

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)	
UNITED STATES OF AMERICA,)	
)	CRIMINAL NO. 08-CR-10049-JLT
v.)	
)	[ORAL ARGUMENT REQUESTED]
THOMAS FARINA,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL
AND SUPPORTING MEMORANDUM OF LAW**

Pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, Defendant Thomas Farina respectfully moves the Court for an Order setting aside the verdict of guilt previously returned on Count 2 of the Indictment, and entering a judgment of acquittal, on the grounds that the evidence in this case is insufficient to sustain a conviction of the offense charged. For the same reasons Mr. Farina also moves the Court for an Order entering a judgment of acquittal on Count 1 of the Indictment.

INTRODUCTION

The Indictment charged Mr. Farina with four counts of obstruction of justice in violation of Title 18, Section 1519 of the United States Code (“section 1519”). The jury found Mr. Farina guilty of one count of aiding and abetting obstruction of justice by willfully causing a violation of section 1519 (Count 2), and was deadlocked on one count of obstruction of justice in violation of section 1519 (Count 1). Nonetheless, following a week-long trial, during which seven witnesses testified and over fifty exhibits were introduced into evidence, the record compels the conclusion that the evidence is insufficient as a matter of law to support a finding beyond a reasonable doubt that Mr. Farina had the specific intent to obstruct, impede, or influence a

federal investigation (Count 1), or that Mr. Farina willfully caused Nelson Bermudez to obstruct, impede, or influence a federal investigation (Count 2), a requirement necessary to sustain a conviction under section 1519. Indeed, all of the documents alleged to have been altered or destroyed were produced in their original, unaltered form by Mr. Farina and Mr. Bermudez to Pfizer, who in turned produced the documents to the government. Even viewing the evidence in the light most favorable to the government, the evidence and the inferences made therefrom, at most, support a finding that Mr. Farina and Mr. Bermudez had an intent to keep some information from Pfizer's outside counsel, Covington & Burling LLP. Even then, the evidence in this case is insufficient to support any finding of the specific intent required by the statute beyond a reasonable doubt.

This conclusion is underscored by the jury's deadlock on Count 1 and the jury's question on March 16, 2009. During deliberations, the jury asked the Court "If there is an agreement that there is an intent to impede an investigation, does it need to be proven beyond a reasonable doubt that this intent related to a federal investigation rather than an internal company investigation?" (Jury Questions and Responses [Docket No. 68] at 4.) As discussed below, the answer to that question is clearly "YES." In order to convict Mr. Farina of obstruction of justice in violation of section 1519, the government must prove beyond a reasonable doubt that Mr. Farina had the specific intent to obstruct, impede, or influence a federal investigation. Because the evidence introduced at trial is insufficient as a matter of law to support a finding beyond a reasonable doubt that Mr. Farina or Mr. Bermudez had the requisite intent under section 1519, this Court should enter an order of acquittal as to Counts 1 and 2 of the Indictment.

ARGUMENT

Rule 29 requires the Court to “enter a judgment of acquittal of any offence for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). A motion made pursuant to Rule 29 tests the sufficiency of the evidence against the defendant and avoids the risk that the jury may have capriciously found the defendant guilty in the absence of legally sufficient evidence of his guilt. See Wright, Federal Practice and Procedure: Criminal 3d § 461.

Although the Court must view the evidence in the light most favorable to the prosecution and cannot weigh the evidence or make credibility judgments, see United States v. Hernandez, 218 F.3d 58, 64 (1st Cir. 2000), “[t]he standard ... is not so heavily weighted in favor of the prosecution that in ruling on a Rule 29 motion the Court must blindly and uncritically accept that every inference the prosecution argues can reasonably be drawn from the circumstantial evidence in the record.” United States v. General Elec. Co., 869 F. Supp. 1285, 1290 (S. D. Ohio 1994). Instead, the Court must “take a hard look at the record and [] reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative. This function is especially important in criminal cases, given the prosecution’s obligation to prove every element of an offense beyond a reasonable doubt.” United States v. Woodward, 149 F.3d 56-57 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999) (quoting United States v. Spinney, 65 F.3d 231, 234 (1st Cir. 1995) (citations omitted)).

