UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

-against- 01 CR 1175 (S-1) (WHP)

ALEX FARES, et al.,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT ALEX FARES' PRETRIAL MOTIONS

JEFFREY LICHTMAN
Attorney for Alex Fares
1790 Broadway
Suite 1501
New York, New York 10019
(212) 581-1001

INTRODUCTION

Defendant Alex Fares respectfully submits this memorandum in support of his pretrial motions to for an Order: a) severing Counts Six through Ten of the indictment pursuant to Fed.R.Crim.P. 8 (b) and 14; b) requiring the government to provide a bill of particulars pursuant to Fed.R.Crim.P. 7 (f); c) requiring the government to provide a list of the names and addresses of the individuals it intends to call as witnesses in its case-in-chief pursuant to United States v. Cannone, 528 F.2d 296, 301 (2d Cir. 1975); United States v. Lino, No. 00 Cr. 632 (WHP), 2001 WL 8356, at *20-21 (S.D.N.Y. December 29, 2000); d) requiring the government to provide early notice of its intent to use Rule 404 (b) evidence pursuant to United States v. Nachamie, 91 F. Supp.2d 565, 577 (S.D.N.Y. 2000); and e) joining in the motions made by his codefendants.

STATEMENT OF FACTS

Count one of the indictment (attached to the Affirmation of Jeffrey Lichtman, Esq., as Exhibit A) charges defendants Alex Fares ("Alex"), Mohammed Fares ("Mohammed"), Moussa Fares ("Moussa") and Rafael Fares ("Rafael") with their involvement, from January 1996 through September 1998, in a conspiracy to launder the proceeds of narcotics sales in violation of 18 U.S.C. § 1956 (a)(2)(B)(i). Within count one, the government describes in general terms a "pattern" of "laundering money for Colombian drug cartels" called the "Black Market Peso Exchange" which is allegedly in evidence here. Indictment at ¶ 1.a. As applied to the allegations in this case, the Black Market Peso Exchange involved, in part, the numerous deposits of cash

(narcotics proceeds) into defendant-controlled bank accounts; after significant sums had accumulated in the accounts, bank checks were allegedly sent to Panamanian businesses which then completed the transfer of the proceeds back to the Colombian narcotics traffickers. Id.

Also included within count one are the names of the entities which had bank accounts at Broadway National Bank ("BNB") in New York City as well as the corresponding defendants who were the alleged "sole signatories" on these accounts. Id. at ¶¶ 2-3. Specifically, the bank accounts were in the names of: Coastal Tours and Travel Agency, Inc. (Alex and Moussa as signatories), AF & MF Trading Corp. (Rafael), Liberty Sportswear, Inc. (Rafael), Marun Fashion and Sportswear, Inc. (Moussa and Rafael), Fast Pace Footwear Corp. (Alex and Mohammed), and Temple Sports Corp. (Alex and Mohammed). Id. All of these entities were "purported to be located at 10 West 28th Street, New York, New York." Id.

Finally, included within the list of "Overt Acts" in furtherance of the conspiracy are the identities of the Panamanian entities – Parvani International and Motta International – which allegedly received the BNB bank checks. Id. at ¶ 7.

Count three charges Alex with substantive Money Laundering in connection with the alleged transfer, via BNB bank check, of $29,500 of deposits from the Temple Sports Corp. account to Motta International. Id. at ¶ 14. Similarly, Rafael is charged in count four with Money Laundering based on his alleged transfer of $100,000 through a BNB bank check (Liberty Sportswear, Inc. account) to Parvani International. Id.

Count two charges the same defendants, Alex, Mohammed, Moussa and Rafael, with Conspiracy to Structure Deposits at BNB from January 1996 through July 1998 (31 U.S.C. §§

5324 (a)(3) and (d)(2)). Within this count is a list of the very BNB accounts listed in count one as well as the number of deposits made into them during this time period. Indictment at ¶¶ 9-11. Count five charges these same defendants with substantive Structuring of these deposits. Id. at ¶ 16. However, this count simply alleges that the four defendants structured deposits of over $13.8 million by breaking down this cash into over 1360 deposits in "amounts just less than $10,000." Id. There is no breakdown of which defendant is responsible for which of these deposits.

