IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Criminal No. 09-335 (RJL)**
	)	
MARC MORALES, *et al.*,	)	**ORAL ARGUMENT REQUESTED**
	)	
Defendant.	)	

RESPONSE TO GOVERNMENT'S NOTICE REGARDING PRIOR STATEMENTS OF MARC MORALES

Defendant Marc Frederick Morales, through undersigned counsel, respectfully responds to the government's notice regarding his prior statements. For the reasons set forth below, Mr. Morales respectfully requests that the Court deny the government's efforts to relitigate this issue.

The government seeks to introduce five manipulated snippets of conversations between Marc Morales and Richard Bistrong as well as an isolated email that Mr. Morales sent to a colleague. The government's attempts to recharacterize the evidence as "prior statements" instead of its original characterization of "intrinsic other crimes evidence" from its Group One pleadings does not change the reality that the proffered statements qualify as "other acts" evidence and, therefore, must survive the strictures of a Rule 404(b) analysis.

The fact that the government cut and paste from its Group One pleading to admit "intrinsic other crimes evidence," but then chose to rename the evidence as "prior statements" is unconvincing and shows that the government is, once again, trying to back door irrelevant, improper, and highly prejudicial evidence into this trial. The government's further efforts to skirt the application of Rule 404(b) by arguing that the manipulated conversations and email are admissible to show that Mr. Morales "knew" that "commission" could double as a term for

"bribe" and that he had knowledge of the existence of the Foreign Corrupt Practices Act (FCPA) also fail. The Court correctly settled this issue in the Group One trial by refusing to admit evidence of the defendants' past acts that were not directly related to the charged Gabon deal. The Court should stand by its ruling and once again refuse to admit this improper evidence against Mr. Morales.

In addition to not satisfying the analysis required by Rule 404(b), the inevitable—and incurable—confusion and unfair prejudice that will flow from the proffered evidence precludes its admission under Rule 403. Smearing Mr. Morales with evidence of snippets from past conversations that have been taken completely out of context, creates an enormous risk that the jury will unfairly brand Mr. Morales as a "repeat offender" with a criminal propensity. For this reason, Mr. Morales's defense will be forced to respond vigorously on the merits, leading to numerous trials within the trial, each with their own unique sets of recordings, documents, testimony, cross-examination, and individualized defenses. Adding these additional fronts to this already multi-faceted affair would create grave risk of confusion of the issues, misleading the jury regarding the actual crimes for which Mr. Morales is actually standing trial, and will generally result in a complete waste of time for all concerned. Put simply, Mr. Morales will not receive a fair trial if the proffered evidence is admitted. *United States v. Biswell*, 700 F.2d 1310, 1318-19 (5th Cir. 1983) (reversing conviction and finding Rule 404(b) evidence should have been excluded where it resulted in a "smear" regarding general criminal activity).

I. THE COURT RULED TO EXCLUDE THE PROFFERED EVIDENCE IN THE GROUP ONE TRIAL AND SHOULD ABIDE BY ITS PAST RULING

The government is once again attempting to admit evidence of prior acts to prove knowledge – an approach that the Court rejected in the Group One trial and should reject once again.

This Court previously indicated that it was "generally not very hospitable to a lot of 404(b) evidence," and that "in many cases the 404(b) evidence the Government wants to use, the prejudicial effect outweighs the probative value." February 23, 2011 Hearing Tr. at 58-59. Never have the Court's concerns been so acute as in this case. There can be no debate that the proffered evidence will significantly lengthen and further complicate this trial.

Before the Group One trial commenced, the Court made clear its dislike for the admission of 404(b) evidence against the defendants. The Court voiced its concern about the increased complexity that admission of the 404(b) evidence would add to the case:

- "How is the jury to figure out without a full blown like mini trial of the separate little events . . . how are they going to figure out whether he may have been just, you know, puffing or let's say bragging or perhaps even maybe misrepresenting his connections with foreign entities in order to get a deal made and he intended to pocket the 20 percent or whatever the percent of the commission was at the time and no portion of it was ever going to go to someone in [the foreign country]?" April 20, 2011 Hearing Tr. at 12:6-14.
- "[T]o be fair to the defense, it has to be a full blown effort through discovery to defend themselves against certain implications the government is trying to create in the minds of the jury that they were working on and participating in some kind of nefarious foreign deal." April 20, 2011 Hearing Tr. at 14:15-23.

Along with these procedural concerns, the Court also expressed doubt that the 404(b) evidence would even be admissible under D.C. Circuit precedent:

- "[A]llowing [the government] to put [the 404(b) evidence] in on the front end seems to me, especially with the D.C. Circuit's opinions being what they are and

the definition of intrinsic that the Circuit Court has found seems to be a stretch to [the government's] side, a real stretch." April 20, 2011 Hearing Tr. at 17:9-12, 18:23-19:2.

- "[T]he potential for confusion and prejudice to the defense is so great and I don't feel that [the evidence was] intrinsic." April 20, 2011 Hearing Tr. at 41:7-21.

