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

UNITED STATES OF AMERICA	§	
	§	
v.	§	
	§	
HOLY LAND FOUNDATION FOR	§	
RELIEF AND DEVELOPMENT (1)	§	
also known as the "HLF"	§	NO. 3:04-CR-240-G
SHUKRI ABU BAKER (2)	§	
MOHAMMAD EL-MEZAIN (3)	§	
GHASSAN ELASHI (4)	§	
MUFID ABDULQADER (7)	§	
ABDULRAHMAN ODEH (8)	§	

DEFENDANTS' JOINT MOTION AND MEMORANDUM FOR A BILL OF PARTICULARS

TO THE HONORABLE A. JOE FISH, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS:

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT (HLF), SHUKRI ABU BAKER, MOHAMMAD EL-MEZAIN, GHASSAN ELASHI, MUFID ABDULQADER AND ABDULRAHMAN ODEH, defendants in the above entitled and numbered cause, through their undersigned attorneys, pursuant to FED. R. CRIM. P. 7(f), respectfully move the Court to order the government to provide a bill of particulars: (a) identifying the Palestinian families the defendants are alleged to have supported in order to support Hamas terrorism; (b) clarifying the category or categories of families the defendants allegedly wrongfully targeted for charitable assistance, and; (c) identifying any unindicted co-conspirators the government intends to call as witnesses at trial.

The grounds for this motion are set forth in detail below.

I. INTRODUCTION

The government's theory of this case is that the defendants provided material support for terrorism by engaging in the following conduct: **First**, the indictment alleges that the defendants provided charitable assistance in the West Bank and the Gaza Strip through local Palestinian charity committees ("zakat" committees), hospitals and other institutions that the government claims "were operated on behalf of, or under the control of Hamas." Superseding Indictment, Count One, Overt Acts (1) - (11), and Counts Two through Twelve. **Second**, the government alleges that the defendants "provided financial support to the families of HAMAS 'martyrs,' detainees and activists knowing and intending that such assistance would support HAMAS' terrorist infrastructure" and that

> [i]n screening potential aid recipients and in providing funds, the defendants distinguished between needy Palestinian families generally, and those Palestinian families who had a relative 'martyred' or jailed as a result of terrorist activities. In some cases, the defendants specifically targeted families for financial aid who were related to known HAMAS terrorists who had been killed or jailed by the Israelis. In this manner, the defendants effectively rewarded past, and encouraged future, suicide bombings and terrorist activities on behalf of HAMAS.

Superseding Indictment, Count One, ¶ 5. All of the other counts in the indictment spring from these two theories of criminal liability.[1]

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[1] If it is the government's position that in providing funds to individual families and orphans in Palestine, the defendants were required to refrain from providing funds to certain persons whom the prosecution asserts were related to Hamas activists, Hamas terrorists, or other suspect categories, then the defendants will assert that their religion requires that they provide charity without regard to the sins of the fathers of orphans or the sins of family members or relatives. The defendants will also assert that criminalizing assistance to such persons substantially burdens their exercise of their religion, a pillar of which is every Muslim's obligation to provide for the poor and especially for orphans. This issue will become clear, defendants believe, when the government responds to the pending motion for a bill of particulars, in which the defendants have requested the Court to order that the prosecution specify what categories of persons the defendants wrongfully supported. Pursuant to the procedures prescribed by the Ninth Circuit in *United States v. Bauer,* 84 F.3d 1549, 1559 (9th Cir. 1996), this Court should hold a pre-trial, evidentiary hearing to determine if this prosecution does, in fact, burden the defendants' exercise of religion, and then address whether the government must prove that criminalizing aid to any

The first category of allegations---that the defendants provided charity, on particular dates, in particular amounts, to particular Palestinian charity organizations---adequately identifies the transactions that are alleged. It is with respect to the second category of allegations---that HLF singled out for assistance particular families for aid because those families were related to Hamas terrorists, Hamas activists or others who had been jailed or killed by Israel for involvement in terrorism---that the indictment lacks sufficient specificity and is otherwise vague or ambiguous and requires a bill of particulars.

First, the indictment identifies none of the families who received aid as a result of the alleged "screening" process or whom HLF "specifically targeted" for assistance. This lack of specificity leaves the defendants unable to anticipate and defend against the charges because they have no idea to which families the government is referring in its indictment.