By incorporating the allegations contained in paragraph one of the indictment, counts six through ten charge the other members of the indictment, Steven Fares ("Steven") and Halime Fares Cristo ("Cristo") with their involvement in a separate Black Market Peso Exchange Conspiracy to Launder Money. Id. at ¶ 17. These defendants were alleged to be the sole signatories of accounts in the names of different entities which had bank accounts at BNB: Zodiac Trading, Inc. (Steven as sole signatory), Tropicana Trade Corp. (Steven), and Halime Trade, Inc. (Steven and Cristo). All of these entities were purported to be located at 1201 Broadway, New York, New York (unlike the entities described in count one). Id. at ¶ 18.

The nature of the Money Laundering Conspiracy charged in this count is similar that which was charged in count one; unnamed narcotics dealers allegedly provided cash to these defendants who then deposited the cash in amounts under $10,000. When the cash in the accounts reached a significant amount, Steven and Cristo allegedly caused a portion to be transferred by bank check or wire transfer to businesses or individuals located in Panama and elsewhere. Id. at ¶ 22. The Panamanian entities which allegedly received the transfers – in

contrast to those listed in count one's conspiracy – were Audio Centro International, S.A. and Gold America, S.A. Id. at ¶ 23.

Counts seven through ten charge defendants Steven Fares and Halime Cristo with Conspiracy to Structure Deposits, substantive Money Laundering, and substantive Structuring. Id. at ¶¶ 24-32.

Despite the similarity of the "patterns" of the money laundering found in the conspiracies charged in counts one and six, i.e., the "Black Market Peso Exchange", there are virtually no similarities in the particulars as alleged on the face of the indictment: there is no overlap between defendants; there is no overlap of acts; there is no overlap in the entities which held the bank accounts at BNB; the locations of the entities which held the bank accounts are dissimilar; no allegation is made that the source of the cash transported to the defendants for deposit into accounts controlled by them is the same in each conspiracy; the Panamanian businesses which received the bank checks from the defendants are different in each conspiracy; and, finally, there is no allegation that the transactions alleged in both Money Laundering Conspiracy counts (and Structuring Conspiracy counts) were part of a series of acts that shared a common purpose.

ARGUMENT

POINT I

PURSUANT TO FED.R.CRIM.P. 8 (b), DEFENDANTS HALIME CRISTO AND STEVEN FARES – ALONG WITH COUNTS SIX THROUGH TEN – ARE IMPROPERLY JOINED IN THIS INDICTMENT

Counts six through ten of the indictment, along with the defendants charged in these separate Money Laundering and Structuring conspiracies (and substantive charges), should be severed because these charges are completely dissimilar and unrelated to the charges in counts one through five. Should the Money Laundering and Structuring charges against Halime Cristo and Steven Fares remain, the government will, in essence, be permitted to bolster its case against defendants Alex Fares and Mohammed Fares by introducing evidence of other conspiracies which is similar in nature but otherwise unrelated.

Rule 8 (a) of the Federal Rules restricts joinder of offenses against one defendant while Rule 8 (b) restricts joinder of defendants. However, the Court of Appeals has ruled that when a defendant in a multi-defendant action challenges joinder, whether of offenses or defendants, the motion is construed as arising under Rule 8 (b). United States v. Turoff, 853 F.2d 1037, 1043 (2d Cir. 1988). Rule 8 (b) provides that:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed.R.Crim.P. 8 (b).