When evaluating a motion for acquittal under Rule 29, the court properly considers “all the evidence,” including uncontroverted evidence that demonstrates that the inferences the government seeks to draw are unreasonable. See e.g., United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997), cert. denied, 520 U.S. 1258 (1997); United States v. Mangual-Corchado, 139 F.3d 34, 44 (1st Cir. 1998), cert. denied, 525 U.S. 942 (1998) (“the evidence as a whole”);

United States v. Czubinski, 106 F.3d 1069, 1073 (1st Cir. 1997) (“the totality of the evidence”). “All the evidence” in this case includes all the testimony and materials admitted during the government’s case-in-chief, including cross-examination and stipulations submitted by the parties. See United States v. Ruiz, 105 F.3d 1492, 1495 n. 1 (1st Cir. 1997). Moreover, in light of the high burden of proof required for conviction, “[i]f the evidence . . . gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction.” United States v. Morillo, 158 F.3d 18, 22 (1st Cir. 1998) (internal quotations omitted); United States v. Andujar, 49 F.3d 16, 22 (1st Cir. 1995) (Reversing a conviction because the evidence supported a theory of innocence and a theory of guilt and holding that “[w]hen a jury is confronted . . . with equally persuasive theories of guilt and innocence it cannot rationally find guilt beyond a reasonable doubt.”)

I. SECTION 1519 REQUIRES PROOF OF A SPECIFIC INTENT TO OBSTRUCT A FEDERAL INVESTIGATION

Section 1519 provides in relevant part:

Whoever knowingly alters, destroys, . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519. Section 1519 requires that the defendant acted knowingly with the purpose of impeding, obstructing, or influencing a federal investigation. Id. In other words, obstruction of justice is a specific intent crime. See United States v. Aguilar, 515 U.S. 593, 611-12 (1995); United States v. Anderson, 798 F.2d 919, 928 (7th Cir. 1986); United States v. Carleo, 576 F.2d 846, 849 (10th Cir. 1978).

In this case, the Indictment alleges that Mr. Farina acted in response to a specific federal investigation. The Indictment alleges that “[i]n or around February, 2004” the United States informed Pfizer that it was “investigating [Pfizer]’s marketing practices with respect to [Bextra].” (Ind. at ¶ 6.) The Indictment goes on to allege that Mr. Farina was “aware of the government’s investigation regarding [Bextra]...” (Ind. at ¶ 9.) Under these facts, section 1519 criminalizes “destruction of documents with the **intent to obstruct a federal investigation.**” United States v. Fumo, Criminal Action No. 06-319, 2007 WL 3132816, at *20 (E.D. Pa. Oct. 2007) (emphasis added); see also United States v. Hunt, 526 F.3d 739, 743 (11th Cir. 2008) (“This statute rather plainly criminalizes the conduct of an individual who (1) knowingly (2) makes a false entry in a record or document (3) with the **intent to impede or influence a federal investigation.**” (emphasis added)). Thus, under the plain language of section 1519, to sustain a conviction the government must prove beyond a reasonable doubt that Mr. Farina (1) altered or destroyed a document; (2) that he did so knowingly; and that (3) he did so with the **specific intent** to obstruct, impede, or influence a federal investigation.

Despite the unambiguous language of section 1519 and the requirement of specific intent to obstruct a federal investigation, during closing arguments, the government argued to the jury that the jury could find Mr. Farina guilty of obstruction of justice if they found that Mr. Farina intended to obstruct Pfizer’s internal investigation. It is undisputed, however, that Pfizer is not a “department or agency of the United States.” Moreover, any internal investigation that Pfizer’s attorneys conducted regarding the promotion of Bextra is not a matter “within the jurisdiction” of a federal agency or department. As one court explains,

[section] 1519 was meant to apply broadly to any acts to destroy or fabricate physical evidence *as long as* they are done with the intent to obstruct *an investigation or matter within U.S. jurisdiction*, or in anticipation of such a matter.

United States v. Ionia Mgmt. S.A., 526 F. Supp. 2d 319, 329 (D. Conn. 2007) (internal quotations omitted, emphasis added). When discussing the meaning of “jurisdiction,” the Ionia court cited the Supreme Court’s decision in United States v. Rodgers, 466 U.S. 475 (1984) for the proposition that “[a] department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation.” Ionia Mgmt., 526 F. Supp. 2d at 329 (quoting Rodgers, 466 U.S. at 477).