During the Group One proceedings, the Court made its stance against admission of the proffered 404(b) evidence clear on a number of occasions. The Court clarified at many times throughout the proceedings that it intended to enforce its ruling against admission of the 404(b) evidence:

- "[W]e're not getting into the 404(b)." May 16 PM Tr. at 132:16-17.
- "There is no way [a reference to a past deal is] going to come in under any scenario, because that's the 404(b) evidence we're trying to keep out of this case. May 17 PM Tr. at 100:6-8.
- " . . . I've already ruled on the 404(b) evidence . . . And I said that that's not going to get in." June 14 PM Tr. at 104:3-8.
- "I am not going to let you get into conversations, especially of a nonspecific nature, regarding prior dealings by ALS unbeknownst to Mr. Tolleson that may have been involved in international sales of a questionable nature. I am not going to let you get into that. It's way too close to, if not smack in the middle of the 404(b) evidence that I said I am not going to let you use. So stay away from that." June 15 AM Tr. 46:5-13.
- Laura N. Perkins, Assistant United States Attorney: We think, Your Honor, that if they did try to get into any of the prior good acts evidence, that of course

would open the door into the 404(b) evidence that Your Honor has up until now *said that we cannot get into*. May 16 PM Tr. at 146:2-5.

The Court also admonished counsel to be vigilant in their efforts to refrain from opening any doors that would result in the admission of 404(b) evidence.

- "This Court has spent a lot of time and a lot of effort to get us to where we are today without the Government, in the presentation of its case, being specific in any way other than to say that the people who were invited were people who Mr. Bistrong had prior dealings with in order to avoid opening any doors with regard to possible 404(b)." May 25 AM Tr. at 70:14-19.
- Addressing Ms. Mederos-Jacobs: "Well, I don't know where you're going, but I am warning you, be very careful here. Who was invited, why they were invited, what the basis for the inviting was, all that is off the table because that potentially opens up all kinds of issues and problems with 404(b)." May 25 AM Tr. at 71:1-5.
- Disallowing the government's line of questioning regarding "normal industry practices": "Yea I'm going to sustain [Mr. Menchel's] objection. I think at this point we're getting – we're moving into this whole zone of 404(b) once again, yet again. I'm not accusing you of trying to do it through the back door . . . [b]ut I think effectively you could end up doing that." June 1 PM Tr. at 82:4-10.
- Cautioning Special Agent Forvour: "I just want to give you a brief cautionary instruction. Some of these questions that you may be asked . . . may be questions that, in your answering them, you may either accidentally or think you may be by necessity asked to comment on or discuss the evidence that you are aware of relating to the 404(b) issues that the Court has already excluded from testimony in

the case. So I just want to caution you to avoid accidentally or certainly intentionally alluding to or getting into any of the details relating to any of those 404(b) incidents, for fear that I might not be able to cure a mistake of that kind with the jury with some kind of cautionary instruction." June 14 PM Tr. at 59:24 - 60:13.

- Refusing to admit transcripts of Defendant Patel's past deals: "I do not believe that the defense, in its questioning, has sufficiently opened the door . . . to introducing this type of 404(b) evidence. I think doing so would be inconsistent with my earlier rulings, and also would be unfairly prejudicial to Mr. Patel's defense."). June 15 AM Tr. at 36:23-37:6.

These concerns emphasized by the Court throughout the Group One trial are wholly relevant and of utmost importance in the Group Two proceedings. Admission of the proffered 404(b) evidence would complicate the proceedings and would, more importantly, deprive Mr. Morales to his right to an impartial and fair trial.

II. THE GOVERNMENT'S PROFFERED EVIDENCE IS IMPROPER "BAD CHARACTER" EVIDENCE THAT VIOLATES RULES 401, 403, AND 404 AND SHOULD NOT BE ADMITTED.

In its notice to admit Mr. Morales' past statements, the government stated that the word commissions was included in quotes in the Superseding Indictment to "signify that the use of commissions as the payment method was part of a wink-and-nod arrangement among the defendants to conceal their corrupt deal." Unfortunately for the government, however, its reliance on the manipulated conversations between Mr. Morales and Richard Bistrong is misplaced and is improper evidence that violates Federal Rules of Evidence 401, 403, and 404 and should not be admitted.

Generalized evidence of a defendant's "bad character" is forbidden under the Federal Rules of Evidence. Under Rule 404(a), "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]" Fed. R. Evid. 404(a). Likewise, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Id.

Thus, if the government wishes to offer proof of other alleged wrongs or acts under Rule 404(b), it must first convince the Court that the evidence is probative of some material issue other than character. *U.S. v. Loza*, Cr. No. 09-0226, 2011 WL 553438, at *1 (D.D.C. Feb. 3, 2011) (Paul L. Friedman, J.). Moreover, to be deemed admissible under Rule 404(b), evidence of prior bad acts must *also* be sufficiently similar to the crime charged. *See United States v. Foskey*, 636 F.2d 517, 524 (D.C. Cir. 1980); *United States v. Kasouris*, 474 F.2d 689, 692 (5th Cir. 1973) ("Similarity, being a matter of relevancy, is judged by the degree in which the prior act approaches near identity with the elements of the offense charge[d]…there must be *substantial* relevancy…"); *see also United States v. Nicely*, 922 F.2d 850, 856 (D.C. Cir. 1991) ("A fundamental tenet in our criminal jurisprudence is that a jury should not premise its verdict upon a general evaluation of the defendant's character but rather upon an assessment of the evidence relevant to the particular crime with which the defendant is presently charged.") (citation omitted). Finally, "because of the *enormous danger of prejudice* to the defendant that evidence of other crimes creates," the proffered evidence must also be "necessary" as well as "clear and convincing" to gain admission, lest the jury "draw illogical and incorrect inferences from such evidence." *United States v. Shelton*, 628 F.2d 54, 56 (D.C. Cir. 1980) (emphasis added) (citations omitted).