"Improper joinder under Rule 8 is considered to be inherently prejudicial" (United States v. Krout, 66 F.3d 1420, 1429 (5th Cir. 1995); United States v. Bright, 630 F.2d 804, 813 (5th Cir. 1980)), and, therefore, is a matter of law, not a matter of discretion. Turoff, 853 F.2d at 1042; United States v. Attanasio, 870 F.2d 809 (2d Cir. 1989). As noted in Turoff:

> It has long been settled that the joint trial of charges against several accuseds when they are not for the same act or transaction, or for connected acts or transactions, or provable by the same evidence is prejudicial. *See McElroy v. United States*, 164 U.S. 76, 79-80, 41 L.Ed. 355, 17 S.Ct. 31 (1896). Also well-recognized is the proposition that joint trials serve the public interest in economy, convenience, and the prompt trial of the accused. *See United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986). The former is supported by considerations of fairness to the defendants, and the latter by the need for the efficient administration of criminal justice.

Turoff, 853 F.2d at 1039.

"[I]n deciding joinder under 8 (b) the test posited must be broad enough to maintain 'efficient' justice, yet not so all-encompassing as substantially to prejudice the accuseds." Id. While the rules allow for defendants to incur some prejudice through joinder of offenses or defendants, "the Rules do not permit cumulation of prejudice by charging several defendants with similar but unrelated offenses." Id. at 1043.

Under Rule 8 (b) "[p]roper joinder requires that the offenses charged 'must be shown to be part of a single plan or scheme,' and . . . 'proof of such a common scheme is typically supplied by an overarching conspiracy from which stems each of the substantive counts.'" United States v. Faulkner, 17 F.3d 745, 758 (5th Cir.), cert. denied, 115 S.Ct. 193 (1994), quoting

United States v. Lane, 735 F.2d 799, 805 (5th Cir. 1984), rev'd in part on other grounds, 106 S.Ct. 725 (1986) (emphasis added). Nonetheless, "it is clear that an indictment may allege multiple conspiracies, and 'need not charge a single overarching conspiracy [uniting each of the counts of the indictment], provided the separate conspiracies . . . charged arise from a common plan or scheme and so could alternatively have been charged as a single conspiracy.'" United States v. Giraldo, 859 F. Supp. 52, 55 (E.D.N.Y. 1994) (Hurley, J.), quoting United States v. Moon, No. 88 Cr. 64, 1988 WL 88056, at *3 (N.D.N.Y. Aug. 23,1988), quoting United States v. Velasquez, 772 F.2d 1348, 1353 (7th Cir. 1985), cert. denied, 475 U.S. 1021 (1986). "It is equally clear, however, that 'defendants charged with two separate – albeit similar – conspiracies having one common participant are not, without more, properly joined.'" Giraldo, 859 F. Supp. at 55, quoting Moon, 1988 WL 88056, at *3, quoting United States v. Welch, 656 F.2d 1039, 1049 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982), and citing United States v. Castro, 829 F.2d 1038, 1044-46 (11th Cir. 1987); Velasquez, 772 F.2d at 1253-53; United States v. Marionneaux, 514 F.2d 1244, 1248-49 (5th Cir. 1975), cert. denied, 434 U.S. 903 (1977).

Moreover, "two separate transactions do not constitute a 'series' within the meaning of Rule 8 (b) 'merely because they are of a similar character or involve one or more common participants.'" United States v. Rojas, No. S4 01 Cr. 257, 2001 WL 1568786 (Dec. 7, 2001) (Schwartz, J.), quoting United States v. Lech, 161 F.R.D. 255, 256 (S.D.N.Y. 1995) (Sotomayor, J.), quoting United States v. Bradford, 487 F. Supp. 1093, 1094 (D. Conn. 1980) (Cabranes, J.).

In assessing whether joinder is proper, the reviewing court must look at the indictment on its face. The Supreme Court has consistently acknowledged that Rule 8 (b) is a pleading rule, to

be applied before trial by examining the allegations in the indictment. See, e.g., United States v. Lane, 474 U.S. 438 (1986); Schaffer v. United States, 362 U.S. 511 (1960). Moreover, Rule 8 (b) is in the section of the Rules of Criminal Procedure entitled "Indictment and Information," and refers to permitting defendants to "be charged in the same indictment ... if they are alleged to have participated in the same act or transaction ...." Fed.R.Crim.P. 8 (b). The "rule itself thus refers solely to the indictment's allegations as the basis for determining the propriety of joinder." United States v. Grey Bear, 863 F.2d 572, 576 (8th Cir. 1988).