Here, no federal agency, including the FBI, the OIG’s Department of Health and Human Services, and the FDA Office of Criminal Investigations, had any power to exercise its authority over Pfizer’s internal investigation. As Stephen Anthony, an attorney for Covington & Burling LLP, testified as part of the government’s case-in-chief, Covington & Burling’s internal review of Bextra’s marketing practices, including the various interviews that its lawyers conducted on behalf of Pfizer, was protected by Pfizer’s attorney-client privilege. Only **Pfizer**, not the FBI, the OIG, or the FDA, had the power and authority to waive the attorney-client privilege and allow Covington & Burling to provide information to any government agency. While the government could issue subpoenas to Pfizer and interview Pfizer’s personnel as part of its investigation into the off-label promotion of Bextra, the government could not force Pfizer to waive its attorney-client privilege in order to share the results of Pfizer’s own internal review. Thus, only **Pfizer**, not the FBI, the OIG, or the FDA, had power and control over the investigation being conducted by Covington & Burling. Accordingly, under the principle stated in Ionia, Pfizer’s internal investigation was not a “matter within the jurisdiction” of a federal agency. Mere intent to obstruct Pfizer’s internal investigation, without more, is not conduct criminalized by section 1519. Therefore, in order to establish a violation of section 1519 in this

case, the government must prove beyond a reasonable doubt that Mr. Farina had a specific intent to obstruct a federal investigation.

II. THE GOVERNMENT FAILED TO PRESENT SUFFICIENT EVIDENCE OF INTENT TO OBSTRUCT A FEDERAL INVESTIGATION

Section 1519 requires a specific intent to impede, obstruct, or influence an investigation or matter within the jurisdiction of the federal government. A conviction for violating section 1519 cannot be sustained if based merely on an intent to obstruct any matter, such as an internal investigation, which falls outside of the jurisdiction of a federal agency. When taking a “hard look” at the evidence in this case, as required by Woodward, it becomes clear that the record simply cannot support a finding beyond a reasonable doubt that Mr. Farina knowingly altered and destroyed documents with the intent to obstruct, impede, or influence a federal investigation, or that Mr. Farina willfully caused Nelson Bermudez to alter documents with the intent to obstruct, impede, or influence a federal investigation.

Knowledge is not intent, especially when a finding of specific intent is necessary to sustain a conviction. United States v. Linares, 367 F.3d 941, 948 (D.C. Cir. 2004) (“knowledge ... is not identical to intent,” quoting Morissette v. United States, 342 U.S. 246, 270 (1952)). In this case, mere knowledge of a “pending” federal investigation is not enough to prove beyond a reasonable doubt a specific intent to obstruct, impede, or influence a federal investigation, as required by section 1519. Although intent may be established by inference drawn from the evidence, there must be sufficient support for such inference. The First Circuit is “loath to stack inference upon inference” to uphold convictions. United States v. Ruiz, 105 F.3d 1492, 1499 (1st Cir. 1997). “While a conviction may rest on circumstantial evidence, or upon reasonable inferences from the facts proved at trial, the stacking of multiple inferences raises serious concerns.” United States v. Mubayyid, 567 F. Supp. 2d 223, 251 (D. Mass. 2008) (reversing a

conviction based on insufficiency of evidence). Therefore, it has been held that the government cannot satisfy its burden in a criminal case by “piling inference upon inference.” United States v. DeLutis, 722 F.2d 902, 907 (1st Cir. 1983).

As discussed below, the inferences upon which the government relied in this case are unreasonable, not supported by the evidence, and overly speculative. In other words there is insufficient evidence to support a finding that Mr. Farina had the requisite intent under section 1519. Accordingly, this Court must enter a judgment of acquittal as to Counts 1 and 2 of the Indictment.