The District Courts, of course, are the gatekeepers regarding 404(b) evidence and must exclude such evidence if its admission would result in an unfair trial for the defendant. Even if the Court determines that the other crimes evidence has a legitimate purpose under Rule 404(b), the Court must nevertheless exclude that evidence if it fails Rule 403's balancing test. *See Loza*, 2011 WL 553438, at *2. Indeed, the D.C. Circuit has "repeatedly emphasized the narrow scope of the 'bad acts' evidence exceptions under Rule 404(b) . . . and the continuing applicability of the Rule 403 limitation on unduly prejudicial evidence even if an exception is satisfied." *Nicely*, 922 F.2d at 856.

A. The Court Correctly Excluded the Proffered 404(b) Evidence Because it is Unfairly Prejudicial to the Defense and Does Not Satisfy the Rule 403 Balancing Test.

One of the reasons for excluding the government's proffered evidence in the Group One trial that this Court emphasized again and again was the significant danger of unfair prejudice to the defendants. The Court's concern was correct and valid. The Court must weigh the probative value of that evidence against the countervailing considerations enumerated in Rule 403 to gauge its admissibility. *See Foskey*, 636 F.2d at 525 ("Bad acts evidence must satisfy Federal Rule of Evidence 403"). In this case, where the probative value of the proffered evidence is at best limited (*see Loza*, 2011 WL 553438, at *2-3), admission of the evidence cannot be justified in light of the enormous risk of unfair prejudice to Mr. Morales. In this case, every danger enumerated in Rule 403 – save perhaps needless presentation of cumulative evidence – will be triggered by the introduction of a substantial quantity of highly prejudicial evidence pertaining to an alleged corrupt discussion that is dissimilar from the charged conduct.

One of the factors the court must take into consideration when performing the Rule 403 balancing test is whether there were any available "evidentiary alternatives." *United States v. Brown*, 597 F.3d 399, 406 (D.C. Cir. 2010) (quoting *United States v. Old Chief*, 519 U.S. 172,

184 (1997)). Here, the proffered Rule 404(b) evidence is wholly unrelated to the Gabon deal and, therefore, does not have any evidentiary value to the charged act. Instead, the government possesses tapes and videos that contain conversations and meetings that are actually relevant to and concern the Gabon deal. As the 404(b) evidence is not related to the Gabon deal in any way, the Gabon tapes and videos are the most efficient and logical "evidentiary alternatives" readily available to the government.

Ultimately, given that the government's proffered evidence in this case involves manipulated snippets of conversations that are wholly unrelated to the current charge, what will begin as one trial of substantial scope and complexity will slowly (and from a juror's perspective, painfully) mushroom into numerous separate mini-trials. *See United States v. Njock Eyong*, Cr. No. 06-305, 2007 WL 1576309, at *1 (D.D.C. May 30, 2007) (John D. Bates, J.) (expressing concern that introduction of extrinsic evidence "would result in mini-trials and/or protracted litigation over immigration-related matters wholly distinct from the three substantive offenses charged in the indictment."); *Masel v. Barrett*, Civ. No. 87-2505, 1989 WL 39379, at *2 (D.D.C. Apr. 10, 1989) (Louis F. Oberdorfer, J.) (declining to allow even limited inquiry into plaintiff's prior altercations with police officers, in light of risk that "the trial would rapidly degenerate into a series of mini-trials of assorted other incidents"); *see also United States v. Waloke*, 962 F.2d 824, 830 (8th Cir. 1992) (district court may exclude evidence under Rule 403 if it would cause undue delay or lead to collateral mini-trials).

But this case is already complicated enough as it is. Marshaling the many moving parts of this case over multiple weeks of trial will present a serious challenge for even the most dedicated juror. Adding even more unwieldy fronts and substantially extending the length of what is already a multi-faceted trial risks confusing and frustrating the jury to the point of

complete alienation. *See United States v. Rhodes*, 886 F.2d 375, 381-382 (D.C. Cir. 1989) (reversing conviction for bank fraud and forgery where introduction of highly prejudicial evidence of similar, but wholly unrelated, fraudulent checks may have misled the jury into believing that the defendant participated in a fraudulent scheme or acted with knowledge); *U.S. v. Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984) (upholding district court's exclusion of otherwise admissible 404(b) evidence, given court's concerns about unfair prejudice, jury confusion, and a "trial within a trial"). This Court should decline the government's invitation to turn what they have already designated as a complex trial into several complex mini-trials.

The sum of these considerations leads to one inescapable conclusion: permitting the government to introduce inflammatory evidence concerning Mr. Morales's discussions about general industry topics that did not involve any actual transactions, much less the Gabon deal, will not only unfairly prejudice Mr. Morales, it will transform an already complex trial into a quagmire of trials within trials that will massively confuse the issues and severely mislead the jury. Accordingly, the proffered evidence must be excluded under Rule 403 if Mr. Morales is to have a chance at a fair trial.