There is a split of authorities on this issue however, with the Fifth, Seventh, Eighth, Ninth and Eleventh Circuits holding that the determination of Rule 8 (b) severance lies solely with the allegations contained in the indictment. United States. v. Kaufman, 858 F.2d 994, 1003 (5th Cir. 1988); United States v. Moya-Gomez, 860 F.2d 706, 767 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989); United States v. Wadena, 152 F.3d 831 (8th Cir. 1998), cert. denied, 526 U.S. 1050 (1999); United States v. Terry, 911 F.2d 272, 276 (9th Cir. 1990); United States v. LaSpesa, 956 F.2d 1027, 1032 (11th Cir. 1992). The First, Third and D.C. Circuits have ruled that the issue of joinder need not be considered solely on the allegations of the indictment. United States v. Talavera, 668 F.2d 625, 629 (1st Cir. 1982), cert. denied, 456 U.S. 978 (1982); United States v. McGill, 964 F.2d 222, 240-41 (3d Cir. 1992), aff'd in part, rev'd in part on other grounds, 964 F.2d 222 (3d Cir. 1992); United States v. Spriggs, 102 F.3d 1245, 1255 (D.C. Cir. 2000), cert. denied, 522 U.S. 831 (1997).

Various district courts within the Second Circuit have also weighed in on this issue, with the majority of the decisions supporting the defendant's position. United States v. Reale, No. S4

96 Cr. 1069, 1997 WL 580778, at * 11 (S.D.N.Y. September 17, 1997)(Batts, J.)(noting that "[e]xamination of the Indictment fails to reveal a common plan or scheme which would permit joinder under Rule 8 (b)"); United States v. Rucker, 32 F. Supp.2d 545, 548 (E.D.N.Y. 1999) (Glasser, J.)("Proper joinder is determined from the face of the indictment ...."); United States v. Ashley, 905 F. Supp. 1146 (E.D.N.Y. 1995)(Hurley, J.)(Rule 8(b) is a pleading rule and joinder under Rule 8(b) is to be determined by examining the allegations contained in the indictment); United States v. Moon, No. 88 Cr. 64, 1988 WL 88056, at *3 (N.D.N.Y. Aug. 23,1988)(same); but see United States v. De Yian, No. 94 Cr. 719, 1995 WL 368445, at *10 (S.D.N.Y. June 21, 1995(Cote, J.)(not "necessary that the relationship justifying joinder appear in the indictment.").

The Second Circuit has not ruled definitively on this issue; however, the Eleventh Circuit has cited the Second Circuit's decision in United States v. Friedman, 854 F.2d 535, 561 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989), as supporting its holding that Rule 8 (b) joinder must appear proper from the indictment. United States v. Morales, 868 F.2d 1562, 1567 (11th Cir. 1989). In Friedman, the Second Circuit indicated, without discussion, that "[i]n evaluating the defendants' claims of misjoinder under Rule 8 (b), then, our task is limited simply to determining whether the indictment properly alleged their participation in a RICO conspiracy." Friedman, 854 F.2d at 561.

Finally, should prosecutors be permitted to provide additional allegations justifying Rule 8 (b) joinder following the filing of the indictment, it follows that these additional allegations could be developed at trial.

The difficulty we see in allowing a court to analyze a Rule 8 (b)

> claim based on the evidence adduced at trial is that it permits a reviewing court to conclude that initial joinder was improper based on information that was not and could not have been known to the prosecutor at the time the indictment was brought

Morales, 868 F.2d at 1568.

In reviewing the two sets of conspiracies charged in this indictment, the court must determine whether (1) there was a substantial identity of facts between the conspiracies charged, (2) there was a substantial identity of participants between the conspiracies charged, (3) the character of the acts within the conspiracies were similar, and (4) each of the participants in both sets of conspiracies knew that he or she acted in furtherance of a common plan in which other participants were involved. Castro, 829 F.2d at 1045, citing United States v. Andrews, 765 F.2d 1491, 1496-97 (11th Cir. 1985).