A. Count 2 – Causing/Aiding and Abetting a Violation of Section 1519

Even assuming Mr. Farina caused Mr. Bermudez to alter documents on Mr. Bermudez’s computer, there is absolutely no evidence that Mr. Farina did so willfully “with the intent to do something the law forbids be done, that is to say, with the bad purpose to either disobey or disregard the law,” (Jury Instructions [Docket No. 69] at 9); nor is there any evidence supporting a finding that Mr. Farina willfully associated with Mr. Bermudez by sharing Mr. Bermudez’s intent to obstruct a federal investigation. “[T]he criminal intent essential to the commission of the crime must exist at the time of the criminal act.” United States v. Fairchild, 990 F.2d 1139, 1142 (9th Cir.1993) (quoting United States v. Fox, 95 U.S. 670, 671 (1877)).

1. A conviction based on the stacking of inferences cannot be sustained.

Although the government puts great weight on Exhibit (“EX”) 4, a DVD entitled “Healthcare Law Compliance at Pfizer” hosted by Eric Aaronson from Pfizer Legal Division; and EX 4A, a printed copy of slides from EX 4, neither of these exhibits convey anything concerning Mr. Farina’s or Mr. Bermudez’s intent at the time of the alleged alteration of documents “[i]n or about August 10 or 11, 2004” as alleged in the Indictment. (Ind. at ¶ 18.) In

fact, the record in this case is devoid of any evidence of Mr. Farina or Mr. Bermudez's specific intent at the time of the alleged alteration of documents. The evidence presented at trial suggests that EX 4 was shown to Mr. Farina and Mr. Bermudez in or around mid May 2004. (*Id.*) It would be overly speculative to infer from one bulleted entry, on one slide in a May 2004 video addressing multiple topics, that on August 11, 2004 Mr. Farina had the requisite intent to sustain a conviction under section 1519.

First, the government offered EX 1, an email dated March 12, 2004 with the subject line "Follow-up Notice Re: Bextra Document Hold." Nowhere does this exhibit make reference to a federal investigation. In particular, EX 1 states that "Pfizer is involved in **litigation** involving Bextra." (EX 1 at TF408 (emphasis added).) EX 1 does not specify the type of "litigation" in which Pfizer was involved. Three months later, one bulleted sentence stating that there was a "pending" federal investigation into the sales and marketing of Bextra was displayed in a video (EX 4) shown to the sales force. EX 4 made no mention of EX 1 or any "litigation" hold, nor did it inform the sales force that Pfizer, or a law firm acting on Pfizer's behalf, would be conducting an investigation in response to the federal investigation.

Second, neither Pfizer nor Covington & Burling informed the Pfizer sales force why Pfizer was conducting an internal investigation. The government offered evidence that Mr. Alejandro ("Alex") Alvarez was interviewed on August 5, 2004 by attorneys from Covington & Burling. There is no evidence, however, that the Covington & Burling attorneys discussed a federal investigation with Mr. Alvarez, or later with Mr. Farina, Mr. Bermudez, or Ms. Gorelick. Mr. Alvarez testified that during his interview with Covington & Burling in August 5, 2004, Covington & Burling attorneys informed him that Pfizer was reviewing Bextra promotional practices. Mr. Alvarez's testimony is confirmed by Mr. Anthony himself. Mr. Anthony testified

that when he interviewed Mr. Farina and Mr. Alvarez on December 16, 2004, he told both Mr. Farina and Mr. Alvarez that Pfizer had retained Covington & Burling to gather information relating to the promotion of Bextra. Mr. Anthony admitted during his testimony that Covington & Burling did not tell the Pfizer employees that the interview was in connection with, or in response to a federal investigation. As such, there is no evidence in the record connecting whatever investigation is referred to in EX 4 or EX 4A to EX 1, the “litigation” hold email in March 2004, or to Pfizer’s internal review in August 2004, or even to EX 5, the requests for Mr. Bermudez’s, Mr. Alvarez, and Ms. Gorelick’s computer in September 2004.

