UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	09 CR 383-3
	)	
JESUS VICENTE ZAMBADA-NIEBLA	)	Judge Ruben Castillo

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT BASED ON AN ALLEGED PROMISE OF IMMUNITY

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, hereby responds to defendant's motion to dismiss the indictment and for an evidentiary hearing based on an alleged promise of governmental immunity.

INTRODUCTION

Defendant Jesus Vicente Zambada-Niebla has filed a motion to dismiss the second superseding indictment in this case based on his counsel's allegation, unsupported by any documents or sworn affidavit from any witness, that the United States Government "conferred immunity on him." R.95 at 1.[1] To reach that conclusion, defendant proffers a set of facts which, even if true, and they are not, would not entitle defendant to relief. Defendant's immunity theory rests on the premise that another criminal defendant, Humberto Loya-Castro, indicted in San Diego in 1995 and alleged to be an attorney for and member of the Sinaloa Cartel, entered into a cooperation agreement with

[1]Citations to Defendant's Motion to Dismiss on Immunity Grounds are to the document record number on the Court's docket (R.95) assigned to the motion. Citations to other motions are similarly identified.

DEA agents and the U.S. Attorney's Office in San Diego in an effort to gain a sentencing benefit in his criminal case. After a period of cooperation, Loya-Castro's pending indictment was dismissed in 2008 upon an application to the court by the U.S. Attorney in San Diego.

From the result of Loya-Castro's case, in order to support his legally unprecedented immunity theory, defendant makes two significant, and factually and legally erroneous, leaps. First, without explanation or legal citation, defendant argues that the dismissal of a pending indictment against another criminal defendant, in another case, in another jurisdiction, based on the exercise of executive discretion of a U.S. Attorney, amounted to an all-encompassing "immunity agreement" for Loya-Castro binding the entirety of the U.S. government for criminal acts, past, present and future. Then, defendant expands this non-existent "immunity agreement" for this one individual into an agreement between the U.S. government and "Loya and the leadership of the Sinaloa Cartel, including Chapo [Guzman] and Mayo [Zambada]," as well as defendant (R.94 at 2; R. 95 at 2-3, 7), ignoring considerable evidence that the United States government never entered into such an agreement, including Chapo's and Mayo's multiple indictments in several federal judicial districts during the relevant period (including this district), and Chapo and Mayo's respective designations, by the President of the United States, as Significant Foreign Narcotics Traffickers pursuant to the Kingpin Act.

Distilled, defendant's argument is that if one member of a criminal organization is indicted and cooperates, every member of that organization whether it is a drug trafficking cartel, a Mafia organization, or a street gang is immune from prosecution for all of their organization's criminal acts. That is not the law, and defendant's motion fails because of it. Moreover, as this motion is defendant's burden, it should be denied without a hearing because defendant fails to provide any

evidentiary support for his allegations.

Contrary to defendant's claim, no immunity was conferred upon him, nor was any immunity conferred upon Loya-Castro. Loya-Castro entered into a standard cooperation agreement related to one pending case in another judicial district, and personally acknowledged that no promises or benefits were conferred upon him in exchange for his cooperation. In addition, as explained below, Loya-Castro has recently made statements confirming the absence of any promise of immunity for him or defendant.

Even if counsel's additional factual assertion were true that defendant himself was told by DEA agents at a meeting in Mexico City on March 17, 2009, that he had the same immunity agreement as Loya-Castro which it is not, an agent's promise of this sort of "international street immunity" is unenforceable as a matter of law. A promise of immunity is unenforceable because DEA agents had no actual authority to make it, and defendant's argument that "the highest levels" of the U.S. government granted defendant immunity is simply untrue. As explained below, the agents who met with defendant were expressly ordered by the highest ranking DEA official in Mexico not to even meet with defendant, and no official with actual authority, namely the United States Attorney General or a United States Attorney, authorized agents to promise defendant immunity. Finally, even if defendant could establish that agents promised him immunity and had authority to do so, case law makes clear that the remedy for a breach of that promise is not dismissal of the indictment. In sum, even if all of counsel's proffered assertions were true, defendant's motion fails as a matter of law, and a hearing is not necessary.

For all of these reasons, defendant's motion to dismiss should be denied.

FACTUAL BACKGROUND

The Allegations of Defendant's Motion

Defendant states that his immunity motion is "based upon investigations and interviews by defense counsel in Mexico and the United States, including interviews of Mexican citizen, Humberto Loya Castro ('Loya')." (R.95 at 1). Defendant identifies Loya-Castro as "an attorney and Sinaloa Cartel member who in the late 1980s and into the early 1990s became an adviser and confidante of, *inter alia,* the defendant [Zambada-Niebla], Joaquiz [sic] Guzman Loera ("Chapo") and Ismael Zambada Garcia ("Mayo")," all alleged leaders of the Sinaloa Cartel and defendants in the case before the Court. *Id.*

Defendant asserts that beginning in or about 1998, Loya-Castro "entered into an agreement" with the United States government, through agents of the Drug Enforcement Administration ("DEA") and the Immigration and Naturalization Service ("INS"), and that under the alleged "agreement," Loya-Castro was to provide information to the U.S. government, particularly about rival cartels, "in return for immunity for Loya's prior acts and continuing acts." *Id.* at 2.

In support of his theory, defendant apparently admits that he, together with Chapo Guzman and Mayo Zambada, were among the leaders of the Sinaloa Cartel. He further claims that all three leaders provided information to Loya-Castro in Loya-Castro's attempts to cooperate with the U.S. government. (R.94 at 2). He then asserts, "[d]efendant was party to the agreement between the United States government, through its officials, and the Sinaloa Cartel through Loya." (R.95 at 2). In a related motion, defendant expands on this argument even further:

> Sometime prior to 2004 . . . the United States government entered into an agreement with Loya and the leadership of the Sinaloa Cartel, including Mayo and Chapo. Under that agreement, the Sinaloa Cartel, through Loya, was to provide information accumulated by

> Mayo, Chapo, and others, against rival Mexican Drug Trafficking Organizations to the United States government. In return, the United States government agreed to dismiss the prosecution of the pending case against Loya, not to interfere with his drug trafficking activities and those of the Sinaloa Cartel, to not actively prosecute him, Chapo, Mayo and the leadership of the Sinaloa Cartel, and to not apprehend them.