The counts charged herein are listed in the table below:

COUNT	**CHARGE**	**DEFENDANTS NAMED**
One	Money Laundering Conspiracy	Alex, Mohammed, Moussa, Rafael
Two	Structuring Conspiracy	Alex, Mohammed, Moussa, Rafael
Three	Substantive Money Laundering	Alex
Four	Substantive Money Laundering	Rafael
Five	Substantive Structuring	Alex, Mohammed, Moussa, Rafael

Six	Money Laundering Conspiracy	Steven, Halime Cristo
Seven	Structuring Conspiracy	Steven, Halime Cristo
Eight	Substantive Money Laundering	Steven
Nine	Substantive Money Laundering	Halime Cristo
Ten	Substantive Structuring	Steven, Halime Cristo

Simply stated, the two sets of Money Laundering conspiracies (and corresponding Structuring conspiracies) alleged in the indictment herein do not constitute a single series of events or common plan or scheme as envisioned by Rule 8 (b). A review of these groups of charges finds that there are virtually no similarities in the particulars as alleged on its face: there is no overlap between defendants; there is no overlap of acts; there is no overlap in the entities which held the bank accounts at BNB; the locations of the entities which held the bank accounts are dissimilar; no allegation is made that the source of the cash transported to the defendants for deposit into accounts controlled by them is the same in each conspiracy; the Panamanian businesses which received the bank checks from the defendants are different in each conspiracy; and, finally, there is no allegation that the transactions alleged in both money laundering conspiracy counts were part of a series of acts that shared a common purpose.

Many courts within the Southern and Eastern Districts of New York have found that joinder of offenses was improper under Rule 8 (b) where two or more distinct conspiracies were alleged. The difference between these cases and the situation at hand is that there was at least

some overlap in the particulars of the separate conspiracies. No overlap, in fact, exists here. In United States v. Palacios, 949 F. Supp. 198, 199-200 (S.D.N.Y. 1996)(Cedarbaum, J.), defendants Edwin and Jason Palacios were charged in counts one through six with various crimes arising in connection with the conspiracy to murder and rob a cab driver in Brooklyn. Counts seven and eight charged other defendants with the conspiracy to murder and the attempted murder of another individual. Despite the fact that both sets of defendants were alleged on the face of the indictment to be members of the Latin Kings, Judge Cedarbaum granted severance under Rule 8 (b) due to the failure of the indictment to "allege that the moving defendants participated in the same act or transaction or in the same series of transactions" or that there was a "'substantial identity of facts or participants' or a 'common plan or scheme.'" See also United States v. Gentile, 60 F.R.D. 686 (E.D.N.Y. 1973) (Where three distinct but similar schemes to bribe an IRS official were charged involving the same IRS official and one of the same defendants, the Court severed the counts, finding that the only "common thread" among the counts was the involvement of the IRS official and the one defendant.).

In United States v. Menashe, 741 F. Supp. 1135 (S.D.N.Y. 1990), Judge Stanton held that joinder was improper where the first count of the indictment charged defendants Menashe, St. Francis and O'Toole with conspiring to sell American made military planes located in Israel, and the second count of the indictment charged only O'Toole with conspiring to sell American made anti-aircraft missiles located in Israel. Finding that the indictment failed to allege that there was a common plan between Menashe, St-Francis or O'Toole with regard to both conspiracies, Judge Stanton severed the second count of the indictment. Id. at 1138.

Similarly, the indictment at hand has failed to allege that any of the defendants charged in the counts one through five were even aware of or somehow participated in the Money Laundering and Structuring conspiracies (and substantive charges) found in counts six through ten. See United States v. Camacho, 939 F. Supp. 203, 207 (S.D.N.Y. 1996)(Haight, J.), quoting Giraldo, 859 F. Supp. at 54 (court severed two conspiracies and noted that "[e]ven where an indictment charges two conspiracies, joinder under Rule 8 (b) is not proper if 'the government has not alleged that the two conspiracies shared a common plan.'").