Third, the government introduced EX 5, an email dated September 16, 2004 from Pfizer Legal Discovery with the subject line “Bextra Document Collection,” to bolster its allegation that Mr. Farina had a “scheme” to obstruct, impede, or influence a federal investigation. EX 5, however, makes absolutely no reference to a federal investigation but instead states that “**Pfizer** is looking into certain issues relating to the marketing of Bextra.” (EX 5 at TF3731 (emphasis added).) Neither EX 1 nor EX 5 makes any reference to a federal investigation connected to Pfizer’s internal investigation and its document collection and review. There is simply no evidence that Pfizer employees knew that any of the actions Pfizer was taking, either by itself or through Covington & Burling, had any relationship to a federal investigation. The only reasonable inference that the evidence can support is that whatever these individuals did, they did in response to Pfizer’s internal review. As already discussed, Pfizer’s internal review is not a matter within the jurisdiction of a United States agency. An intent to keep information from those conducting Pfizer’s internal review is not conduct criminalized under section 1519.

Finally, while a defendant’s intent may be inferred “from the surrounding circumstances[,]” such as “any statement made by him or any act done by him or failed to have

done by him and any other facts and circumstances in evidence....” (Jury Instructions [Docket No. 69] at 9), in this case, Mr. Bermudez’s testimony of what Mr. Farina allegedly said or did lacks any probative value concerning Mr. Farina’s specific intent. At trial, Mr. Bermudez testified about a conversation he recalled having with Mr. Farina on August 11, 2004. During that conversation, Mr. Farina did not make any reference to a federal investigation or a document hold. According to Mr. Bermudez, Mr. Farina simply said “we’re being watched” before allegedly instructing Mr. Bermudez on how to change the clock and alter some documents in his computer. Nothing in the conversation Mr. Bermudez recalls can be used to impute to Mr. Farina an intent to obstruct, impede, or influence a federal investigation. On the contrary, the temporal proximity of the August 11, 2004 call to Mr. Alvarez’s August 5, 2004 interview with Covington & Burling can only lead a rational juror to infer that Mr. Farina was referring to Covington & Burling when he allegedly told Mr. Bermudez “we’ve been watched.”

Because the government presented no evidence of Mr. Bermudez’s intent on August 11, 2004, Count 2 is based solely on Mr. Farina’s alleged intent to willfully cause a violation of section 1519. There is no direct evidence of Mr. Farina’s intent. The only circumstantial evidence pointing to a federal investigation is one bulleted sentence on one slide in EX 4, a 20-minute video allegedly shown to Mr. Farina three months before the alleged alterations of documents in Count 2. Any inference drawn from EX 4 to impute to Mr. Farina a specific intent to obstruct, impede, or influence a federal investigation is unreasonable, insupportable, and overly speculative.

Mere knowledge that there was a “pending” federal investigation is not sufficient to prove specific intent to obstruct, impede, or influence a federal investigation. See Linares, 367 F.3d at 948. Nonetheless, the government argued to the jury that because (1) Mr. Farina received

and reviewed the document hold in March 2004 (EX 1); (2) Mr. Farina saw the video in May 2004 (EX 4); and (3) Mr. Farina knew that Covington & Burling had interviewed Mr. Alvarez, then Mr. Farina must have intended to impede, obstruct, or influence a federal investigation when he spoke to Mr. Bermudez on August 11, 2004. However, there is no evidence that Mr. Farina knew that Pfizer's "litigation" hold (EX 1) was in response to a federal investigation. There is no evidence that Mr. Farina ever discussed with Mr. Bermudez a federal investigation in connection with the alteration of documents. There is no evidence that by August or September 2004 Pfizer had told any of its employees that it was conducting an internal review in response to a federal investigation. There is simply insufficient evidence connecting the document hold, Pfizer's internal review, and Mr. Alvarez's interview to a federal investigation, and no basis to infer beyond a reasonable doubt that on August 11, 2004 Mr. Farina's intent was to impede, obstruct, or influence a federal investigation.

Instead, viewing the evidence in light most favorable to the government, the record in this case gives rise only to the inference that Mr. Farina and Mr. Bermudez's intent was, at most, to keep certain information from Covington & Burling. Any inference to the contrary can only be based on speculation and impermissible stacking of inferences as to what Mr. Farina's intent must have been on August 11, 2004. These are precisely the sort of impermissible inference and speculation that the law forbids in determining whether the government has proven beyond a reasonable doubt an essential element of its case. See, e.g., Ruiz, 105 F.3d at 1499; DeLutis, 722 F.2d at 907 (prohibiting stacking of inferences to sustain criminal convictions).

