IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	
	)	**Criminal No. 2006-80**
GELEAN MARK,	)	
VERNON FAGAN,	)	
WALTER ELLS,	)	
DORIAN SWAN,	)	
KELVIN MOSES,	)	
HENRY FREEMAN, and	)	
EVERETTE MILLS,	)	
Defendants.	)	

ATTORNEYS:

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For the Plaintiff,

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For the defendant Henry Freeman,

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For the defendant Everette Mills.

MEMORANDUM OPINION

Before the Court are the motions of defendants Gelean Mark ("Mark"), Vernon Fagan ("Fagan"), Dorian Swan ("Swan"), and Kelvin Moses ("Moses") (collectively, "the Moving Defendants") to dismiss the conspiracy charges in the indictment in the above-captioned matter.

I. FACTS

The indictment in this matter was filed on December 19, 2006. In Count One of the indictment, the government charges all of the Moving Defendants with conspiracy to possess with intent to distribute a controlled substance, under 21 U.S.C. § 846 (“Section 846"). Count One states:

> Beginning from a time unknown, but no later than 1999, and continuing until 2005, at St. Thomas in the District of the Virgin Islands and elsewhere [the Moving Defendants] did, knowingly and intentionally, combine, conspire, confederate and agree with each other and with diverse other persons . . . to knowingly and intentionally possess with intent to distribute a controlled substance . . . in violation of

> Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A)(ii)(II).

(Indictment 1-2, Dec. 19, 2006.).

Count Two charges Mark and Fagan only with conspiracy to import five kilograms or more of cocaine, under 21 U.S.C. § 963 ("Section 963"). Count Two states:

> Beginning from a time unknown, but no later than 1999, and continuing until 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark [] and Vernon Fagan, did, knowingly and intentionally, combine, conspire, confederate and agree with each other and with diverse other persons . . . to import into the United States from . . . Tortola, British Virgin Islands, a [] controlled substance . . . . in violation of Title 21, United States Code, Sections 952(a), 960(b)(1)(B)(ii), and 963.

(*Id.* at 7.)

II. DISCUSSION

Federal Rule of Criminal Procedure 12(b)(2) ("Rule 12(b)(2)") permits pre-trial dismissal of an indictment, "if its allegations do not suffice to charge an offense." *United States v. DeLaurentis,* 230 F.3d 659, 661 (3d Cir. 2000); (citing *United States v. Sampson*, 371 U.S. 75, 78-79 (1962)). A district court evaluating such a motion considers "only those objections that are 'capable of determination without the trial of the general issue'" *United States v. Gallagher*, 602 F.3d 1139, 1142 (3d Cir. 1979)(quoting *United States v. Knox*, 396 U.S. 77 (1969)).

In determining the sufficiency of the charges in a criminal indictment, the court should "accept[] as true the factual allegations set forth in the indictment." *United States v. Besmajian,* 910 F.2d 1153,1154 (3d Cir. 1990); (citing *Boyce Motor Lines v. United States,* 342 U.S. 337, 343 (1952)). The sufficiency of an indictment "may not be properly challenged by a pretrial motion on the ground that it is not supported by adequate evidence." *Id.* (citations and quotations omitted).

Generally, an indictment will be deemed sufficient if it:

> 1) contains the elements of the offense intended to be charged, 2) sufficiently apprises the defendant of what he must be prepared to meet, and 3) allows the defendant to show [ ] with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.

United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989) (internal citation and quotations omitted); *see also* Fed. R. Crim. P. 7(c)(1) (2002) ("The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . .").

"Furthermore, an indictment charging a statutory crime is sufficient if it substantially follows the language of the criminal statute, provided that its generality does not prejudice a defendant in preparing his defense nor endanger his constitutional guarantee against double jeopardy." *United States*

v. Eufrasio, 935 F.2d 553, 575 (3d Cir. 1991) (quoting *United States v. Addonizio*, 451 F.2d 49, 58 n.7 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *see also Rankin,* 870 F.2d at 112 ("[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution.")*.*

III. ANALYSIS

The Moving defendants argue that Counts One and Two should be dismissed because the indictment fails to sufficiently allege the elements of conspiracies charged under Sections 846 and 936.