In Giraldo, the government charged defendants Giraldo, Fermin, Tellez and Giraldo-Gamez with conspiracy and distribution of cocaine between February and March 1994. Additionally, the government charged Giraldo with Conspiracy and Distribution of cocaine from 1990 through 1993. The government argued there was proper joinder of these two separate conspiracies because there was a logical relationship between them, including sales to the same cooperating witness. The Court found that joinder was improper because there was "no suggestion that defendants Fermin, Gamez, or Tellez 'knew of or were involved in any overall scheme.'" Id. at 52, quoting United States v. Castigilia, No. 85 Cr. 93E, 1986 WL 6873, at *11 (W.D.N.Y. June 18, 1986).

The case of Lech, supra, involved a seven count indictment that charged three separate schemes involving the New York City Board of Education. The first count charged defendants Russo and Fulton with Conspiracy, Bribery and Mail Fraud in connection with a construction project. The second charged Russo, Fulton and Lech with Conspiracy and Bribery related to a second construction project, and the third charged Russo only with Conspiracy and Bribery with

respect to a third project. The government argued that joinder was proper because, although Lech had no specific knowledge of the other schemes, the first scheme was an "unmistakable springboard" for the second scheme, i.e., the second scheme which included defendant Lech directly arose out of the first. This Court granted severance pursuant to Rule 8 (b) finding that there was no common thread among the counts. See also United States v. Lane, 735 F.2d 799, 805 (5th Cir. 1984), rev'd in part on other grounds, 474 U.S. 438 (1986) ("Requirement of a common scheme ensures that the offenses are actually part of a series of transactions."); Carrozza, supra, 728 F. Supp. at 270 ("Rule 8 (b) requires a common scheme or plan and the mere existence of similarities between some of the actors or some of the crimes committed will not suffice.").

In conclusion, it is clear that under the plain language of Rule 8 (b), joinder of the conspiracies charged in counts one through five and counts six through ten is improper. At best, there may be a "historical connection between the two sets of crimes, but that is not the Rule 8 (b) test." Palacios, 949 F. Supp. at 200. Without a severance of these two sets of conspiracies, the government will be permitted to improperly bolster its proof against one set of the defendants with evidence of the other conspiracies which are similar in character, but otherwise not related. For these reasons, a severance should be granted.[1]

[1] In the alternative, the defendant moves for severance due to prejudicial spillover pursuant to Fed.R.Crim.P. 14.

POINT II

THE GOVERNMENT SHOULD BE REQUIRED TO PROVIDE A BILL OF PARTICULARS PURSUANT TO FED.R.CRIM.P. 7 (f)

Pursuant to Fed.R.Crim.P. 7(f), defendant Alex Fares moves for an order requiring the government to disclose immediately the identity of: a) the unindicted co-conspirators described in the Money Laundering and Structuring charges contained in the indictment; and b) each defendant responsible for each of the deposits described in count five's substantive Structuring charge.

Unindicted Co-conspirators

In count one, the government charges defendants Alex, Mohammed, Moussa and Rafael, along with "others", with their involvement in a Money Laundering conspiracy which occurred in New York, New York and "locations outside the United States, including Panama ...." Indictment at ¶ 6.a. This conspiracy allegedly occurred from the beginning of 1996 through mid-1998. Id. at ¶ 4. As noted in the indictment, the alleged Money Laundering involved a complicated series of money transfers: i) proceeds of Colombian-associated drug sales in the United States were given to American money brokers; ii) the brokers provided this cash to the defendants who deposited the money in their bank accounts; iii) the defendants then transferred these funds to entities in the United States, Panama or "elsewhere" which sell goods for export to Colombia; iv) businesses in Colombia paid a Colombian money broker for these goods using Colombian pesos; v) the Colombian money broker supplied these pesos to the Colombian drug traffickers minus a fee. Id. at ¶ 1.b. The Structuring charges in count two allege that these defendants, along with unnamed "others", "would and did structure and assist in structuring, and

attempt to structure and assist in structuring" over $13.8 million from January of 1996 through September of 1998. Id. at ¶¶ 10-11.