2. The Court must acquit when the evidence supports a theory of innocence.

Even assuming that the evidence partially supports the government's theory, when the evidence offered by the government equally supports two theories, one of innocence (intent to

keep information from Covington & Burling) and one of guilt (intent to impede, obstruct, or influence a federal investigation), this Court must reverse the conviction. See Morillo, 158 F.3d at 22; Andujar, 49 F.3d at 20. “This is so because ... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the verdict, a reasonable jury *must necessarily entertain* a reasonable doubt.” Id. (internal quotations omitted, emphasis and omission in original). In this case, the cumulative evidence confirms that there was no intent to obstruct, impede, or influence a federal investigation, but that, at most, Mr. Farina and Mr. Bermudez sought to keep some of Mr. Bermudez’s documents from Covington & Burling; documents that Mr. Farina and Mr. Bermudez ultimately produced to Covington & Burling in their original, unaltered form during Pfizer’s internal review, as did other Pfizer employees, and which Pfizer, in turn, produced to the government. (See EX 13A-H; Stipulation E; EX 125A-I; Stipulation N.)

The government, nonetheless, seeks to use Mr. Bermudez’s testimony regarding the August 11, 2004 telephone call to show Mr. Farina’s intent to willfully cause a violation of section 1519. Mr. Farina’s actions, however, speak louder than the words attributed to him by Mr. Bermudez. Mr. Bermudez testified that he won the “Operate for Cash” contest, a marketing contest among the different districts covering the New York metropolitan area, by submitting nine pre-operative briefing sheets for nine different doctors in his territory. Mr. Bermudez also testified that on August 11, 2004, Mr. Farina instructed him how to alter every one of the pre-operative briefing sheets he had submitted as part of the contest. Mr. Bermudez and Ms. Gorelick both testified that Ms. Gorelick came in second place in that contest by submitting six pre-operative briefing sheets for six different doctors. (See EX 9.) Ms. Gorelick testified that her pre-operative briefing sheets (EX 35; EX 35A-C) followed the same template as Mr.

Bermudez's (EX 13A-H) and that as a result, her pre-operative briefing sheets were nearly identical, in content and format, to Mr. Bermudez's pre-operative briefing sheets. (Compare EX 13A-H with EX 35; EX 35A-C.)

Despite the fact that Ms. Gorelick's pre-operative briefing sheets were nearly identical to Mr. Bermudez's, Ms. Gorelick testified that Mr. Farina never contacted her regarding the alteration of her pre-operative briefing sheets. Ms. Gorelick's testimony begs the question – If Mr. Farina had the specific intent to obstruct, impede, or influence an investigation, why didn't he also call Ms. Gorelick? In light of the insufficiency of the government's evidence regarding Mr. Farina's specific intent, that unanswered question amounts to reasonable doubt.

Ultimately, nothing in the evidence presented by the government directly addresses Mr. Farina's intent to obstruct, impede, or influence a federal investigation. Furthermore, as a matter of law, none of the government's circumstantial evidence proves Mr. Farina's intent “[i]n or about August 10 or 11, 2004” with the necessary certainty for a criminal conviction. Accordingly, this Court should issue an Order setting aside the verdict of guilt returned on Count 2 of the Indictment and entering a judgment of acquittal.

B. Count 1 – Violation of Section 1519

Similarly, the record in this case is void of any evidence that could support a finding beyond a reasonable doubt that Mr. Farina altered and destroyed documents with the intent to obstruct, impede, or influence a federal investigation. As discussed above, the government failed to present any direct evidence of Mr. Farina's intent at the time of the alleged alteration and destruction of documents “[i]n or about August or September of 2004.” (Ind. at ¶ 16.) Once again, the government relies solely on EX 4 and EX 4A as evidence of Mr. Farina's intent. As already discussed, the only inference that can be drawn from EX 4 and EX 4A regarding Mr.

Farina's intent "[i]n or about August or September 2004" is speculative and unsupported by the rest of the evidence presented by the government. The fact that the evidence presented concerning Mr. Farina's intent is insufficient to support a finding beyond a reasonable doubt is underscored by the jury's deadlock on Count 1.