B. The Court Correctly Excluded the Proffered 404(b) Evidence Because it is Inadmissible under Rules 401 and 404(b).

It is true that the defendants' knowledge is a core issue in this case. Unfortunately for the government, however, the evidence it seeks to admit is not probative of Mr. Morales's knowledge and fails the strictures of a Rule 401, 403, and 404 analysis. The Court refused to admit similar evidence against the Group One Defendants, and the Court should abide by that ruling in this case.

Whether prior acts are relevant to a defendant's knowledge depends on whether the acts "tend to make the existence of any fact that is of consequence to the determination of the action

more or less probable." *United States v. Hicks*, 635 F.3d 1063, 1069-70 (7th Cir. 2011) (quoting Fed. R. Evid. 401). In *Hicks*, the Seventh Circuit vacated a defendant's cocaine distribution conviction when the lower court allowed the government to admit evidence of two prior drug convictions to prove the defendant's knowledge of the drug industry and his intent to distribute drugs. *Id.* at 1066, 1074. The court determined that the evidence was improperly admitted under Rule 404(b) because the defendant never claimed that he was unaware of the illegality of possessing or selling cocaine. *Id.* at 1070.

As an initial matter, the proffered evidence does not satisfy the requirements of Rule 401. In an effort to clarify the government's misrepresentations, it is helpful to examine each piece of proffered evidence in turn. Four of the six proffered pieces of evidence that the government seeks to admit concern Mr. Morales's practices in dealing with the payments of *agents*, not end-users or foreign officials, as is the case in the Gabon deal. The government incorrectly argues that these excerpts show that Mr. Morales knew that "commissions" were used to bribe players in the industry. When examined in their totality, the content of these conversations show that this could not be farther from the truth.

In the first proffered snippet (ID-86 at 14:40-16:16), Mr. Morales is explaining how Allied Trading structures scope of work agreements for its agents. Nowhere in this conversation does Mr. Morales state that he provides commissions, let alone "bribes," to end-users. In fact, in the same meeting, Mr. Morales states that he is "not going to buy the end users anything." *See* ID-90 at 2:27. The government has conveniently excluded this portion of the conversation from its proffered evidence.

The government's second proffered snippet comes from the same recorded conversation between Mr. Morales and Richard Bistrong and suffers from the same manipulated and

misguided representation. In this excerpt, the government seeks to admit the fact that Mr. Morales stated that people in the industry have to be "creative" about paying agents and that "[y]ou just gotta be smarter than the government." Mr. Morales, however, was still speaking to scope of work agreements to agents, not end-users or foreign officials as is the case in the Gabon deal, in order to comply with accounting principles.

Through its third and fourth proffered portion of a conversation between Mr. Morales and Richard Bistrong, the government incorrectly states that Mr. Morales refers to bribes as "commissions" and once again references the need to be "creative" when paying commissions. The government also offers Mr. Morales's statement that he is conscious of the issues with paying large commissions and how large commissions could raise red flags and should be called a scope of work. As explained above, scope of work agreements provide companies with ways to pay agents without doing so through large commissions, which put a company at risk for an expensive and unnecessary audit. At no point in either of these conversations does Mr. Morales refer to commissions as bribes.

In order to show that structuring scope of work agreements is a legal and agreed-upon practice in the industry, Mr. Morales's defense would call a number of witnesses who are authorities in the profession to rebut the government's arguments. This would needlessly add to both the length and complexity of this already complicated trial. Also, in order to be truly representative, the government should offer these tapes in their entirety to avoid the misrepresentation and manipulation present in its pleading. The government should not be able to offer only isolated snippets that serve their interests at the risk of unduly prejudicing Mr. Morales.

The last two pieces of the government's proffered evidence – an excerpt from a conversation in which Mr. Morales jokes about falling asleep during an FCPA briefing and an email to a co-worker in which Mr. Morales states that he was familiar with the FCPA – concern Mr. Morales's knowledge of the FCPA. Unfortunately for the government, this proffered evidence is not probative of Mr. Morales's alleged "intent" to violate the FCPA. Mr. Morales is not arguing that he had no knowledge of the FCPA itself, or of how the Act operates. The government, however, may not argue that the mere fact that Mr. Morales knew of the existence of the FCPA means that he had the propensity to violate it. The government's proffered evidence contained in ID-485, in which Mr. Morales jokes about falling asleep during FCPA briefings, and his statement to a co-worker that he "likely know[s] the [FCPA] better than most" serves no purpose but to insinuate that Mr. Morales knows about the FCPA, has no regard for it, and has a propensity to violate it. This purpose violates Rules 403 and 404(b).

In short, misrepresented snippets of conversations and an isolated email, all of which took place well before the Gabon deal was pitched, do not "tend to make the existence of any fact that is of consequence to the determination of the action more or less probable." These conversations have no relation or bearing on the facts of the Gabon deal, or Mr. Morales's knowledge concerning the Gabon deal. The issue here, and what the government must prove, is whether on the four corners of *this* deal, Mr. Morales acted willfully and corruptly in violation of the Foreign Corrupt Practices Act. In other words, like the defendant in *Hicks*, Mr. Morales is not arguing that he did not know that it is illegal to bribe foreign officials. Instead, the manner in which the government agents presented the Gabon deal made the allegedly illegal nature of the deal unclear. As a result, Mr. Morales did not have the state of mind to "willfully" and "corruptly" participate in the Gabon deal and violate the Foreign Corrupt Practices Act.