Considering the length, complexity, geographical broadness and age of these charges, disclosure of these unnamed "others" is necessary so that the defendant may properly prepare for and avoid surprise at trial.

Rule 7 (f) and relevant caselaw provide that the court may direct the filing of a bill of particulars to enable a defendant to prepare for trial and to prevent unfair surprise. United States v. Lauresen, No. 98 Cr. 1134 (WHP), 1999 WL 440619 (S.D.N.Y. June 28, 1999). This court has noted, additionally, that "[r]equests for names of unindicted co-conspirators are fairly common and often are granted by district courts." United States v. Lino, No. 00 Cr. 632 (WHP), 2001 WL 8356, at *12 (S.D.N.Y. December 29, 2000). In the case at hand, unlike in Lino, the government will be hard pressed to claim that security concerns should be considered as a counterbalance to the defendant's need for this information: no violence is charged in the indictment and the government has never alleged that any of the defendants charged are dangers to the community.

The Substantive Structuring Charge

Count Five charges defendants Alex, Mohammed, Moussa and Rafael with their individual involvement in the structuring of the deposits of "over $13.8 million" by "breaking those deposits down into more than 1360 deposits of amounts just less than $10,000." Indictment at ¶ 16. There is no indication in this count of which defendant made which of these deposits.

To begin, the defendant recognizes that the structuring itself, and not the individual deposits, is the unit of crime. United States v. Handakas, 286 F.3d 92 (2d Cir. 2002). Regardless, how can the defendant fight this charge with such little information? How can there be any hope for a unanimous jury when the count, as written, would allow some members to find one of the defendants responsible for certain of the deposits and other members of the jury to find that same defendant responsible for different deposits? The Double Jeopardy problems presented by this Count are even more vexing. If Alex Fares is prosecuted in the future for Structuring deposits in any of the BNB bank accounts during a period within 1996 and September of 1998, there would be no way to determine whether these deposits are part of the structuring included in this count. For these reasons, the defendant requests a bill of particulars indicating which defendant is responsible for which allegedly structured deposits as described in this count.

POINT III

THE GOVERNMENT SHOULD BE COMPELLED TO DISCLOSE ITS LIST OF WITNESSES

The government should be compelled to provide a list of its witnesses due to the difficulties the defendant faces in preparing for trial. The hurdles the defendant faces include: the allegations in the indictment occurred approximately four to six years ago; the charged offenses occurred over a 32 month period; the pool of potential witnesses is not only large but apparently spans the globe; and the documentary evidence is voluminous. In addition, the government

cannot make a credible claim that the witnesses will be subject to intimidation or danger should their identities be revealed just a few months prior to trial.

A district court has discretion to compel pretrial disclosure of government witnesses. United States v. Triana-Mateus, No. 98 Cr. 958 (SWK), 2002 WL 562649 (S.D.N.Y. April 15, 2002). However, the burden is on the defendant to make a "specific showing that disclosure [is] both material to the preparation of his defense and reasonable in light of the circumstances surrounding his case." Cannone, 528 F.2d at 300-01.

In considering whether to order disclosure of the government's list of witnesses, courts in this district have frequently looked to the factors set out in United States v. Turkish, 458 F. Supp. 874, 881 (S.D.N.Y. 1978):

> (1) Did the offense alleged in the indictment involve a crime of violence? (2) Have the defendants been arrested or convicted for crimes involving violence? (3) Will the evidence in the case largely consist of testimony relating to documents (which by their nature are not easily altered)? (4) Is there a realistic possibility that supplying the witnesses' names prior to trial will increase the likelihood that the prosecution's witnesses will not appear at trial, or will be unwilling to testify at trial? (5) Does the indictment allege offenses occurring over an extended period of time, making preparation of the defendants' defense complex and difficult? (6) Do the defendants have limited funds with which to investigate and prepare their defense?

United States v. Rueb, No. 00 Cr. 91 (RWS), 2001 WL 96177 (S.D.N.Y. February 5, 2001).