Second, by alleging that HLF's criminal conduct was its screening of Palestinian families so that aid would go to "the families of HAMAS 'martyrs,'detainees and activists" and by its "specific[] target[ing of] families for financial aid who were related to known HAMAS terrorists who had been killed or jailed by the Israelis," the government has described categories of families that encompass practically the entire population of Palestine and, unless narrowed, will make the defense of this case impossible. As it stands, the defendants have no way of knowing what criteria the

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families whose relatives are affiliated with Hamas is a compelling interest of the United States Government and whether a flat ban on such aid is the least restrictive means of furthering the compelling interest. Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1, *et seq.*

government will apply at trial to prove that any particular family should not have received HLF's assistance.

For example, the defendants do not know whether they must be prepared to defend against an accusation that they should not have given assistance to a particular family because a member of the household was guilty of terrorism. Moreover, the use of the word "family" is ambiguous. The defendants do not know what the government means by the word "family," a term that could include a parent, a child, a grandparent, a cousin, an in-law or any number of other relations.

The word "Hamas activist" is also ambiguous. The defendants do not know whether this includes persons who merely assert support of Hamas or whether, for example, it includes persons who have distributed leaflets supporting Hamas. In the last election, in January of 2006, we know that more than half the population of Palestine supported Hamas. The evidence will show that in the relevant time period, Palestinian support in some form for Hamas waxed and waned from about 12% to about 15% of the Palestinian population, although at some points it was considered to be as high as 30%. *See* Shaul Misal and Avraham Sela, The Palestinian Hamas: Vision, Violence and Coexistence, Columbia University Press, 133 (2000). As such, it is critical that defendants know before trial what activities or level of support the government contends qualifies a person as a "Hamas activist."

As these allegations are set forth in the indictment, the defendants will have no way to anticipate and defend against what the government will attempt to prove at trial. If the defendants are to take the allegations at face value, then no charity can target any families in Palestine for assistance because so many families in Palestine are either

related to, or include persons who are Hamas activists and/or detainees, regardless of whether those persons were involved in acts of terrorism. Moreover, the Government of Israel has incarcerated thousands of Palestinians based on allegations that they were involved in terrorism or because they were alleged to be "Hamas activists" or because they were involved in armed resistance to the Israeli occupation of the West Bank and Gaza, or for other reasons entirely. During the relevant time period, thousands of Palestinians were imprisoned for some period of time in Israeli jails, and many had never been charged with any crimes. *See* Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*, University of California Press, 2005.

HLF provided assistance to thousands of families in Palestine and the defendants do not know and have no way of knowing which families the government is referring to in the indictment and which families will be the subject of the government's proof at trial. The indictment leaves it up to the defendants not only to guess at which individual families and persons they are accused of criminally supporting, but also which *categories* of families are within the ambit of the indictment.

Unless the Court requires the United States to identify the families, orphans, activists, and terrorists alleged in the indictment, and explain and narrow the nature of the conduct by relatives of these families that may give rise to criminal liability on the part of these defendants, the defendants will not be able to rebut evidence at trial that any particular families or orphans were related to alleged terrorists or activists and will have no way to address whether a particular person, the government identifies as a terrorist relative of any family or orphan, was or was not a terrorist. These are the circumstances for which FED. R. CRIM. P. 7(f) provides a remedy through a bill of particulars.

Finally, the law in this Circuit establishes that in order to allow the defendants to prepare for trial and to avoid surprise, the government should be required to identify any unindicted co-conspirators it intends to call as witnesses.

II. ARGUMENT

A. Applicability of Rule 7(f).

Rule 7(f) of the Federal Rules of Criminal Procedure authorizes this Court to require the government file a bill of particulars where appropriate. FED. R. CRIM. P. 7(f) ("The court may direct the government to file a bill of particulars."). Before 1966, Rule 7(f) limited bills of particulars to those situations in which the moving party demonstrated cause for his request. By amending the rule in 1966 to eliminate the cause requirement, the drafters expressly sought "to encourage a more liberal attitude by the courts toward bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases." FED. R. CRIM. P. 7 Advisory Committee's Note to 1966 Amendment.

Consistent with this shift, the case law now recognizes that a court should grant motions for bill of particulars whenever an indictment's failure to provide factual or legal information significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial. *United States v. Rosa,* 891 F.2d 1063, 1066 -1067 (3d Cir. 1989).[2] This Court has in the past recognized these principles.

> In *United States v. Davis*, 582 F.2d 947, 951 (5th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979), Judge Higginbotham explained that the purpose of a bill of particulars is to inform an accused of the charge with sufficient precision to reduce trial surprise, to enable adequate defense preparation,

[2] Of course, "it is a settled rule that a bill of particulars cannot save an invalid indictment." *Russell v. United States,* 369 U.S. 749, 770 (1962).