(R.94 at 2-3).

Defendant's motion alleges that DEA and INS agents, acting with approval from the "highest levels" of the American government (without identifying whom or at what level) promised the entire Sinaloa Cartel among the largest criminal organizations in the world that it and its members would have complete immunity for all past, present, and future crimes, in every federal district in the United States. Defendant's allegations are factually infirm and legally unsupported.

Loya-Castro's Cooperation Agreement

In 1995, a federal indictment was returned in the Southern District of California charging twenty-three defendants, including Joaquin Guzman-Loera ("Chapo") and Humberto Loya-Castro with federal narcotics charges. (*See* Case 1995 CR 973 (S.D. Cal.)). As defendant states in his motions, Chapo Guzman, Mayo Zambada and Mayo Zambada's son, the defendant Zambada-Niebla, are alleged to be among the "leadership" of the Sinaloa Cartel. (R.94 at 2; R.95 at 2-3).

Beginning in approximately 2000, Loya-Castro approached DEA and ICE agents about the possibility of offering his cooperation.[2] Between approximately 2000 and early 2005, Loya-Castro periodically and voluntarily met with U.S. law enforcement officials in Mexico and offered to provide information about individuals involved in narcotics trafficking and money laundering

[2]As discussed below, Loya-Castro was a cooperating source for the United States, a fact that the government did not reveal. Defendant's motion, however, has publicly identified Loya-Castro as a source and has done so in a manner that significantly distorts what actually occurred. The government therefore responds to clarify the record.

activities.

On June 3, 2005, Loya-Castro signed a cooperation agreement with the United States Attorney's Office for the Southern District of California. (Attached as Ex. A hereto). In that agreement, Loya-Castro acknowledged that "[a]t no point during my above-noted cooperation has any U.S. law enforcement officer, or any other representative or individual associated with the U.S. government, promised me that I would receive any benefit in exchange for my cooperation. Specifically, no promise or representations have been made to me regarding the federal drug charges pending against me. Nor have I been promised any financial compensation in exchange for my cooperation." Ex. A. The agreement further provided, "I wish to continue to cooperate with U.S. law enforcement officers by providing them with information about individuals involved in narcotics trafficking and money laundering. I understand that I will not be promised any benefits (either related to my pending case or monetary) for my ongoing cooperation. . . . I understand that the prosecutor handling the case against me will be given the full details of my cooperative efforts and that he may, in his sole discretion, decide whether I will receive any benefit, reduction in sentence, or any other favorable recommendation by the U.S. Attorney's Office regarding my cooperative efforts." *Id.*

In addition to signing the cooperation agreement, Loya-Castro also signed multiple DEA Confidential Source Agreements between 2005 and 2011 (attached hereto as a group as Ex. B), which provide, *inter alia:*

> 1. I understand that my assistance to the DEA and any statements that I make to my Controlling Investigators are entirely voluntary.
>
> * * *
>
> 4. The DEA does not promise or agree to any consideration by a prosecutor or a court in exchange for my cooperation, since any decision to confer any such benefit lies

> within the exclusive discretion of the appropriate prosecutor and court. . . .
>
> * * *
>
> 5. I understand that I have no immunity or protection from investigation, arrest, or prosecution for anything that I say or do, except for activities specifically authorized by my Controlling Investigators pursuant to my cooperation with DEA. . . .
>
> * * *
>
> 6. I have not been authorized to participate in any criminal activity, except as specifically authorized in writing by a prosecutor and/or my Controlling Investigators. I understand that I may be prosecuted for any unlawful conduct that I may have committed in the past or may commit in the future.

Id.[3]

Also in June 2005, DEA sought approval to continue using Loya-Castro as a cooperating fugitive defendant. As a Mexican citizen under indictment in the United States but living in Mexico, Loya-Castro was beyond the arrest power of federal agents. DEA agents sought approval to meet and continue to use Loya-Castro as a cooperating fugitive defendant. Contrary to defense counsel's allegations, Loya-Castro neither received a grant of immunity nor did any authorization for immunity come "from the highest levels of the U.S. government." Rather, DEA agents sought and obtained permission to use Loya-Castro as a cooperating fugitive defendant from the Sensitive Activities Review Committee. *See SGS-92-X003 v. United States*, 85 Fed.Cl. 678, 689 (Fed. Cl. 2009). "In conjunction with its objective of reducing the flow of drugs into the United States, DEA established the Sensitive Activities Review Committee ('SARC') to review activities that DEA viewed as warranting special attention, including drug-related money laundering activities and operations utilizing Attorney General exemptions." *Id.* at 689. In August 2005, the SARC authorized the continued cooperation of Loya-Castro, pursuant to, among other things, the cooperation agreement

[3]Acknowledgement 3 to the Confidential Source Agreement specifically provides that "The United States Government and the DEA will strive to protect my identity, but cannot guarantee that my identity will not be divulged as a result of legal or other compelling considerations . . . ."

with the U.S. Attorney's Office in San Diego.

In the aftermath of signing the cooperation agreement, and pursuant to its terms, Loya-Castro continued to cooperate with U.S. law enforcement. As a result of that cooperation, in December 2008, the U.S. Attorney for the Southern District of California, in its exercise of executive discretion, moved to dismiss the pending criminal charges against Loya-Castro. (Ex. C). The United States moved to dismiss Loya-Castro's indictment without prejudice. *Id.* Thus, subject to the statute of limitations and other prosecutorial considerations, the U.S. government was free to charge Loya-Castro with any further criminal conduct of which it had or obtained evidence. On December 4, 2008, U.S. District Judge Jeffrey T. Miller entered an order dismissing the indictment as to defendant Loya-Castro. (Ex. D). The dismissal, which was without prejudice, was a result of an application by the U.S. Attorney, not pursuant to an order granting immunity to Loya-Castro. *Id.* The charges against Chapo Guzman in the 1995 Southern District of California case are still pending.