The charges on Count 1 relied solely on the testimony of attorney Stephen Anthony and Special Agent Paul Baumrind. Mr. Anthony testified that Mr. Farina admitted that he had received the document hold (EX 1), that he read it, understood it, and violated it. As discussed above, however, there is no evidence in this case connecting EX 4 and EX 4A to EX 1, the document hold email, or EX 5, the request for the computers and hardcopy documents. Apart from speculation and inference stacking, there is simply no way to start at EX 1, go to EX 5 and arrive at the conclusion that Mr. Farina understood that the document hold pertained to a federal investigation, and that he intended to violate the document hold in order to obstruct, impede, or influence a federal investigation.

Additionally, according to Mr. Anthony, Mr. Farina admitted that "if" he had "cleaned up" some documents he did so only to prevent his sales representatives from being cast in a bad light. Once again there was no mention of a federal investigation. Even Mr. Baumrind testified that Mr. Farina only admitted to altering and deleting documents "during Pfizer's internal investigation." There are absolutely no statements in evidence that can support a finding beyond a reasonable doubt that Mr. Farina intended to obstruct, impede, or influence a federal investigation.

Mr. Farina's actions once again speak louder than any words attributed to him. Mr. Anthony confirmed that Mr. Farina kept hard copies of the altered documents and provided those copies to Covington & Burling during the internal investigation. Mr. Baumrind testified that Mr.

Farina told him that he (Mr. Farina) “had felt dishonest” so instead of leaving a misleading altered document on his computer, Mr. Farina deleted the altered document, kept hard copies of the original, unaltered document and provided the unaltered documents to Covington & Burling, as confirmed by Mr. Anthony. The evidence in this case demonstrates that whatever was Mr. Farina’s intent, it was not an intent to obstruct, impede, or influence a federal investigation.

There is simply no evidence in this case that “[i]n or about August or September of 2004,” Mr. Farina specifically intended to obstruct any investigation, let alone a federal investigation. Simply put, the government’s proof of Mr. Farina’s intent fails. As a result there is insufficient evidence from which a jury rationally could find guilt beyond a reasonable doubt. Indeed, the government’s theory with respect to Mr. Farina’s intent seems to be that Mr. Farina somehow knew that the document hold in March 2004 was related to the “pending” federal investigation of Bextra shown in EX4 in May 2004, even though there is no evidence that Pfizer ever notified its employees of the connection. In the absence of any evidence of Mr. Farina’s intent, the government simply argued to the jury that the jury should infer that Mr. Farina’s true intent “[i]n or about August or September of 2004” was to obstruct, impede, or influence a federal investigation. Such speculation, without evidence to support it, is an inadequate basis for any rational juror to find proof beyond a reasonable doubt. Cf. Spinney, 65 F.3d at 234 (cautioning against inference stacking in criminal cases). Therefore, this Court must enter an Order of acquittal as to Count 1.

CONCLUSION

The evidence presented at trial is insufficient to sustain a conviction for causing a violation of section 1519. There was no evidence introduced at trial that would establish beyond a reasonable doubt that Mr. Farina had the requisite intent under section 1519. “To deem the

evidence presented against [Mr. Farina] adequate would do violence to the presumption of innocence, and the due process requirement that a defendant be proved guilty beyond a reasonable doubt.” United States v. Clotida, 892 F.2d 1098, 1106 (1st Cir. 1989). Accordingly, the Court must enter a judgment of acquittal on Counts 1 and 2 of the Indictment.

Respectfully submitted,
THOMAS FARINA
By his attorneys,

/s/ William H. Kettlewell

William H. Kettlewell (BBO No. 270320)
Eve M. Slattery (BBO No. 634776)
Ariatna Villegas-Vázquez (BBO No. 655249)

DWYER & COLLORA, LLP
600 Atlantic Avenue
Boston, MA 02210
(617) 371-1000
wkettlewell@dwyercollora.com
eslattery@dwyercollora.com
avillegas-vazquez@dwyercollora.com

Dated: March 25, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document has been filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ William H. Kettlewell

CERTIFICATE PURSUANT TO LOCAL RULE 7.1

I certify that on March 25, 2009 I conferred with Assistant United States Attorney Sara Bloom in a good faith attempt to resolve or narrow the issues presented by this motion.

/s/ Eve M. Slattery
