IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **v.** **PANKESH PATEL,** **JOHN BENSON WIER III,** **ANDREW BIGELOW, and** **LEE ALLEN TOLLESON,** **Defendants.**	**Case No. 1:09-CR-335 (RJL)**

GROUP 1 DEFENDANTS' REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANTS' RENEWED MOTION FOR JUDGMENT OF ACQUITTAL

Defendants Pankesh Patel, John Benson Wier, III, Andrew Bigelow, and Lee Allen Tolleson, the Group 1 Defendants, hereinafter "Defendants," by and through their undersigned attorneys, submit this reply to the government's response to Defendants' renewed motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The evidence presented by the government is insufficient to establish Defendants' guilt under Count 1 of the Indictment, even when viewed in the light most favorable to the Government. There is no evidence that could establish, or even create an inference, that the Defendants acted as part of a single, interdependent conspiracy to violate the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2 & 78dd-3 ("FCPA").

In its memorandum in opposition to Defendants' Renewed Rule 29 Motion for Judgment of Acquittal, the government continues to advance an unprecedented conspiracy theory entirely

unsupported by the evidence introduced at trial. This attempt must fail since the evidence upon which the government relies cannot and does not establish that the Defendants knowingly and willfully participated in a criminal conspiracy. The government ignores the evidence and lack of evidence, which establishes the Defendants were not part of a conspiracy. The government relies upon hearsay statements of government agents; evidence the defendants were told the total value of the deal was $15 million; evidence that some defendants saw other alleged co-conspirators before the Miami pitch meetings; and evidence that some participants (and non-participants) attended the Clyde's reception and traveled to Las Vegas. This evidence, however, fails to establish that the success of the Gabon transaction was contingent on the participation of any one individual, or that the participants' assistance to each other was necessary to consummate or execute the deal. To the contrary, this and other evidence introduced at trial demonstrates that various participants in the Gabon transaction were competitors at odds with each other in the same industry, and were deliberately kept separated by the government, proceeding on parallel tracks from each other in the deal.

In an act of desperation, the government insists the conspiracy count is legally sustainable based on the Defendants' supposed knowledge of the overall purpose of the conspiracy and their knowledge that others were involved in the transaction. This argument, however, fails to adequately address the Defendants' recognition of a lack of evidence as to the Defendants' reputed interdependency. Throughout trial, the government maintained that participants were told they were involved in a $15 million procurement deal, which required the alleged co-conspirators to "get all those products in order to have [the] deal go through, so they're all working toward this mutual goal." The Court acknowledged the absence of any evidence supporting this assertion:

> Remind me where Bistrong or Latour or both specifically said in the evidence in the record, specifically said to any one of these defendants words—maybe not to the effect but precisely along the lines of, if I can't accumulate all of the parts to total $15 million, this deal will not happen.
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> June 21, 2011 PM Trial Tr. at 21.

The government effectively conceded that the Gabon deal was not contingent on each and every participant playing his individual role. Counsel for the government stated, "I don't think that that's in the record...except for Your Honor's questioning...to Mr. Spiller, there's no specific reference" to each alleged co-conspirator's participation being contingent on the others' participation. *Id.* After government counsel expressed he didn't think contingency on any one participant was necessary for a conspiracy, the Court elaborated on the unique nature of the purported conspiracy:

> I have no doubt...that when this case is all done...that this will be the first case cited in the footnote after Learned Hand's famous saying that conspiracy is the darling in the prosecutor's nursery, this will be textbook example why it's such a darling in the prosecutor's eye. I mean you all are pushing—you're pushing conspiracy way out there here. And the question is whether the elastic will snap. All right? You're pushing it hard...the Department [of Justice] is pushing hard on conspiracy...I've...never seen a conspiracy quite like this. This is real creative stuff. You're way out there. The Department's way out there.
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> June 21, 2011 PM Trial Tr. at 22-23.

The government attempts to bolster its lack of evidence by reminding the Court how counsel for both sides were warned not to reilitigate issues. The government neglects to recognize that, on this issue, the Court was very torn, and almost granted the Defendants' renewed Rule 29 motion at the close of all the evidence. The Court registered great concern about the conspiracy and, prior to ruling on Defendants' renewed Rule 29 motion, stated:

> It's a close call. I'm sure I'll be quoted. It's a close call. I think you've really [pushed] this conspiracy concept right out to the edge...I gotta tell you, you're just way out, but you know now...how close I think you are to the elastic snapping.

June 21, 2011 PM Trial Tr. at 29-30. Everyone in the courtroom anticipated—if not entirely expected—written pleadings advocating for the dismissal of conspiracy.

CONCLUSION

As the Court previously articulated, the policy behind criminalizing conspiracies is to protect the public from individuals working together to achieve an unlawful purpose. *Id.* at 26. The danger lies where individuals have the ability and desire to work in concert—backing each other up, assisting one another, and covering for one another. Here, however, "the government has concocted a conspiracy sting operation where there's none of that, where it's just a discussion with an undercover agent, a discussion with a cooperator, and [] knowledge that there are other people helping out." *Id.* The participation of each and every individual in the transaction is insignificant; it does not matter. The conspiracy "is not typical in any way, shape, or form." *Id.* Under such circumstances, and in light of the jury's inability to reach a verdict, the Court should decline the government's invitation to endorse its unprecedented, unsustainable, and unsupported legal theory and dismiss the conspiracy charge as to these four defendants. The government's inability to establish the essential elements of a conspiracy, together with the substantial evidence affirmatively demonstrating the lack of agreement and interdependence among the defendants, warrants a judgment of acquittal on Count 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2011, the above Defendants Patel, Wier, Bigelow and Tolleson's Reply to Government's Response to Defendants' Renewed Motion for Judgment of Acquittal was served electronically via the District Court's electronic filing system on all counsel of record.

/s/ Todd Foster