The Mexico City Meeting

In approximately January 2009, Loya-Castro approached DEA agents about attempting to introduce them to defendant Zambada-Niebla, and indicated that Zambada-Niebla may be interested in cooperating with the U.S. government. At the time, Zambada-Niebla was under indictment for federal narcotics offenses charged in Washington, D.C. in an indictment returned in 2003. (D.D.C. Case number 2003 CR 331 (the "Washington Indictment")).[4] DEA agents in Mexico sought and

[4]At the time, and through defendant's arrest by Mexican authorities in March 2009, the Washington Indictment was the only case pending against defendant in the United States. Only following defendant's arrest in Mexico on an existing provisional arrest warrant emanating from the Washington Indictment was defendant indicted in the current case. On April 23, 2009, defendant was charged in the Northern District of Illinois on two narcotics trafficking counts. A superseding indictment was returned on August 6, 2009, and a second superseding indictment was returned on April 5, 2011.

obtained permission from DEA agents and prosecutors in Washington, D.C. to conduct a preliminary introductory meeting with defendant for the purpose of determining his interest in cooperating with the U.S. government and its feasibility. Agents arranged to meet Loya-Castro and Zambada-Niebla in Mexico City on March 18, 2009.

On the afternoon of March 17, 2009, DEA agents Manuel Castanon and David Herrod flew to Mexico City, and met with DEA agents from Washington, D.C. at the U.S. Embassy in Mexico City to make arrangements to meet Loya-Castro and defendant. Upon their arrival at the Embassy, the Regional Director ("RD") for the North and Central Americas Region of DEA, David Gaddis, met with the agents. RD Gaddis expressed concern about American agents meeting with a high-level cartel member like defendant Zambada-Niebla in Mexico, and expressly ordered the DEA agents not to meet with defendant without further authorization. Agent Castanon thereafter called Loya-Castro, and instructed Loya-Castro to meet with agents so that the agents could explain to him in person that the meeting with defendant was cancelled.

Thereafter, DEA agents met with Loya-Castro at a Mexico City hotel and informed him that they had not been authorized by their superiors to meet with defendant Zambada-Niebla. Loya-Castro expressed dismay at the meeting being cancelled, and indicated he needed to inform defendant personally. Loya-Castro left the hotel. A short time later, Loya-Castro returned with defendant to the hotel against the agents' instructions. DEA agents informed defendant that they could not meet with him, as they had not been authorized to do so. Defendant indicated that he simply wished to convey personally his interest and willingness to cooperate with the U.S.

government.[5] Agents repeated that they were not authorized to meet with defendant, much less have substantive discussions with him, and agents informed defendant and Loya-Castro that they would be in contact if and when they were authorized to hold another meeting.

In defendant's own motion, counsel acknowledge that the first direct contact between defendant and U.S. government agents occurred at this meeting, on March 17, 2009, "just a few hours" before defendant was arrested by Mexican authorities. (R.95 at 3). In the early morning hours of March 18, 2009, defendant was arrested by Mexican authorities, together with several body guards, at a house in Mexico City.[6] In February 2010, defendant was extradited to the United States on both the Washington Indictment and the indictment returned in this district.

Loya-Castro's Continued Communications With U.S. Agents

On July 29, 2011, defense counsel filed the instant motion, together with related motions. On August 14, 2011, Loya-Castro telephoned Agent Castanon. During this conversation, Loya-Castro stated to Agent Castanon that he had been trying to reach Agent Castanon for a week to tell him that he was sorry that defense counsel's filings had garnered so much media attention in Mexico. Loya-Castro stated that he did not agree with statements made by defense counsel in their filings and reported in the Mexican media. Loya-Castro stated that he would be willing to meet with U.S. prosecutors and "tell the truth." Loya-Castro reiterated that there was never any deal or promises made by the U.S. government to defendant Zambada-Niebla. Loya-Castro stated that he had previously informed Chapo Guzman that Loya-Castro was not going to lie for defendant Zambada-

[5]As with Loya-Castro, the government would not have disclosed defendant's interest in cooperating with the U.S. government absent defense counsel's filings.

[6]The factual description of this meeting and the surrounding circumstances are contained in reports that have been produced to defense counsel.

Niebla, because he did not want more problems than he had already encountered with American law enforcement and because of the problems defense counsel had already created for him.[7]

Loya-Castro referenced an earlier conversation with Agent Castanon, in October 2010, in which Loya-Castro told Agent Castanon that he had informed defense counsel that he disagreed with their version of the facts. In that October 2010 conversation, Loya-Castro stated that he had previously met with defendant's attorneys in the Chicago case, together with Mexican lawyers and defendant's wife, in Mexico City. According to Loya-Castro, at that meeting, he advised defense counsel that he would not assist them if they tried to say that defendant had a previous arrangement with the United States government. Loya-Castro stated that the American lawyers became visibly upset with Loya-Castro's statement.

Following the August 14, 2011, conversation, Agent Castanon attempted to arrange for an interview with Loya-Castro, as a fact witness, for agents and the undersigned prosecutors in order to discuss the factual allegations contained in defense counsel's filings. In a conversation on August 16, 2011, Loya-Castro informed Agent Castanon that he would travel to the United States to meet with agents and prosecutors, because he wanted to personally tell U.S. prosecutors that the claims being made by defense counsel were inaccurate. Arrangements were made to meet with DEA agents and prosecutors on August 29, 2011.

On August 24, 2011, Loya-Castro called Agent Castanon to inform him that Loya-Castro had met with a Mexican attorney whom Loya-Castro identified as an intermediary between Ismael

[7]The communications between Loya-Castro and government agents are memorialized in DEA reports that have been produced to defense counsel. If in ruling on the current motion the Court would be aided by those reports, or by an affidavit from the agent(s) involved, the government will provide such evidentiary support to the Court.

Zambada-Garcia ("Mayo") and U.S. defense attorneys representing defendant. Loya-Castro stated he had informed the Mexican attorney of his intention to meet with DEA agents and U.S. prosecutors. Loya-Castro reported that the Mexican attorney advised Loya-Castro to cancel the meeting. Loya-Castro said that the Mexican attorney expressed fear that Loya-Castro would say something to jeopardize defense counsel's strategy. Loya-Castro told Agent Castanon that he now feared that he could encounter problems with Mayo if defense counsel found out he met with U.S. prosecutors, as he feared the lawyers would blame him for any failures they suffer regarding a defense strategy with which Loya-Castro disagreed.

Thereafter, Loya-Castro cancelled the planned meeting, again expressing his fear about being blamed for defense counsel's strategy. Loya-Castro re-affirmed his desire to tell the truth, and suggested alternatives, including asking the Court for an *in camera* hearing.

ARGUMENT

I. Neither Loya-Castro Nor Defendant Was Ever Promised Immunity.

The case before the Court charges that from approximately May 2005 to approximately December 1, 2008, defendant Jesus Vicente Zambada-Niebla, as a high-level member of the Sinaloa Cartel, was involved in a conspiracy to import tons of cocaine and multi-kilogram quantities of heroin into the United States from Mexico, for further distribution in the United States. R.75. That indictment was first returned in this district in April 2009, a month after defendant was arrested in Mexico. In fashioning his motion, defendant has attempted to bootstrap a relatively standard cooperation agreement of another criminal defendant, from a different conspiracy, in a different judicial district, into an alleged omnibus immunity agreement for the "leadership" of one of the

largest narcotics trafficking and criminal organizations in the world, the Sinaloa Cartel. (R.94 at 2).[8] Defendant argues that the "leadership" of the Sinaloa Cartel includes defendant Zambada-Niebla, and that although defendant Zambada-Niebla met only once, briefly, with U.S. law enforcement agents, that agents promised that the "existing [immunity] agreement with the United States that covered Loya and defendant *i.e.,* that defendant was immunized for his actions remained in place and would continue." (R.95 at 3). Defendant argues further that "the government gave defendant Jesus Vicente Zambada-Niebla transactional immunity for his past and future actions by extending to defendant the agreement made with [Loya-Castro]." (R.95 at 7).

Defendant's motion fails on multiple levels. First, defendant's arguments are factually wrong. Loya-Castro was never offered immunity by the U.S. government, and the government is aware of no evidence that any American law enforcement official promised Loya-Castro immunity. The documentary record, including Loya-Castro's cooperation agreement, his DEA confidential source agreements, the application by the U.S. Attorney in San Diego, and the order dismissing Loya-Castro's indictment without prejudice, belies defendant's claim. Moreover, defendant has proffered no testimonial evidence, in the form of sworn affidavits or otherwise, to support his arguments. Indeed, Loya-Castro's statements to agents suggest that Loya-Castro, if truthful, would not testify consistently with defendant's proffered theory. Second, even if defendant's theory related to Loya-Castro were true, which it is not, as a legal matter it does nothing for defendant. Defendant cites no case supporting defendant's bootstrapping theory, and the government has found no case that does so. Indeed, the case law is uniformly to the contrary. Thus, even assuming *arguendo* that

[8]Defense counsel themselves note that the Sinaloa Cartel was engaged in "criminal activities, including and not limited to their smuggling of tons of illegal narcotics into the United States." (R.94 at 10).

defendant's allegations were true and Loya-Castro was promised immunity, such an agreement does not extend to defendant. Third, even if defendant's additional unsworn factual assertion that defendant himself was told by DEA agents at the meeting in Mexico City that the government would promise him immunity, which he was not counsel's theory of some sort of "international street immunity" is unenforceable as a matter of law. A promise of immunity is unenforceable because DEA agents had no actual authority to make it, and defendant's argument that "the highest levels" of the U.S. government granted defendant immunity is simply untrue. The agents who met with defendant were expressly ordered by the highest ranking DEA official in Mexico *not* to even meet with defendant. Finally, even if defendant could establish that agents promised him immunity and had authority to do so, case law makes clear that the remedy for a breach of that promise is not dismissal of the indictment. In sum, even if all of counsel's proffered assertions were true, defendant's motion fails as a matter of law, and a hearing is not necessary.

A. Loya-Castro Was Not Offered Immunity

The underlying premise of defendant's immunity theory that Sinaloa Cartel lawyer Humberto Loya-Castro was promised or extended immunity by the United States government is false. Loya-Castro was not given immunity; rather, the charges against him were dismissed in one case, in another jurisdiction, for conduct alleged to have occurred prior to 1995, on the application of the U.S. Attorney, in its sole discretion, without prejudice, and pursuant to the terms of a cooperation agreement. Exs. C, D. As reflected in the signed cooperation agreement with the San Diego U.S. Attorney's Office into which he entered, Loya-Castro acknowledged that "[a]t no point during my above-noted cooperation has any U.S. law enforcement officer, or any other representative or individual associated with the U.S. government, promised me that I would receive any benefit in

exchange for my cooperation. Specifically, no promise or representations have been made to me regarding the federal drug charges pending against me." Ex. A. Moreover, he acknowledged that "I understand that I will not be promised any benefits (either related to my pending case or monetary) for my ongoing cooperation. . . . I understand that the prosecutor handling the case against me will be given the full details of my cooperative efforts and that he may, in his sole discretion, decide whether I will receive any benefit, reduction in sentence, or any other favorable recommendation by the U.S. Attorney's Office regarding my cooperative efforts." *Id.*

Contrary to defendant's argument that Loya-Castro was promised immunity "for past and future activities involving the Sinaloa Cartel" (R.95 at 2), the cooperation agreement made no such promise. The DEA Confidential Source Agreement, of which Loya-Castro signed several, specifically provided that Loya-Castro had not been authorized to participate in any criminal activity, except as specifically authorized in writing by a prosecutor and/or his Controlling Agent. (Ex. B). The government is aware of no written or oral authorization that was delivered to Loya-Castro in contravention of these two express agreements. Defendant's motion should be denied in light of the absence of any evidence in support of his claim.

Moreover, in addition to the documentary record, the government has learned that Loya-Castro has represented, in telephone conversations with DEA agents, that he told defense counsel that the factual predicate of their theory is unfounded. Neither he nor defendant was ever offered immunity from prosecution. Thus, the entire factual premise of defendant's immunity theory (and public authority defense, addressed elsewhere) is illusory.

B. Even if Loya-Castro Were Immunized – Which He Was Not – Such an Immunity Agreement Could Not Have Extended to the Entire "Leadership of the Sinaloa Cartel," Including Defendant, As Alleged in the Motion.

After transforming Loya-Castro's standard cooperation agreement into a non-existent "immunity agreement," defendant takes a second leap by asserting that "[d]efendant was party to the agreement between the United States government, through its officials, and the Sinaloa Cartel, through Loya." (R.95 at 2). Defendant alleges that this "agreement" binds the entirety of the U.S. government, and protects defendant, together with Chapo Guzman and Mayo Zambada, for all criminal activities, past and present, including the indictment pending before the Court. (R.95 at 7). Defendant makes these allegations without a written agreement, and without producing a sworn affidavit from any witness to the alleged "agreement." To support this argument, defendant alleges that defendant, together with Chapo and Mayo, are entitled to immunity because "defendant had provided information that Loya transmitted to the government." (R.95 at 2). It follows, according to defendant, that because, "[l]ike Loya, [defendant] too was under indictment [that] the agreement contemplated that defendant would receive immunity as it did with Loya." *Id.*

At best, such a scenario would have made defendant a third-party cooperator on Loya-Castro's behalf. As the Court is well aware, third-party cooperation scenarios are not unheard of within federal law enforcement. But the credit in such circumstances goes to the defendant who is cooperating with the government (in this case Loya-Castro), not to the third party. It does not create, and defendant cites no case where it has created, out of thin air an umbrella immunity agreement between the U.S. government and any individual who may have provided a cooperating defendant with information.

The law is quite clear to the contrary. Even if this Court assumed, contrary to fact, that Loya-

Castro at some point secured an immunity agreement for himself, Loya-Castro's agreement could not have provided immunity to defendant. Immunity agreements are contracts, governed by ordinary contract principles, including the objectively reasonable expectations of the parties to the agreement. *United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir. 1990). A cooperation agreement between the government and one member of a criminal organization be it a cartel, an organized crime family, or a street gang does not bind the government to grant immunity to every member of the organization, now and forever. "A contract is between hence binding on only those who are parties to it." *Bd. Of Man. v. Infinity Corp*., 21 F.3d 528, 532 (2d Cir. 1994) (quotations omitted).

Defendant was not party to any contract between Loya-Castro and federal agents; indeed, defendant does not allege that he had communications with any federal agent until March of 2009. Before that time, any communication defendant would have had was with Loya-Castro, and "[t]he assurances of . . . his partner in crime do not rise to the level of instructions, encouragement, or advice from a government official." *United States v. Pitt*, 193 F.3d 751, 758 (3d Cir. 1999) (holding that defendant was not entitled to jury instructions on public authority or entrapment by estoppel). Under these circumstances, defendant could not have reasonably believed before 2009 that he and every other member of the Sinaloa Cartel had won a blanket immunity, simply because one member of the cartel was cooperating with the government.

Moreover, defendant seeks to bind the other alleged party to the agreement, the United States of America, represented in this case by the United States Attorney's Office for the Northern District of Illinois. But it is clear that the government could not have had, even if it had immunized Loya-Castro, a reasonable expectation that it had entered into an agreement with defendant and the other leaders of the Sinaloa Cartel. Chapo Guzman and Mayo Zambada are alleged in the pending

indictment in this district, and in others, to be the two principal leaders of the Sinaloa Cartel, and defendant is alleged to be one of the Sinaloa Cartel's principal logistics coordinators. (R.75). Based on publicly available documents, Chapo Guzman has been indicted on serious narcotics trafficking offenses in no fewer than six federal districts (several being sought and returned during the period defendant claims the "agreement" existed), including districts in California, Arizona, Texas, Florida, New York and Illinois.[9] Defendant's father, Ismael Zambada-Garcia, has similarly been indicted in three federal districts; and defendant in two.[10]

Indeed, on June 1, 2001, the President of the United States designated Chapo Guzman as a Significant Foreign Narcotics Trafficker pursuant to the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. § 1901-1908, 8 U.S.C. § 1182 (the "Kingpin Act"). In October 2003, Chapo Guzman was designated a Consolidated Priority Organization Target ("CPOT") by the Organized Crime Drug Enforcement Task Force ("OCDETF") member agencies, including DEA, FBI, ICE, ATF, IRS, USMS, and EOUSA. The CPOT designation reflects a multi-agency target list of "command and control" elements of the most prolific international drug trafficking and money laundering organizations. In December 2004, the U.S. State Department, through its Narcotics Reward

[9]Joaquin Guzman-Loera is currently under Federal indictment for narcotics trafficking offenses in at least the following cases and jurisdictions: Case 1991 CR 446, pending in the District of Arizona; Case 1995 CR 973, pending in the Southern District of California; Case 2001 CR 659, pending in the Western District of Texas; Case 2007 CR 20508, pending in the Southern District of Florida; Case 2009 CR 1065, pending in the Eastern District of New York; and the current case before the Court in the Northern District of Illinois.

[10] Ismael Zambada-Garcia is currently under indictment for narcotics trafficking offenses in at least the following cases and jurisdictions: Case 2003 CR 331, pending in the District of Columbia; Case 2009 CR 466, pending in the Eastern District of New York; and the current case before the Court in the Northern District of Illinois. The defendant was indicted in the Washington Indictment in 2003, and the current case.

Program, offered a reward of up to $5 million for information leading to the arrest and prosecution of Chapo Guzman.

Similarly, on May 31, 2002, defendant's father, Mayo Zambada, was designated by the President of the United States as a Significant Foreign Narcotics Trafficker pursuant to the Kingpin Act. In October 2002, Mayo Zambada was designated a CPOT, and in February 2004, the U.S. State Department offered a reward of up to $5 million for information leading to his arrest and prosecution. Moreover, on May 17, 2007, the U.S. Department of the Treasury's Office of Foreign Assets Control designated six companies, together with 12 individuals, including defendant, that act as fronts for Mayo Zambada's narcotics trafficking organization, and with whom American individuals and corporations are prohibited from conducting any financial or property transactions.

The government's actions in indicting these defendants and in designating them under the Kingpin Act and as CPOTs serves as powerful evidence rebutting defendant's claim of immunity for himself and his co-conspirators in the Sinaloa Cartel.

Defendant also was not a third-party beneficiary to an agreement between the government and Loya-Castro. In *United States v. Andreas*, the Seventh Circuit held that when the government entered an immunity agreement with a third party at a time when the government was preparing to charge the defendant, the defendant's claim that the immunity agreement was intended to also immunize defendant was "truly remarkable" and "absurd." *United States v. Andreas*, 216 F.3d 645, 663-64 (7th Cir. 2000) (holding that defendant had no standing to enforce immunity agreement with third party). As the *Andreas* court noted, "individuals who are not parties to a contract may enforce its terms only when the original parties intended the contract to directly benefit them as third parties." *Id.* at 663. Even if one assumes *arguendo* that an immunity agreement existed between

the government and Loya-Castro, defendant's claim that such an agreement was intended to extend to an entire criminal organization, including defendant, is at odds with the circumstances. Indeed, when Loya-Castro's indictment was dismissed in December 2008, for conduct alleged to have occurred prior to 1995, defendant was already under indictment in the District of Columbia, and a few months later he was indicted in this district. R. 1 (indictment returned on April 23, 2009). No reasonable person could conclude that the government intended any immunity agreement with Loya-Castro to immunize defendant, when a federal indictment against defendant was pending, and another indictment was on the way.

Defendant is also not entitled to immunity simply because he may have passed information to Loya-Castro, who may then have given the information to the government. As the Seventh Circuit has explained in the commercial context:

> the fact that a seller knows that an immediate buyer of its products will immediately resell the product is not sufficient to make the ultimate buyer an intended beneficiary of the original sales contract. . . . Contract law significantly circumscribes the ability of remote parties to enforce others' promises for good reasons, one of which is to prevent the nearly limitless liability that [plaintiff's] theory would impose.

Cooper Power Sys., Inc. v. Union Carbide Chem. & Plastics Co, Inc., 123 F.3d 675 (7th Cir. 1997).

Defendant was not a party to any immunity agreement with the United States, and his motion should be denied.

C. Defendant Was Not Promised Immunity When He Met with Agents in March 2009.

Defendant devotes much of his motion to describing the alleged agreement between Loya-Castro and the U.S. government, but acknowledges that the first direct contact between defendant and U.S. agents was "just a few hours" before defendant was taken into custody by Mexican

authorities acting on their own in March 2009. R.95 at 3. Defendant states that at this meeting, "it was made clear that the existing agreement with the United States that covered Loya" remained in place and would continue. Defendant continues, "Defendant was specifically told that he would receive immunity, not only under Loya's prior agreement, but as an agreement with him personally and approved at the highest levels of government." *Id.* As his only tangible evidence of the "agreement," defendant notes that "even though defendant had a federal warrant issued for his arrest and was physically in the presence of DEA agents, he was not arrested or detained in any way, but rather, was allowed freely to leave the hotel where the meeting took place." *Id.*

Again, defendant has not submitted any sworn affidavit supporting this version of events. Nonetheless, given that Loya-Castro had no immunity agreement, as demonstrated above, it was not factually or legally possible to extend such an agreement to defendant. Moreover, Loya-Castro has informed U.S. agents that no immunity agreement was ever extended by U.S. agents to either himself or to defendant, and Loya-Castro has indicated that he communicated as much to defense counsel. In the absence of a sworn affidavit, counsel's allegations as to what occurred at the meeting put no genuine issue of fact before the Court.

The government suggests, moreover, that the circumstances of the meeting do not support defendant's allegations. As noted, *supra.,* the two handling agents present for the meeting had been expressly ordered by DEA RD Gaddis not to conduct the meeting with defendant. DEA agents had personally informed Loya-Castro that they were not authorized to meet with defendant, and had called off the meeting. Defendant and Loya-Castro appeared for the meeting nonetheless. In light of those circumstances, defendant's claim that two DEA Special Agents would, faced with an inadvertent and unauthorized meeting with an alleged high-level cartel member, not only defy RD

Gaddis's direct order not to meet with defendant, but would continue on to offer defendant street immunity, is incredible.

However, for purposes of the current response, even if an agent told defendant that immunity was possible, that the agent would recommend immunity to the prosecutor, or that the agent would "do what he can," these statements are not enforceable promises of immunity. *See, e.g., United States v. Serlin*, 538 F.2d 737, 749 & n.9 (7th Cir. 1976) (discussing "the possibility of immunity" is not a promise of immunity); *United States v. Wilson*, 392 F.3d 1055, 1059-60 (9th Cir. 2004) (holding that statements such as "we don't think you're the biggest player in this," and "we don't want you, we just want to take this to the next level," were not promises, regardless of how defendant understood them); *United States v. Irwin*, 612 F.2d 1182, 1190-91 (9th Cir. 1980) (agent's promise to "make a favorable recommendation" to AUSA, and AUSA's statement that dismissal of charges was a "possible disposition," were not binding commitments).

Finally, the fact that defendant "was not arrested or detained in any way" at the meeting in Mexico City (R.95 at 3) does not support his allegation that there was an agreement between defendant and the U.S. government. U.S. agents do not have arrest authority in a sovereign foreign nation. American agents abroad must rely on the host nation to effectuate arrests on foreign soil. *See* 22 U.S.C. § 2291(c)(1) ("No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law").

II. Even If Agents Offered Defendant Immunity, It Is Unenforceable.

For purposes of this response, even assuming, *arguendo,* that agents promised defendant immunity, which they did not, such a promise is unenforceable. It is well-settled that a promise of

immunity is enforceable only if defendant can establish two conditions: that the person who made the promise had actual authority to do so, *and* that the defendant detrimentally relied on the promise. *See United States v. Flemmi*, 225 F.3d 78, 84 (1st Cir. 2000).; *San Pedro v. United States*, 79 F.3d 1065, 1068 (11th Cir. 1996); *Streebing*, 987 F.2d at 372; *Kettering*, 861 F.2d at 677; *Johnson*, 769 F.2d at 634. Defendant has established neither.

A. Law Enforcement Agents Had No Actual Authority to Promise Immunity.

The power to grant immunity is "the exclusive prerogative of United States Attorneys" and the Attorney General of the United States. *See Flemmi*, 225 F.3d at 87 (discussing United States Attorneys); 28 U.S.C. § 509 (providing that "[a]ll functions of other officers of the Department of Justice . . . are vested in the Attorney General"). For this reason, it is black-letter law that a law enforcement agent acting independently has no actual authority to promise immunity. *See Fuzer*, 18 F.3d at 519 (concluding that defendant failed to establish that ATF agents had authority to bind United States Attorney by promising immunity); *Flemmi*, 225 F.3d at 87, 91 (holding that FBI agents had no authority to promise defendant immunity, and such a promise was unenforceable); *Cordova-Perez*, 65 F.3d at 1554 (same for INS agent); *Streebing*, 987 F.2d at 372-73 ("the FBI agent lacked any actual or apparent authority to make the alleged promise not to prosecute"); *Kettering*, 861 F.2d at 678 (holding that DEA agent lacked authority to promise defendant a statutory maximum sentence through a plea agreement); *Williams*, 780 F.2d at 803 ("In general, a promise made by a government employee other than the United States Attorney to recommend dismissal of an indictment cannot bind the United States Attorney."); *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 888 (D.C. Cir. 1981) (there is "no authority for ruling that oral promises of immunity by an [FBI] investigator, not in accord with statutory requirements, bind all federal and nonfederal prosecutors.");

Hudson, 609 F.2d at 1328-1329 (holding that a Secret Service agent's alleged promise of immunity was "clearly outside his authority"); *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1237 (5th Cir. 1979) ("Since the SEC agents lacked actual authority to limit the prosecutorial function of the Department of Justice, any [immunity] agreement with [defendant] would be unenforceable."); *see also United States v. Igbonwa*, 120 F.3d 437, 444 (3d Cir. 1997) ("a promise made by the United States Attorney's Office relating to deportation does not bind the INS without explicit authorization from the INS."); *San Pedro*, 79 F.3d at 1072 (same).

As the First Circuit has explained, any other rule would allow "a minor government functionary hidden in the recesses of an obscure department . . . to prevent the prosecution of a most heinous criminal simply by promising immunity in return for the performance of some act which might benefit his department. Such a result could not be countenanced." *Flemmi*, 225 F.3d at 87-88.

Here, defendant's claim of immunity is even broader than those rejected by courts in many of the cases cited above. Defendant asserts that, rather than merely immunizing him for a discrete crime, instead, beginning in 1998 and continuing apparently forever, DEA agents gave him blanket immunity for every past, present, and future crime in every federal district in the United States including immunity to import and profit from the importation of tons of cocaine and kilograms of heroin. As another court in this district has observed, "The Court knows of [no] law which permits the DEA to carry on prolonged narcotics activity in which the undercover agents or informants involved are permitted to personally profit from the proceeds. To the contrary, law enforcement agents do not have the authority to violate the federal narcotics laws." *United States v. La Cour*, No. 92 CR 153, 1992 WL 365372, *3 (N.D. Ill. 1992) (Nordberg, J.); *see also Pitt*, 193 F.3d at 758 (testimony at trial showed that "only the Director of Customs and the Director of the

Drug Enforcement Agency, in conjunction with the approval of the United States Attorney for the subject district, could sanction and authorize" defendants to ship hundreds of kilograms of cocaine from Los Angeles to New York); *United States v. Anderson*, 872 F.2d 1508, 1516 (11th Cir. 1989) (finding no actual authority in the context of public authority defense because, by Executive Order, the CIA cannot authorize conduct that violates the Constitution or statutes of the United States); *United States v. Rosenthal*, 793 F.2d 1214, 1236 (11th Cir. 1986) (same).

In this case, neither the United States Attorney General nor the United States Attorney for the Northern District of Illinois have promised defendant immunity, or authorized anyone else to do so. And the government is not aware of any other official in the Department of Justice who has granted, or authorized anyone to grant, defendant immunity. Nor has the United States Attorney "ratified" any promise of immunity made by agents. As in *Flemmi*, "no express ratification transpired here, and ratification can be implied only when the ratifying official knows of the agreement, fails to repudiate it in a timely manner, and accepts benefits under it." *Flemmi*, 225 F.3d at 90. None of those conditions apply in this case.

Defendant's motion alleges that when DEA agents met with him in March 2009, agents told him that he would receive immunity, and that this agreement was "approved at the highest levels of government." R. 95 at 3. This allegation is unsupported, and it is false. The government is aware of no evidence that any agent ever made such a statement. Even if an agent had said it, it would still not make such a promise enforceable. Defendant's belief that the agent had authority to promise immunity is irrelevant. "As a general rule, doctrines such as estoppel and apparent authority are not available to bind the federal sovereign." *Flemmi*, 225 F.3d at 85. To be enforceable, the agent must have had actual authority. *See id.*; *Igbonwa*, 120 F.3d at 443-44; *San Pedro*, 79 F.3d at 1068;

Thomas v. INS, 35 F.3d 1332, 1338 (9th Cir. 1994); *Dresser Indus*., 596 F.2d at 1237. Actual authority means that, regardless of what defendant believed, the government official must "*in fact* ha[ve] the authority to empower the defendant to perform the acts in question." *United States v. Baker*, 438 F.3d 749, 753 (7th Cir. 2006).

The Supreme Court has cautioned more than once that, "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority." *Heckler v. Cmty. Health Servs of Crawford County, Inc*., 467 U.S. 51, 63 (1984) (quoting *Federal Crop Ins. Corp., v. Merrill*, 332 U.S. 380, 384 (1947)); *see also Heckler*, 467 U.S. at 63 ("those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law."). As explained above, the government is aware of no official in the Department of Justice who authorized an agent to promise defendant immunity, and is aware of no evidence of such authorization, or of such a promise. Defendant appears to believe that the SARC process for another person authorized such an agreement for him. As reflected in the cooperation agreement and all of the surrounding circumstances, defendant is mistaken. Because agents had no actual authority to promise defendant immunity, any such promise is unenforceable.

B. Defendant Did Not Detrimentally Rely on a Promise of Immunity.

Defendant also cannot establish detrimental reliance. It is well-established that if the government does not use against defendant any information the government obtained through a promise of immunity, then there is no detrimental reliance, and no prejudice. *See Streebing*, 987 F.2d at 373 (noting that "the government did not use any of the information obtained from defendant during the interview against him in any subsequent proceeding nor did it present the information to

the grand jury."); *Kettering*, 861 F.2d at 679-80; *United States v. Coon*, 805 F.2d 822, 825 (8th Cir. 1986). In this case, the United States Attorney's Office in this district did not know about any statements defendant made to DEA agents at the time the case was indicted. As a result, defendant will be in the same position he was before the alleged promise of immunity, and he will have suffered no detrimental reliance or prejudice. *See Streebing*, 987 F.2d at 373; *Kettering*, 861 F.2d at 680; *Coon*, 805 F.2d at 825.[11]

Defendant's claim of detrimental reliance is limited to defendant traveling to Mexico City for a meeting with agents. Defendant does not allege, nor could he, that he had authority to commit the crimes charged in the indictment, including importing and distributing ton-quantities of cocaine and multi-kilo quantities of heroin. R.75. For these reasons, even if defendant could establish that agents had actual authority to make a binding promise of immunity, the remedy is not dismissal of the indictment. As the Supreme Court has explained in an analogous setting:

> [W]hen before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence. . . . [A]bsent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate. . . . The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression.

United States v. Morrison, 449 U.S. 361, 365 (1981). The Seventh Circuit has echoed this conclusion, explaining that "[a] federal judge is not authorized to punish the misconduct of a

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[11] Defendant suggests that he suffered detrimental reliance because by meeting with DEA agents in March 2009, defendant put himself "at risk of retribution by rival cartels and detention by the Mexican government." R. 95 at 8. Defendant cites no authority holding that this type of detrimental reliance requires dismissing an indictment. Every criminal risks retribution and detention by meeting and cooperating with authorities. Defendant's theory suggests that an indictment should be dismissed in every case in which a government agent has promised immunity. That is not the law.

prosecutor by letting the defendant walk, unless the misconduct not only violated the defendant's rights but also prejudiced his defense." *United States v. Van Engel*, 15 F.3d 623, 631 (7th Cir. 1993) (overruled on other grounds by *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994)).

Finally, because defendant suffered no prejudice, this case does not fall within the "narrow" and "seldom-seen" exception that requires a promise of immunity to be enforced if failure to do so would be "fundamentally unfair." *Flemmi*, 225 F.3d at 88 n.4; *see also Williams*, 780 F.2d at 803 (explaining that a prosecution is not fundamentally unfair if defendant suffered no prejudice).

III. An Evidentiary Hearing is Unnecessary.

An evidentiary hearing is necessary only "when the allegations and moving papers are sufficiently definite, specific, non-conjectural and detailed enough to conclude that a substantial claim is presented and that there are disputed issues of material fact which will affect the outcome of the motion." *United States v. McGaughy*, 485 F.3d 965, 969 (7th Cir. 2007) (quoting *United States v. Villegas*, 388 F.3d 317, 324 (7th Cir. 2004)). The burden is on defendant to make these showings. *McGaughy*, 485 F.3d at 969.

Defendant has not established a substantial claim. He has offered no affidavits or any other evidence to support his sweeping claims of immunity, relying only on statements in his filings. This sort of "bald assertion," unsupported by any evidence, is not sufficient to trigger an evidentiary hearing. *See Sophie*, 900 F.2d at 1071 (upholding district court's refusal to hold evidentiary hearing on alleged immunity agreement); *cf. United States v. Theunick*, __ F.3d __, No. 08-1363, 2011 WL 2566883, * 8 (6th Cir. June 30, 2011) (holding that district court correctly refused to give public authority instruction because defendant's testimony was "vague" and "unsupported" by any other evidence). In addition, even if defendant had made a sufficient showing that he received a promise

of immunity, he has made no showing that the agents who made the promise had actual authority to do so. Finally, even if defendant could show both that agents made the promise, and that they had actual authority in other words, if all of defendant's allegations and more were true the remedy would be to suppress any evidence the government obtained because of the promise. Therefore, the Court need not resolve any issues of material fact in order to deny the motion to dismiss, and there is no need for a hearing.

CONCLUSION

For the foregoing reasons, the Court should deny defendant's motion to dismiss the indictment and for an evidentiary hearing.

Dated: September 9, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT BASED ON AN ALLEGED PROMISE OF IMMUNITY

was served September 9, 2011, in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, LR5.5, and the General Order on Electronic Case filing pursuant to the District Court's Electronic Case Filing (ECF) system as to ECF filers.

Respectfully submitted,

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