IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 14-CR-00116-LRR
	)	
v.	)	
	)	
WILLIAM B. AOSSEY, JR.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

NOW COMES Defendant, William B. Aossey, by and through his undersigned counsel, and hereby moves, pursuant to Rules 12(b)(2) and 12(b)(3)(B) of the Federal Rules of Criminal Procedure, this Honorable Court for the entry of an order dismissing the above styled criminal action and respectfully state as follows:

Respectfully Submitted:

s/ *Haytham Faraj*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

William B. Aossey Jr., by and through undersigned counsel, hereby submits the following Memorandum of Law in Support of his Motion to Dismiss pursuant to L.R. 7(d).

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE THE GOVERNMENT'S MISBRANDING ALLEGATIONS

Unlike most criminal cases, the jurisdiction of this Court is not controlled by the general provision in 28 U.S.C. 3231 to hear offenses against the laws of the United States. Instead, the Federal Meat Inspection Act controls in special provision, 21 U.S.C. § 674, which establishes the authority of the district court, and limits it "as provided in section 607(e) of this title." Section 607(e) confers on the Secretary of Agriculture power to decide disputes about the proper "marking or labeling," i.e., the misbranding, of the products he regulates, subject to review by the U.S. Court of Appeals.

The entirety of the indictment (the "*Indictment*") [D.E. #15] is predicated upon the government's ability to maintain a criminal misbranding of meat or meat food products case, based upon allegations of false or misleading labeling practices, before the U.S. District Court.

A. Meat Misbranding Allegations Predicated Upon False or Misleading Labeling Are Assigned to the Secretary of Agriculture, Not the U.S. District Court

The statute which prohibits the sale of meat using false labeling 21 U.S.C. § 610 and it uses the term "misbranding" to identify that prohibition. In relevant part, it reads:

> **No person, firm, or corporation shall**, with respect to any [meat or meat food products] **sell**, transport, **offer for sale** or transportation, or receive for transportation, **in commerce**, (1) any such articles which (A) are capable of use as human food and (B) are adulterated or **misbranded at the time of such sale**, transportation, offer for sale or transportation, or receipt of transportation; or (2) any articles required to be inspected under this subchapter unless they have been so inspected and passed.

21 U.S.C. § 610(c) (emphasis added). Simply, it is unlawful to sell or offer to sell misbranded food products in commerce. On its face, this rule is straight forward and of obvious importance to the health and safety of our nation's food supply. However, this rule is deceptively simple.

Section 601 of the FMIA states, in relevant part, as follows:

> The term 'misbranded' shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:
>
> (1) if its labeling is false or misleading in any particular.

21 U.S.C. § 601(n)(1). Section 601 of the FMIA defines labeling as follows:

> [t]he term 'labeling' means **all labels and other written, printed, or graphic matter** (1) **upon any article or any of its containers** or wrappers, **or** (2) **accompanying such article**.

21 U.S.C. § 601(p)(emphasis added).

In this case, the government alleges that certain of Midamar's labeling was false or misleading. The government alleges that Midamar altered or changed the establishment numbers printed on certain articles of food to reflect a different establishment number, which effectively disguised the true identity of the slaughterhouse(s) where the meat or meat food products were in fact slaughtered, thus rendering the labeling false or misleading. The government further alleges that the foregoing false or misleading label information was subsequently replicated on certain documents that accompanied the sale of said articles of food in commerce (e.g. Export Certificates, Certificates of Islamic Slaughter, Letterhead Certificates, Health Certificates, Inspections, etc.).

Even assuming arguendo the government's allegations are correct, this Honorable Court lacks the subject matter jurisdiction necessary to adjudicate criminal misbranding issues predicated on allegations of false or misleading labeling practices. As a matter of general jurisprudence, Congress gave the United States District Courts jurisdiction over federal crimes.

See 18 U.S.C. § 3231. And, "as the Supreme Court has recently made clear, the matter of jurisdiction has to do only with the court's statutory or constitutional power to adjudicate the case." *United States v. White Horse*, 316 F.3d 769, 771 (8th Cir. 2003)(internal citations omitted)(quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)).