To sufficiently allege a federal drug conspiracy, an indictment must set forth: (1) the existence of an agreement between two or more persons to commit an unlawful drug trafficking act, and (2) the specific intent to enter into such agreement for the purpose of committing the underlying offense. *See United States v. Werme*, 939 F.2d 108, 112 (3d Cir. 1991) ("To be legally sufficient, a conspiracy count in an indictment need only set forth the agreement and specific intent to commit an unlawful act, and when required by statute, an overt act." (internal citation and quotations omitted); *United States v. Johnstone*, 856 F.2d 539, 542 (3d Cir. 1988) ("It is [not] an

element of 21 U.S.C. § 846 . . . that a defendant have committed an overt act in furtherance of the conspiracy.”).

Count One of the indictment in this matter alleges: (1) the existence of an agreement between the Moving Defendants to possess with intent to distribute controlled substance; and (2) that the Moving Defendants specifically intended to enter into the agreement for the purpose of possessing with intent to distribute a controlled substance. The indictment also specifies the time frame, geographical area, controlled substance involved (cocaine), and purpose of the conspiracy alleged in Count One. Therefore, Count One contains every element of the conspiracy charged under Section 846,[1] and is specific enough to notify the Moving Defendants of the offense they must defend, and to enable a double jeopardy claim in a future prosecution for conspiracy to possess with intent to distribute a controlled substance. *See, e.g., Johnstone,* 856 F.2d at 541 (holding that an indictment sufficiently alleged a conspiracy under Section 846 where it alleged the elements of the conspiracy charged, and specified the conspiracy’s time frame, geographical area, and purpose); *see*

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[1] *See Johnstone,* 856 F.2d at 541 (“Count two, alleging that [the defendant] knowingly and intentionally conspired with his co-defendants to distribute [] a controlled substance . . . contained every element of the offense charged under [Section] 846.”).

also United States v. Cheatham, 2007 WL 2331075 at *2 (W.D. Pa. Aug. 16, 2007) (publication forthcoming) (holding that an indictment sufficiently alleged a conspiracy under Section 846 where it: set forth the elements of the drug conspiracy charged, listed the beginning and end dates of the conspiracy, specified the court district as the location of the conspiracy, and described illegal substances allegedly conspired to be sold). Accordingly, the government has sufficiently alleged the conspiracy charged in Count One of the indictment.

Similarly, Count Two sets forth: (1) the existence of an agreement between Mark and Fagan to import a controlled substance into the United States from Tortola, British Virgin Islands; and (2) that the Mark and Fagan specifically intended to enter into the agreement for the purpose of importing a controlled substance into the United States from Tortola, British Virgin Islands. Furthermore, the indictment sets forth the time frame, geographical area, and purpose of the conspiracy alleged in Count Two. Therefore, Count Two alleges all of the elements of the conspiracy charged under Section 963,[2] and is sufficiently

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[2] *See United States v. Watkins,* 339 F.3d 167 (3d Cir. 2003) (holding that allegations establishing that the defendants "had a criminal agreement to act in concert to import cocaine" sufficiently alleged the elements of conspiracy to import cocaine under Section 963).

specific to inform Mark and Fagan of the offense they must defend, and to make a future double jeopardy claim possible. *See, e.g., Echavarria-Olarte v. Reno,* 35 F.3d 395, 397-98 (9th Cir. 1994) (holding that an indictment sufficiently alleged conspiracy to import controlled substances under Section 963 where it stated all of the elements of the conspiracy charged, the conspiracy's time frame, geographical area, general unlawful purpose, and the particular controlled substance that the defendants conspired to import); *see also United States v. Cheatham,* 2007 WL 2331075 at *2.

IV. CONCLUSION

Based on the foregoing reasons, the Court will deny the motions to dismiss Counts One and Two of the indictment. An appropriate order follows.

Dated: September 5, 2007 **S_____**

CURTIS V. GÓMEZ
Chief Judge

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