As the Court stated in the jury instructions in the first segment of this trial, the "good faith of a defendant is a complete defense to all the charges in the Superseding Indictment because good faith is, simply, inconsistent with the required element, which the government must prove beyond a reasonable doubt, that the defendant acted 'corruptly.'" The Foreign Corrupt Practices Act does not require a defendant to be aware that they were violating the statute itself, but instead requires that the defendant "intended to do something unlawful." *United States v. Kay*, 513 F.3d 432, 449 (5th Cir. 2007). Due to the government's portrayal of the deal as legitimate, instead of knowingly entering into an unlawful deal, as the government alleges, Mr. Morales entered into the deal with a good faith belief that the deal was lawful and had been approved by the United States Government.

The government's proffered evidence is likewise inadmissible under Rule 404(b). Under well-established D.C. Circuit precedent, the government has the burden to prove that the proffered evidence is sufficiently similar to the charged conduct to warrant admission under any of the exceptions enumerated in Rule 404(b). *See Foskey*, 636 F.2d at 524 ("when a prior criminal act is relied upon to prove intent or knowledge, similarity between the two events must be shown to establish the threshold requirement of relevance") (quoting *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979)). Indeed, this Court has very recently recognized the limited probative value of prior acts evidence under circumstances where the proffered evidence bore a much closer resemblance to the charged conduct than it does in this case. *See Loza*, 2011 WL 553438, at *2-3 (refusing to admit evidence of prior acts of domestic bribery in a domestic bribery case).

In *United States v. Loza,* the defendant was charged with conspiracy to defraud the United States, bribery, extortion, and making false statements in connection with an alleged

scheme to unlawfully control and dominate the taxicab industry in the District of Columbia. *See id.* at *1. In *Loza* – as in this case – the government proffered the prior acts evidence to show the defendant's "intent, knowledge and absence of mistake" as to the bribery charge and sought to admit evidence of the defendant's acceptance of a prior bribe as proof of those elements. This Court refused to admit the evidence, concluding that the probative value of the proffered evidence was "limited" and "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* at *2 (quoting Fed. R. Evid. 403).[1]

If, as this Court found in *Loza*, alleged prior acts of bribery in the U.S., and in violation of U.S. law have "limited" probative value in proving a violation of U.S. anti-bribery laws, then surely the government's proffered evidence here of a conversation regarding general industry topics, not concerning an actual deal, has far less probative value in proving a violation of U.S. anti-bribery laws. *See also United States v. Turner*, No. 06-0026, 2006 WL 1980232, at *4-7 (D.D.C. July 12, 2006) (Colleen Kollar-Kotelly, J.) (rejecting proffered admission of prior act of bribery in domestic bribery case where the alleged offense was committed in a foreign country, in a significantly different setting, with different accomplices, and was remote in time).

Moreover, the teachings of *Loza* and the D.C. Circuit's decision in *United States v. Nicely* make it clear that broad-brush rationales of similarity are insufficient. In *Nicely,* the D.C. Circuit analyzed two separate conspiracies which shared similarity in membership, a common fraudulent

[1] The Court went on to exclude additional evidence proffered by the government relating to the defendant's alleged failure to disclose certain items he had received on annual financial disclosure forms. In rejecting the government's purported justifications of intent, knowledge and absence of mistake as to this evidence, the Court noted that it was "not convinced that this evidence [is] probative of some material issue other than character" and found that any probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Loza*, at *4 (internal quotations and citations omitted). The Court left open the possibility that it might permit use of the proffered evidence at trial only if the defense were to open the door to the admission of such evidence at trial, such as by testifying in his own defense. *Id.* at *3.

premise, and other minor connecting elements for purposes of a Rule 404(b) analysis. *Nicely*, 922 F.2d at 856. The D.C. Circuit concluded that, despite these commonalities, because (1) one of the conspiracies targeted a private company and the other targeted the U.S. government, and (2) the defendants had varying levels of involvement in the two schemes, the separate conspiracies were not sufficiently similar such that the majority of the evidence pertaining to each conspiracy would have been admissible under any of the Rule 404(b) exceptions. *Id.*[2]

The lessons of *Loza* and *Nicely* apply with full force to the instant matter. Here, the government is unable to offer any solid basis as to why its proffered evidence is "sufficiently similar" to the charged conspiracy. *See, e.g.*, *Nicely,* 922 F.2d at 854, 855 ("Beyond the similarity in membership, the government points to nothing in common between the two conspiracies more specific than the common use of falsehoods to make money . . . The government's choice of the word 'symbiotic' on appeal to explain the link between the conspiracies is symptomatic of its inability to articulate a nexus between the schemes, and identifying the common objective as making money and the shared *modus operandi* as telling lies are patently insufficient[.]").