Application of these factors to the instant case leads to the determination that the defendant can make a specific showing of need for disclosure of the names of the witnesses. To begin, the offenses alleged in the indictment do not involve a crime of violence and Alex Fares

has never been arrested for or convicted of a crime of violence. As for the evidence in the case, thousands of pages of bank records will need to be explained to the jury by witnesses. In addition, the underlying events "span several years" (ending four years ago) and witnesses may be as far away as Lebanon, Panama and Colombia. United States v. Rosenthal, No. 91 Cr. 412 (LLS), 1991 WL 267767, at *4 (S.D.N.Y. Dec. 3, 1991). Finally, while this motion is made on behalf of just Alex Fares, upon information and belief, two of the four defendants are represented by court-appointed counsel. Such counsel may have limited resources for investigation in this case. United States v. Shoher, 555 F. Supp. 346, 354 (S.D.N.Y. 1983) (particularized need shown where alleged offense took place over 17 month period and some defendants were represented by court-appointed counsel); Rueb, 2001 WL 96177, at *8 n.3 (noting that court-appointed counsel has limited resources to review voluminous discovery); Turkish, 458 F. Supp. at 881 (particularized need shown where alleged offense took place over 15 month period); United States v. Madeoy, 652 F. Supp. 371, 375-76 (D.C. Cir. 1987) (particularized need shown due to 70 potential witnesses and thousands of relevant documents).

The last factor, the possibility that the release of the names of the witnesses will increase the likelihood that they will not appear at trial, can hardly be argued here. The government has never claimed that any of the defendants in this case have ever obstructed justice or are a danger to the community. For all these reasons – and the fact that trial is presently scheduled in just three and one-half months – the defendant requests an order compelling the government to provide the names and addresses of its witnesses.

POINT IV

THE GOVERNMENT SHOULD BE REQUIRED TO PROVIDE RULE 404 (b) EVIDENCE SIXTY DAYS BEFORE TRIAL

Due to the age of the charges in this case, along with the extensive period of time in which these allegations occurred, the defendant requests disclosure of Rule 404 (b) evidence 60 days before trial. As shown above, additionally, there is no possibility of threat to the safety of any prospective witness in this case.

Rule 404 (b) of the Federal Rules of Evidence requires the government to provide "reasonable notice" in advance of trial of its intent to use other act evidence. The purpose of the notice provision is "to reduce surprise and promote early resolution" of any challenge to admissibility of the proffered evidence. Fed.R.Evid. 404 (b) Advisory Committee's Notes. "While notice is typically provided no more than two to three weeks before trial, a longer period is appropriate [where there is an] absence of any threat to the safety of prospective witnesses and the ... Rule 404 (b) evidence [is important to] this action." Nachamie, 91 F. Supp.2d at 577 (internal citations and quotations omitted).

A survey of Southern District decisions reflect a wide range of time periods determined by courts to be reasonable for purposes of Rule 404 (b) disclosure. In United States v. Reddy, 190 F. Supp.2d 558 (S.D.N.Y. 2002), Judge Swain determined that 45 days was reasonable. In Lino, this Court determined that 60 days was reasonable. See also De Yian, supra (Judge Cote ordered disclosure four months prior to trial); United States v. Aronson, No. 98 Cr. 564, 1999 WL 97923 (S.D.N.Y. Feb. 24, 1999) (one month prior to trial). Considering the fact that trial is

just three and one-half months away, the defendant respectfully requests that the government provide Rule 404 (b) notice 60 days prior to trial to avoid any unfair surprise and to permit the defendant to properly investigate any new allegations.

POINT V

DEFENDANT JOINS IN THE MOTIONS OF HIS CODEFENDANTS TO THE EXTENT THAT THEY ARE APPLICABLE TO HIM

CONCLUSION

For the reasons stated herein, defendant Alex Fares' motions should, we respectfully submit, be granted in their entirety.

Dated: New York, New York
July 9, 2002

Respectfully submitted,

JEFFREY LICHTMAN
Attorney for Alex Fares
1790 Broadway
Suite 1501
New York, New York 10019
(212) 581-1001