Section 674 of the FMIA imposes a limitation upon the District Court's jurisdiction as follows:

> [t]he United States district courts…are **vested with jurisdiction specifically to enforce**, and to prevent and restrain violations of, this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, **except[1] as provided in section 607(e)** of this title.

21 U.S.C. § 674 (emphasis added). The exception deals specifically with directives "respecting false or misleading marking, labeling, or container modification or false or misleading matter[s]." 21 U.S.C. § 607(e). Addressing limitations upon Federal Court jurisdiction, "[e]ven the High Court itself has acknowledged that it 'should hesitate to increase its jurisdiction without explicit directive from Congress.'" *United States v. Lee*, 472 F.3d 638, 643 (9th Cir. 2006) (citing *Star-Kist Samoa, Inc. v. The M/V Conquest*, 3 Am. Samoa 2d 25, 28 (1986) (contrasting non-exclusive territorial criminal jurisdiction with exclusive criminal jurisdiction under agricultural regulatory statutes, including 21 U.S.C. § 674 and standing for the proposition that 18 U.S.C. § 3231 should not be read to grant federal jurisdiction in the absence of clear Congressional intent). *See also Lockerty v. Phillips*, 319 U.S. 1019, 1022 (1943)(recognizing "Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, in the exact degrees and character which

[1] The "except" clause of § 674 confers jurisdiction upon the Secretary (which is what this section gives the district court) for an adjudication. This is not a mere Article II allocation of enforcement power away from the Attorney General, but rather an express grant of adjudicatory jurisdiction denied an Article III court, given by Congress to another officer... the Secretary of Agriculture.

Congress may seem proper for the public good.[2]"). *See also Elgin v. Dept. of Treasury*, 132 S.Ct. 2126, 2133-35 (2012)(carve out of district court § 1331 jurisdiction need be only "fairly discernible"). *See also United States v. Corrick*, 298 U.S. 435, 439-40 (1936)(cautioning the District Court not to invoke its jurisdiction too quickly or imprecisely.) In light of the 9th Circuit's holding in *Lee*, 21 U.S.C. § 674 contains a clear limitation upon the United States district courts' exercise of jurisdiction that 18 U.S.C. §3231 should not trump.

Section 607(e) of the FMIA confers exclusive jurisdiction upon the Secretary of Agriculture (the "*Secretary*") to adjudicate mislabeling claims predicated upon allegations of false or misleading labeling as follows:

> [i]f **the Secretary** has reason to believe that **any marking or labeling** or the size or form of any container in use or proposed for use with respect to any article subject to this subchapter **is false or misleading in any particular**, he may direct that such use be withheld unless the marking, labeling, or container is modified in such manner as he may prescribe so that it will not be false or misleading. If the person, firm, or corporation using or proposing to use the marking, labeling or container does not accept the determination of the Secretary, such person, firm, or corporation may request a hearing, but the use of the marking, labeling, or container shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. **Any such determination by the Secretary shall be conclusive unless**, within thirty days after receipt of notice of such final determination, the person, firm, or corporation adversely affected thereby **appeals to the United States court of appeals** for the circuit in which such person, firm, or corporation has its principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of **section 194 of Title 7 shall be applicable to appeals** taken under this section.

21 U.S.C. § 607(e) (emphasis added). Furthermore, the Uniform Rules of Practice for the Department of Agriculture are the Rules of Practice (7 C.F.R. § 1.131, *et seq*.) applicable to adjudicatory, administrative proceedings under, *inter alia*, section 607(e) of the FMIA. *See* 9 C.F.R. § 335.1(a). "[T]he principal statutes under which [Secretary] issues final decisions …

[2] 21 U.S.C. § 602 sets forth Congress' statement of findings under the FMIA and states, in relevant part, that **regulation by the Secretary** and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers. *Infra*.

include "The Packers and Stockyards Act, 1921 (7 U.S.C. § 181, *et seq*.), The Agricultural Marketing Act, 1937 (7 U.S.C. § 608c), The Federal Meat Inspection Act (21 U.S.C. § 604, 606, 607(e), 608, 671(a))" and others. *See In Re World Wide Citrus*, 50 Agric. Dec. 319, 348 (USDA 1991). The foregoing statutory scheme also dictates the Circuit Court's standard of review. *See generally Dickerson v. Zurko*, 527 U.S. 150, 164 (1999)(holding that a reviewing court of the United States must review the underlying agency decision pursuant to section 706 of the APA.). *See Community Nutrition Institute v. Block*, 749 F.2d 50, 55-54 (D.C. Cir. 1984)(acknowledging the Secretary's "express statutory authority" under the FMIA, his "broad discretion over the content of meat food product labels," and the "evident need for expert and technical judgment in applying 21 U.S.C. § 607(e)).