Indeed, whereas in *Nicely* the government sought only to link two different conspiracies, in this case, the government is attempting to brand Mr. Morales's past conversations as "similar" to the charged conspiracy. As the D.C. Circuit did in *Nicely*, this Court should reject the

[2] The primary issue being considered by the *Nicely* Court was whether actual prejudice arose from the misjoinder of two conspiracies in a single trial. In resisting a finding of actual prejudice, the government argued that any error arising from the misjoinder was harmless since evidence of both conspiracies would be cross-admissible in the case of the other under Rule 404(b). *Id.* at 854-858. Thus, the D.C. Circuit conducted a Rule 404(b) analysis and, as set out above, completely rejected the government's Rule 404(b) argument.

government's claims that the evidence of this alleged prior bad act is admissible pursuant to Rule 404(b).[3]

An example of the Court's reasoning in the Group One trial is instructive in this matter. During the Group One trial, the government attempted to admit into evidence a prior conversation held between Defendant Pankesh Patel, Richard Bistrong, and Daniel Alvirez. The government contended that the conversation was probative of Mr. Patel's knowledge of the structure of the commission of the Gabon deal and its illegality. Specifically, the government stated that "when we [the government] talk about using expressions like back hands and he does what the frick he wants to do with it, and it's not for us to know – this shows that when we are talking about commissions in this context, that Mr. Patel does understand, that it is reasonably clear for the agents to use that word as a shorthand with him." June 15 AM Tr. at 29:5-10.

The Court, however, disagreed with the government's erroneous analogy between the two conversations and correctly pointed to the dissimilarities between the past deal discussed in the conversation between Mr. Patel, Mr. Bistrong, and Mr. Alvirez, and the Gabon deal. In short, the Court stated that the past conversation dealt with commissions being paid to an *in-country* agent, and with Mr. Patel allowing the agent to do with the commission what he desired after the commission had been paid. June 14 PM Tr. at 109:17 – 110:4. The Court also correctly explained that it was not clear if the commission in that deal that went to the in-country agent also included a bribe or gratuity to a government official. June 15 AM Tr. at 30:21 – 31:6. As the government failed to prove that its proffered evidence was sufficiently similar to the charged act,

[3] As the proffered justifications of "opportunity" and "absence of mistake" likewise require threshold showings of relevance and similarity, those grounds also fail. *See, e.g., United States v. Cruz*, 343 F. Supp. 2d. 226, 232 (S.D.N.Y. 2004) (holding that government could not introduce substantive evidence of prior armed robbery convictions in trial on weapons charges to prove, *inter alia*, defendant's opportunity and ability to obtain a firearm, as prior bad acts were not sufficiently similar to charged conduct); *Loza* at *2-4 (absence of mistake).

the Court correctly excluded the evidence as it would be "confusing to the jury and unfair to the defense." June 15 AM Tr. at 31:11-12.

The government's proffered evidence against Mr. Morales is even more dissimilar that the evidence the government precluded from use against Mr. Patel in the Group One trial. The conversation encapsulated in the government's proffered evidence from ID-86 against Mr. Morales discusses strategies used to structure commissions to *agents*, not to government officials. Specifically, the ID-86 conversation concerns the use of scope of work agreements as a method of paying commissions to agents to reflect the amount of work that will be done by the agent over the course of the contract. Nowhere in the conversation does Mr. Morales discuss using commissions as a way of bribing government officials or structuring commissions in a way that would allow agents to bribe government officials. These dissimilarities, along with the Court's accurate reasoning in the Group One trial, render the government's proffered evidence inadmissible under Rule 404(b).

The Court likewise refused to admit past conversations between Defendant Saul Mishkin and Richard Bistrong for the government's purpose of providing "context" for the call in which Mishkin tried to withdraw from the deal and was eventually lured back in by Mr. Bistrong, with the advice and consent of Case Agent Forvour. The government wanted to introduce this evidence of past recorded conversations to argue that this was Mishkin "winking and nodding," instead of actually wanting to get out of the deal because his attorneys had advised him that they questioned the deal's legality. June 15 AM Tr. at 94:1-7. The Court did not permit the government to admit these past conversations and instead warned it that it was "drifting into the zone that . . . is fraught with danger and inconsistent with [the Court's] prior rulings here." June 15 AM Tr. at 100:15-17. Here, the government is blatantly ignoring the Court's numerous, clear

rulings and once again trying to introduce impermissible 404(b) disguised as "prior statements" that lend context to the government's case. The Court has already made the correct ruling to keep this evidence out, and it should abide by that ruling here.

Once stripped away of the government's window-dressing, it is clear that the proffered evidence of Mr. Morales's past conversations would not tend to make the existence of any fact that is of consequence in this case more or less probable. *See* Fed. R. Evid. 401. Given the lack of sufficient similarity between the proffered evidence and the charged conduct, admitting the evidence would only serve to subject Mr. Morales to precisely the kind of general smear campaign against which Rules 404(a) and 404(b) were designed to protect. *See Loza*, at *2-3; *Turner*, at *4-7; *see also Nicely*, 922 F.2d at 856-857; *Biswell*, 700 F.2d at 1318-19. The Court should, therefore, exclude the proffered evidence under Rules 404(a) and 404(b) as irrelevant and insufficiently-similar bad character and propensity evidence. *See* Fed. R. Evid. 404(a) and 404(b).

III. THE COURT CORRECTLY EXCLUDED THE PROFFERED 404(b) EVIDENCE BECAUSE IT IS NOT "DIRECT" OR "INTRINSIC" TO THE CHARGED CONSPIRACY.

Although the government once again changed its labeling from its Group One pleading from "intrinsic" to "direct" evidence, its attempt to position the proffered evidence relating to Mr. Morales as "direct" or "intrinsic" to the charged conspiracy should be rejected by this Court. Controlling D.C. Circuit precedent makes abundantly clear that "*there is no general 'complete the story' or 'explain the circumstances' exception to Rule 404(b) in this Circuit*." *Bowie*, 232 F.3d at 929 (emphasis added); *see also United States v. Moore*, No. 05-3050, 2011 WL 3211511, at *25 (D.C. Cir. July 29, 2011) (emphasizing the D.C. Circuit's rejection of the "completes the

story" or "explains the circumstances" approach to determining whether evidence is intrinsic to a charged offense).

In *Bowie*, the D.C. Circuit considered the district court's admission of prior bad acts evidence against Bowie in connection with a charge against him for possession of counterfeit money. The prior acts proffered by the government concerned an arrest of Bowie made one month earlier that had resulted in the recovery of counterfeit bills with the same exact serial numbers as the counterfeit money that Bowie was charged with possessing, along with an eye-witness description of Bowie passing a counterfeit bill (again, bearing the same serial number) on the same day of the prior arrest. *Bowie,* 232 F.3d at 926. Although the D.C. Circuit found the district court had properly admitted the proffered prior acts evidence as evidence of knowledge and intent pursuant to Rule 404(b), the Court of Appeals rejected the district court's contention that the evidence also qualified for admission as so-called "intrinsic" evidence. *See id.* at 929. Just as here, the government in *Bowie* sought to classify its proffered prior acts evidence as "intrinsic" on the theory that it "completes the story of the crime." The district court, in turn, invoked the "*res gestae*" doctrine in finding the prior acts evidence "inextricably intertwined with the charged crime." *Id.* at 928. In rejecting the "*res gestae*" doctrine as an appropriate basis for admitting prior acts evidence outside the context of Rule 404(b), the D.C. Circuit reasoned:

> To the extent this Latinism was meant to suggest that the [prior acts] evidence was outside Rule 404(b) because it "explained the events" or "completed the story," we do not agree. As we have said, all relevant prosecution evidence explains the crime or completes the story. The fact that omitting some evidence would render a story slightly less complete cannot justify circumventing Rule 404(b) altogether.

Id. at 928-929; *see United States v. Khanu*, 664 F. Supp. 2d 80, 82, 84 (D.D.C. 2009) (noting that the "D.C. Circuit has rejected a broad construction of the 'inextricably intertwined' test, noting

that evidence needed only to 'complete the story' or 'explain the circumstances' is not intrinsic to the charged crime" and explaining that "when evidence of prior acts related to actions substantially different from the goals of the conspiracy charged, and occurs *prior to the commencement of the conspiracy period*, that evidence is better analyzed as falling under the purview of Rule 404(b).") (emphasis added).

To paraphrase the D.C. Circuit's query in *Bowie*: is the alleged prior act evidence at issue here "so indistinguishable from the charged crime that [the] item of evidence is entirely removed from Rule 404(b)?" *Id.* at 928. The answer in *Bowie*, as the answer must be here, is no. As the D.C. Circuit held, only if the proffered evidence "is of an act that is part of the charged offense" can it properly be considered "intrinsic" and, therefore, immune to Rule 404(b)'s limitations on evidence of criminal propensity. *Id.* at 929. As previously stated, the details of Mr. Morales's conversations had nothing to do with the Gabon deal, as the Gabon deal was not even introduced until a year after the proffered conversation. Following the reasoning of *Khanu*, this evidence is "better analyzed as falling under the purview of Rule 404(b)" as it occurred prior to the alleged conspiracy period. In other words, this highly prejudicial (and unproven) background material is not "direct" or "intrinsic" to the charged conduct.

As the proffered evidence against Mr. Morales is not admissible as "direct" or "intrinsic" evidence under controlling D.C. Circuit authority, nor, as shown above, under Rules 401, 404(b) and 403, it must be excluded from the trial of this matter.

IV. <u>THE GOVERNMENT MUST ADHERE TO THE COURT'S RULING</u>

In the Group One trial, there were many instances where the government sought to evade the Court's ruling against admission of 404(b) evidence by attempting to "back door" the 404(b) evidence into the trial. In the upcoming trial, should the Court decide to follow its previous

ruling and exclude the government's proffered 404(b) evidence, the government *must* adhere to the court's ruling. Allowing the government to introduce 404(b) evidence through alternate means would essentially eviscerate the Court's ruling and deprive the Mr. Morales's rights to a fair trial. A few of the government's attempts to introduce 404(b) evidence in the Group One trial are as follows:

- The Court sustained Mr. Menchel's objection and precluded the government from using evidence of past deals to elicit testimony on the specific words used in those past deals:
    - "MR. MENCHEL: Your Honor, this is an attempt to do through the back door what couldn't be done through the front door. I didn't elicit any testimony about what words were used in the Mexico or Argentina deal." June 1 PM Tr. at 79:19-22.
    - "THE COURT: Yeah. I'm going to sustain the objection. I think at this point we're getting -- we're moving into this whole zone of 404(b) once again, yet again. I'm not accusing you of trying to do it through the back door . . . But I think effectively you could end up doing that. I think at this point I think we should move on to a different topic. I'll sustain the objection." June 1 PM Tr. at 82:4-10.
- The Court precluded the government from introducing evidence of Mr. Tolleson's income from previous deals:
    - "MR. PASSANISE: Your Honor, and also I think that Mr. Haray is also bringing in income that was from 404(b) stuff that the Court's already previously ruled, so I think there's an improper inference that the government is trying to backdoor 404(b) issues on Tolleson." June 14 PM Tr. at 43:5-9.