> and critically, by the fleshing out of the charges to illuminate the dimensions of jeopardy.

United States v. Campbell, 710 F. Supp. 641, 641 (N.D. Tex. 1989) (denying bill of particulars because "there is very little if anything in the motion that the defendant has not or will not obtain through legitimate disclosure devices," *id.* at 642).

Stated tersely, "[t]he purpose of a bill of particulars is to apprise the defendant of the charge against him with sufficient precision to enable him to prepare his defense." *United States v. Montemayor*, 703 F.2d 109, 117 (5th Cir. 1983). "The ready remedy of a motion for a bill of particulars is available to add specifics beyond those required for the indictment to pass constitutional muster." *United States v. Hajecate*, 683 F.2d. 894, 898 (5th Cir. 1982). The grant or denial of a motion for a bill of particulars is "addressed to the sound discretion of the trial court, subject to review for clear abuse of that discretion." *Campbell,* 710 F. Supp. at 641. However, "[a]lthough grant of a bill of particulars lies in the discretion of the trial court, the defendant may show abuse of discretion in denying the motion by proving unfair surprise." *United States v. Jackson*, 757 F.2d 1486, 1491 (4th Cir. 1985), citing *Wong Tai v. United States*, 273 U.S. 77, 82 (1927).

B. The Need to Specify the Families the Government Alleges HLF Should Not Have Targeted for Assistance.

In the case at bar, if the government is permitted to identify at trial for the first time the families or relatives of alleged terrorists, "Hamas activists," Israeli prisoners, etc., that HLF is accused of having "screened" or "targeted" for charitable assistance, the defendants will be unable to avoid surprise. It will be too late to investigate the basis for the government's assertions that HLF targeted a particular family for assistance, that the family was related to a terrorist, a "Hamas activist," a person imprisoned by Israel or

someone whose conduct is otherwise sufficient to place him or her within the ambit of the government's definitions. Neither defendants nor their counsel have any way of anticipating who these families are because the categories are too broad and ambiguous.

A review of cases in which courts have evaluated motions for bills of particulars reveals that federal courts have readily granted bills of particulars when defendants have sought disclosure of the identities of *the persons* who participated in the acts alleged, were victims of the acts alleged, or were recipients of the money or services that are alleged as forming the basis for the allegation of criminal conduct. *See, e.g., United States v. Chen*, 378 F.3d 151, 162 (2d Cir. 2004) (noting that in extortion case district court granted bill of particulars to require government to disclose "the identity of the 'others' whose persons, reputations, and properties the indictment alleges were harmed or threatened"); *United States v. True*, 250 F.3d 410, 414 (6th Cir. 2001) (in price-fixing conspiracy, noting that trial court had required bill of particulars "identifying the specific bids, prices, products and customers that were the basis for the allegations in the Indictment."); *United States v. Linn*, 889 F.2d 1369, 1372 (5th Cir. 1989) (in response to motion for bill particulars, government supplied list of individuals defendant was alleged to have supervised in a continuing criminal enterprise case); *United States v. Rosa,* 891 F.2d 1063, 1066 (3rd Cir.1989) (in a continuing criminal enterprise prosecution, "we believe that the defendant should be advised prior to trial of the individuals claimed by the government to be controlled persons so that he or she may prepare a defense and avoid surprise at trial"); *United States v. Davidoff,* 845 F.2d 1151, 1154 (2d Cir. 1988) ("Though we agree with the Government that even in a RICO case it is not obliged to disclose before trial all of its evidence, we believe the trial judge exceeded his discretion

in this RICO prosecution by denying a bill of particulars identifying at least the victims of discrete extortionate schemes that the prosecution intended to prove."); *United States v. Panzavecchia*, 446 F.2d 1293, 1295-96 (5th Cir. 1971) (identity of persons to whom forged instruments uttered is not essential for validity of indictment, but it is better practice to include it, "because ordinarily the defendant would be entitled to the name or other identification of such person by a bill of particulars"); *United States v. Lino*, 2001 WL 8356, *7 (S.D.N.Y. 2001) (in RICO prosecution of police officer for trading information for things of value, prosecution required to provide bill of particulars disclosing persons who received information, description of information, statement of what the things of value were, identity of persons who were assisted in obtaining pistol permits, etc; also granting bill of particulars as to second defendant requiring government, *inter alia*, to specify the recipients of bribes and the entities with which those recipients were affiliated); *United States v. Trie*, 21 F. Supp.2d 7, 21-22 (D.D.C. 1998) (requiring government to provide bill of particulars identifying, *inter alia,* persons whom defendant had caused to make false statements and how defendant caused the false statements to be made).

Counsel could find no cases in which the identity of recipients of charitable aid was at issue in such a motion, since the government has apparently never proceeded criminally against anyone by alleging that by providing food, medical supplies and clothing to genuinely needy people, the defendant was thereby supporting terrorism.

Some cases are relevant by analogy, however. In *Ginsberg v. United States*, 257 F.2d 950 (5th Cir. 1958), decided before Rule 7(f) was liberalized, the defendant was accused of understating his income by selling used cars for more than he reported. He

sought the names of the car purchasers, the number of cars involved and the tax deficiency associated with the sales. At trial, the government introduced evidence involving 392 car sales, which gave the defendant's accountant no time to examine the transactions. The Court of Appeals reversed, holding that disclosure of the particular transactions should have been required to allow the defendant to prepare for trial. *Id.* at 955-56. *See also United States v. Wittek*, 1994 WL 19931, *3 (4th Cir. 1994) (unpublished decision) (reversing conviction on other grounds, but requiring that, on remand, "the prosecutor should furnish a bill of particulars which describes any business or transactions other than the checks on which the government relied"); *United States v. Hammad* 678 F. Supp. 397, 403 (E.D.N.Y. 1987), *reversed on other grounds by United States v. Hammad*, 846 F.2d 854 (2d Cir. 1988) (motion for bill of particulars denied where government had supplied defendant all of the names of Medicaid recipients to whom the defendant had allegedly provided non-reimbursable services); *United States v. Wynn*, 54 F.R.D. 72, 74 (E.D. Pa. 1971) (holding, in prosecution for illegal liquor sales, that "fundamental fairness and the spirit of the amendment to Rule 7(f) require that defendant be informed of the identity of persons to whom liquor sales were allegedly made").

It is correct, as the Court noted in *Hammad*, that discovery can take the place of a bill of particulars. If the Government otherwise supplies the information necessary for the defendant to prepare, no bill of particulars need be filed. *Hammad*, 678 F. Supp. at 403. In this case, however, the defendants' ignorance has not been ameliorated by discovery. In fact, the sheer volume of discovery in this case has worsened the problem.

The government has provided these defendants with millions of pages of discovery. During the relevant time period, HLF provided aid to thousands of needy families in the West Bank and Gaza. The discovery includes all the HLF documents that confirm this aid. The government has provided no limitation or guidance to assist the defendants in filtering through these millions of pages to identify the particular families the government will attempt to prove should not have received such aid. "[T]he Court believes that defendant is entitled to know prior to trial certain basic matters: the identity of the patient-victims of the alleged offenses, the records claimed to include false entries, and any allegedly fraudulent bills to insurers. The defense should not be left to its own devices and a sifting of the voluminous materials that have been provided in order to divine the particulars of these critical allegations, which have not yet been disclosed." *United States v. Vasquez-Ruiz*, 136 F.Supp.2d 941, 943 (N.D. Ill. 2001). *See also United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987).

In *Bortnovsky*, an insurance fraud/arson prosecution, the government had successfully argued in the district court that since it had provided all of the documents from which the defendant could learn the specifics of the allegations, it should not be required to file a bill of particulars. The Court of Appeals reversed. "The Government did not fulfill its obligation [to inform defendant of the charges] merely by providing mountains of documents to defense counsel who were left unguided as to which documents would be proven falsified or which of some fifteen burglaries would be demonstrated to be staged." *Id.* at 575. *Accord, United States v. Green*, 1990 WL 136682, *1 (E.D. La. 1990) (unreported decision) ("[W]here crucial information is so shrouded in mystery that the defendant is unduly hampered in preparing his defense, then

the government must produce that information. The government does not fulfill its obligation merely by providing mountains of documents to defense counsel who are left unguided when the indictment fails to define the pending charges sufficiently."). Unlike the defendants in *Bortnovsky* and *Green*, the defendants in this case are not dealing with just a mountain of documents. They are dealing with an entire mountain range of documents.

In addition to enabling the defendants to avoid surprise, the defendants need advance notice of who these families are so the defense can obtain evidence to counter the government's allegations. In this case, the government contends that the defendants' crime was in providing a tiny amount of support and sustenance to particular Palestinian families. This is akin to the facts in one of the leading cases regarding pre-trial access to critical information, *Roviaro v. United States*, 353 U.S. 53 (1957), in which the Supreme Court held that the government was required to disclose the identity of a confidential informant if the informant was a participant in the crime. In a footnote to its opinion ruling that the lower court had erred in not requiring the disclosure of the informant's identity, the Supreme Court added:

> [W]e think that the court erred also in denying, prior to trial, petitioner's motion for a bill of particulars, insofar as it requested John Doe's identity and address....[I]t was evidenced from the face of the indictment that Doe was a participant in and a material witness to that sale. Accordingly, when his name and address were thus requested, the Government should have been required to supply that information or suffer dismissal.

353 U.S. at 65 n.15.

C. The Ambiguity Arising from Allegations that HLF Intended to Support Families Related to "Hamas Activists" and Families Related to "Terrorists."

As set forth in the introduction to this memorandum, the superseding indictment alleges that the defendants singled out various families for assistance either because the family was related to a terrorist, or because the family was related to a "Hamas activist," or a prisoner of Israel. The indictment makes no effort to explain what it means by "family member" (*i.e.*, whether it is son, brother, father, uncle, cousin, niece, etc.).

The indictment is classically ambiguous in this respect. Federal courts have consistently held that such a situation requires a defendant to move for a bill of particulars. *See, e.g., United States v. Chandler,* 753 F.2d 360, 362 (4th Cir. 1985) ("The defendants' remedy therefore was to seek a bill of particulars to clarify the specific factual theory (or theories) upon which the government was proceeding. They did not pursue their remedy and may not be heard now to challenge the adequacy of the notice.") (citation omitted); *United States v. Perkins*, 748 F.2d 1519, 1526 (11th Cir. 1984) ("[A]ny ambiguity could have been clarified by requesting a bill of particulars."); *United States v. Rodriguez*, 465 F.2d 5, 9 (2d Cir. 1972) ("[A]ny ambiguity could have been clarified by demanding a bill of particulars. No demand was ever made. Under these circumstances, appellant cannot now question the adequacy of the indictment.") (record citation omitted).

Accordingly, defendants respectfully request that the government specify what categories of families it will attempt to prove that the defendants "targeted" for assistance. If it includes households that include or included an alleged terrorist, then the government should be required to say so. If it includes families with a relative who was or is an alleged "Hamas activist," the government should say so. If it includes a particular degree of consanguinity, the government should say so. If it includes the

families of persons incarcerated by Israel regardless of the cause, then the government should be required to say so. From reading the indictment, it is impossible to discern the government's theory of criminal liability, and the defendants cannot prepare for trial, and cannot avoid surprise, unless they are on notice of the government's theory of criminal liability.

D. The Government Should Be Required to Disclose in a Bill of Particulars the Identities of Any Unindicted Co-Conspirators It Intends to Call as Witnesses.

The superseding indictment contains forty-two counts. In thirty-nine of those counts either a conspiracy or an aiding and abetting phrase appears with the words, "and others known and unknown to the Grand Jury." *See* Superseding Indictment at 13, 20, 25, 27, 30, 33. The defendants seek a bill of particulars setting out the names of all unindicted co-conspirators whom the government plans to use as witnesses in the trial of this case.

"A bill of particulars is a proper procedure for discovering the names of unindicted coconspirators who the government plans to use as witnesses. It is not uncommon for the trial judge to require the government to disclose their names when information is necessary in a defendant's preparation for trial." *United States v. Barrentine*, 591 F.2d 1069, 1077 (5th Cir. 1979). *See also United States v. Hughes*, 817 F.2d 268, 272 (5th Cir. 1987) (citing *Barrentine*).

In the instant case, each of the instances cited above in the Superseding Indictment refer to unindicted co-conspirators and aiders and abettors. Defendants respectfully move this Court to require the government to file a bill of particulars naming any of them it intends to call as witnesses in this case.

III. CONCLUSION

For the reasons set forth above, the defendants respectfully request that the Court require the government to file a bill of particulars as follows:

A. Identifying the specific Palestinian families the government alleges the defendants targeted to receive assistance in order to support Hamas' terrorist goals and identifying the Hamas terrorists, activists and/or detainees whom the government alleges were related to the particular families.

B. Clarifying what categories of families the government intends when it alleges that the defendants selected particular families because they included Hamas terrorists, detainees, activists, etc. or because they were related to Hamas terrorists, detainees, activists, etc.

C. Identifying any unindicted co-conspirators the government intends to call as witnesses.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that I discussed the instant motion with Mr. James Jacks, Assistant United States Attorney and he is opposed to this motion.

/s/ Nancy Hollander
NANCY HOLLANDER

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Joint Motion for a Bill of Particulars was served on Mr. James Jacks, on this 6th day of October, 2006.

/s/ Nancy Hollander
NANCY HOLLANDER