughout the first trial, this attorney chose to submit vouchers for payment after the trial ended. When the vouchers were sent from this Court to the Circuit, all of the documentation

needed by the Circuit was not included, which resulted in a short delay. In any event, the vouchers have been before the courts for four months and have now been approved for payment. Any delay in payment for the first trial is due in part to the timing of counsel's submission of the vouchers.

Defendants argue that without this funding, they are unable to prepare their case for trial and therefore, the Court should grant a continuance of the trial date. It is important to remember that this case involves a re-trial of a case that was tried only last year. The same defense attorneys spent three years and considerable resources preparing for the first trial. These are competent attorneys who certainly were prepared to try this case the first time. Thus, any new and additional work that needs to be done to prepare for this trial is not the same as preparation for the first trial. Furthermore, the trial will not begin for another six weeks or so (September 15 – after jury selection and opening statements are complete). Because the Government anticipates that its case will last approximately four to five weeks, Defendants will not be putting on their case for another ten weeks or so. There is adequate time for Defendants to prepare for this re-trial.

Additionally, the Fifth Circuit's decision concerning the budget regarding travel and expenses for certain experts and for counsel should alleviate defense counsels' concerns that such work could not be completed in time for trial and streamline counsels' preparation for the second trial.

In their briefing for the motion for continuance, Defendants attached to their reply declarations of two of their experts and some local criminal defense attorneys who testified that under these circumstances, it would be impossible to be prepared for trial by mid-September. The Government argues the Court should strike the declarations because those exhibits should have been submitted in support of Defendants' original motion. The Court agrees that the exhibits should have been filed with the motion rather than with the reply.

The purpose of a reply brief is to answer arguments raised in the response, not add new supporting materials. *See e.g., Springs Indus., Inc. v. Am. Motorists Ins. Co.*, 137 F.R.D. 238, 240 (N.D. Tex. 1991) (Fitzwater, J.) The thrust of Defendants original motion was that they "cannot be prepared for trial on September 8, 2008." (Mot. at 2.) There is no doubt the materials attached to the reply addressed the very argument that formed the basis for their motion and could have and should have been submitted therewith. Defendants' submission of these documents in conjunction with the reply necessarily delayed resolution of the motion because it forced the Government to seek leave to respond or move to strike, which in turn, precipitated even more briefing from Defendants. As this Court's previous orders have indicated, this is *not* the first time Defendants have used reply briefs to raise arguments/issues that should have been raised in their original motion. It appears Defendants are engaging in improper usage of reply briefs to delay resolution of the issues in this case, perhaps in hopes of continuing the trial.

The Fifth Circuit approved the budget presented by the District Court with certain exceptions on August 1, 2008. Defense counsel and their approved experts, paralegals and investigators can continue working and traveling and may submit their vouchers for District Court approval. These amounts will be paid as long as they are reasonable. As defense counsel is aware, the outstanding vouchers from the first trial are being processed.

The Government's motion to strike Defendants' reply is hereby GRANTED and Defendants' reply is hereby stricken. Defendants' motion to continue the trial is hereby DENIED. Defendants' motion to extend all remaining pretrial deadlines is GRANTED. Defendants' pretrial materials, such as proposed voir dire, the proposed jury charge, witness list, the exhibit list, and motions in limine are due no later than August 22, 2008. Defendants' motion for extension of time to file motions

regarding Daniel Olson is hereby GRANTED and Defendants have until August 15, 2008 to file said motion(s). The Government's response, if any, is due no later than August 22, 2008. Defendants may file a proper reply, if any, no later than August 26, 2008.

It is SO ORDERED, this 5th day of August 2008.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE