UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

NO. 08-20314

v.

HON. NANCY G. EDMUNDS

ISSAM HAMAMA,

Defendant.
_____/

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* TO PRECLUDE ADMISSION OF COCONSPIRATOR HEARSAY STATEMENTS

The United States of America respectfully submits this opposition to Defendant's Motion *In Limine* to Preclude Admission of Coconspirator Hearsay Statements. The defendant's motion seeks either "a mini trial," or, in the alternative, a hearing in which the government presents evidence regarding the existence of the conspiracy that is alleged in the indictment. Def. Motion at 3. The purpose of this hearing would presumably be to determine the admissibility of the Iraqi Intelligence Service ("IIS") documents that were the subject of the government's Motion to Admit Documents, which was filed on March 1, 2010, Docket No. 27. The government believes that a "mini trial" on the admissibility of

the IIS documents is not required under the law and would be an inefficient use of the parties' and the Court's resources.[1] However, the government is not opposed to a hearing at which it presents evidence of the conspiracy. At such a hearing, the government can rely on hearsay and proceed by proffer because the Rules of Evidence do not apply.

ARGUMENT

For a coconspirator statement to be admissible "[t]he government must show by a preponderance of evidence that a conspiracy existed, that the defendant was a member of the conspiracy, and that the statement was made in the course and furtherance of the conspiracy." *United States v. Lopez-Medina*, 461 F.3d 724, 746 (6th Cir. 2006). Federal Rule of Evidence 104(a) governs the determination of these questions. *United States v. Enright*, 579 F.2d 980, 984 (6th Cir. 1978) ("We therefore decide that Rule 104(a) provides the proper basis for analyzing the preliminary question of admissibility of a co-conspirator's out-of-court statement.").

Under Rule 104(a), "[p]reliminary questions concerning the . . .

[1] The government notes in this regard that some of its witnesses are located overseas and others have legitimate concerns about their safety following their testimony. Requiring these witnesses to testify in a "mini trial" when their testimony is not required by the Rules of Evidence involves unnecessary risks and costs.

admissibility of evidence shall be determined by the court . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges." This means that in making a determination on the admissibility of coconspirator statements "the judge may consider under Rule 104(a) hearsay evidence which the jury could not consider." *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979); *see also Bourjaily v. United States*, 483 U.S. 171, 178 (1987) (Rule 104(a) "on its face allows the trial judge to consider any evidence whatsoever . . . ."). The Court may even consider the coconspirator statements themselves in determining their admissibility. *Lopez-Medina*, 461 F.3d at 921.

The Court should therefore not hold a "mini trial" at which the government would be required to call witnesses and present evidence pursuant to the Federal Rules of Evidence, as it would be required to do at trial. Rather, the Court should schedule a hearing on the admissibility of the IIS documents under Rule 104(a) and permit the government to rely on hearsay statements and proffered evidence.

Respectfully submitted,

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Dated: March 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2010, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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