  - "THE COURT: I don't know where you're [the government] headed on this, but I think common sense would tell you that $45,000, as you yourself just said, is a lot of money anywhere. So I think getting into an investigation into what Mr. Tolleson's income was first of all is unnecessary, it is outside the scope, and I'm not sure what the relevance of it is under the circumstances. But as you yourself said and he acknowledged, $45,000 is a lot of money anywhere. I think you're plowing territory you don't need to go into. So I'll sustain the objection." June 14 PM Tr. at 43:15-23.

- The Court realized that the government's attempts to elicit information about "normal industry practices" could easily cross over into 404(b) territory:
  - "MR. MENCHEL: I can find the words he used to what's in this case. Now he's trying to backdoor in 404(b) evidence by talking about other conversations and other deals. That's what he's referring to in his questions. I think if we continue down this path, I'm going to have no choice but to move for a mistrial." June 14 PM Tr. at 48:1-6.
  - "MR. MENCHEL: [Mr. Haray] now asked this witness about, in talking presumably with these defendants and others, whether Mr. Bistrong used other words than what's been introduced in evidence in this case. And what he's referring to obviously are not the Gabon tapes, because those have been played for the jury, but to the 404(b) tapes in which other words may have been used. And that's precisely what the Court ruled was not going to be admissible." June 14 PM Tr. at 48:11-18.

  - "THE COURT: I think Mr. Menchel's point is a good one in terms of the risk here. The risk that the agent will make statements that are unfortunate and not really – the prejudicial effect of them may not be curable by some kind of instruction. I think the cautionary notice [to Special Agent Forvour] is a fair one under the circumstances." June 14 PM Tr. at 52:16-21.
  - "THE COURT: But I think whenever we get to discussions of a generic nature about the industry, whenever the questions appear to be posed to elicit observations of that kind, therein lies the risk that there might be these unfortunate statements, or maybe things that might give rise to the 404(b) concerns that we've worked hard to try to keep out of the case." June 14 PM Tr. at 53:8-14.
- The government argued that Mr. Menchel had opened the door to 404(b) evidence and asking Special Agent Forvour what his understanding of the word "commission" was in the context of the Clyde's speech when Mr. Menchel asked Special Agent Forvour if the word "commission" was used in the speech. A review of the record showed that Mr. Menchel had asked if the word was used, but did not question Special Agent Forvour's understanding of the word itself:
  - "MR. MENCHEL: So what he has essentially done here is [the government] has created [its] own testimony of what [it] says that I actually asked, which I didn't, and then has argued that I opened the door. So that's the first point, and I find that very concerning because that's not what the record shows happened." June 15 AM Tr. at 6:11-15.
- The Court then asked the government to which piece of evidence they would tie Mr. Patel's "understanding" of the illegality of the word "commission." The government

wished to introduce a conversation between Richard Bistrong and Mr. Patel that involved a prior deal. The Court precluded the government from introducing that phone call to prove Mr. Patel's understanding of the word "commission" as it was not clear from the phone call if the structure of the deal was even similar to that of the Gabon deal:

- "THE COURT: [To the government:] I am not going to permit using this." June 15 AM at 31:14-16.

To protect both the expediency and fairness of this trial, the government must adhere to the Court's ruling regarding the introduction of 404(b) evidence against the defendants. It would be unacceptable for the government to attempt in this trial, as it did in the Group One trial, to sidestep the Court's ruling and masquerade its proffered 404(b) evidence as admissible evidence against Mr. Morales.

CONCLUSION

The government's notice to admit Marc Morales's prior statements is a show of its blatant disregard for the Court's prior rulings against admission of this type of evidence in the Group One trial. The government's unsuccessful attempt to recharacterize this evidence does not change the reality that the Court has already held that such evidence is not probative of the defendants' knowledge and is highly prejudicial.

This Court's decision on the government's motion will be one of the most important the Court will make during this trial because it will define how the government is permitted to present this case to the jury. The Court's ruling will decide whether the government is permitted to tar Mr. Morales with completely collateral evidence in an effort to bolster their evidence relating to the Gabon deal or whether the government will be forced to stick to evidence

pertaining to the charges they have brought and let the jury decide whether Mr. Morales is guilty of an FCPA conspiracy related to the Gabon deal.

As to Mr. Morales, because no fair and just trial can be had if the government is permitted to introduce highly prejudicial and irrelevant evidence, in violation of Rules 401, 403, and 404(b), we respectfully request that the Court deny the government's request to introduce this evidence at trial.

Respectfully submitted,

/s/

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