In light of the above, it is the Secretary and not the U.S. District Court that Congress vested with the requisite jurisdiction to adjudicate matters involving allegations of false or misleading labeling. Addressing this very issue, the Fourth Circuit stated that "[s]ection 203 of the Packers and Stockyards Act together with the provisions of the Meat Inspection Act… undoubtedly vest the Secretary of Agriculture with plenary power to regulate the branding and labeling of meat food products and to forbid unfair trade practices in the sale thereof." *United Corporation v. Federal Trade Commission*, 110 F.2d 473, 475 (4th Cir. 1940). The 4th Circuit also noted that the U.S. "Supreme Court has sustained this exercise of power on the part of the Secretary of Agriculture and has held that **exclusive power** has been delegated to him by Congress with respect thereto." *Id*. (citing *Brougham v. Blanton Mfg. Co.*, 249 U.S. 495 (1919)(emphasis added).

In 1998, the Eighth Circuit considered whether the district court erred in failing to submit a "theory of the defense" jury instruction based on "the defendants claim that the government

was required to give them notice of any violation of the Federal Meat Inspection Act and to bring administrative proceedings against them before the government could bring criminal charges against them, citing 21 U.S.C. § 607(e) and 9 C.F.R. § 355.40(a)." *United States v. Jorgensen*, 144 F.3d 550, 561 (8th Cir. 1998). Finding that the district court properly declined to submit the proposed instructions, the 8th Circuit held that "the claimed theory of defense, i.e., that the government failed to abide by its own regulations before seeking the indictment, is not a defense submissible to the jury. Rather, it is the kind of attack that should be made by a motion to dismiss before trial pursuant to Federal Rule of Criminal Procedure 12(b)(1) since it claimed a defense or objection on a defect "in the institution of the prosecution." *Id*. In essence, the *Jorgensen* Court found the defendants therein to have waived the argument.

The 8th Circuit's ruling in *Jorgensen* failed to consider, on a *sua sponte* bases, the defendants' aforementioned "theory of defense jury instruction" challenge as a timely, but perhaps un-artfully formed, subject matter jurisdiction challenge under Fed.R.Crim.P. 12(b)(2). Not because of the government's conduct, but rather based on the express limitation upon the district court's jurisdiction found in 21 U.S.C. § 674 and crystalized in 21 U.S.C. § 607(e). *See United States v. Seher*, 562 F.3d 1344, 1359 (11th Cir. 2009)(holding that an appellate court is required to raise *sua sponte* the jurisdictional issue of whether the indictment sufficiently alleges an offense in violation of the laws of the United States). The *Jorgensen* Court ignored the foregoing obligation and improperly found the defendants therein to have waived a challenge to the district court's jurisdiction. *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998).

B. The Federal Meat Inspection Act and the Packers & Stockyards Act Function as an Integrated Statutory and Regulatory Framework

Because the core activity challenged by the United States is "misbranding," jurisdiction is reserved to the Secretary and the Court of Appeals by section 607(e) of the FMIA, which invokes the procedures of the P&S Act, § 194. *See* 21 U.S.C. § 674.Those statutes are part of an integrated program for a particular subject matter--federal meat inspection-- controlled by the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq*..[3] Congress has assigned criminal jurisdiction to a different court, and is not conferred here by 18 U.S.C. § 3231. Meat misbranding thus is governed by a complex statutory program which requires consideration of labeling requirements and harmonizing those requirements with the mandates of multiple related statutes and their respective governing regulations. Congress has assigned criminal jurisdiction under that program to a different court, and it is not conferred here by 18 U.S.C. § 3231.

1. The Federal Meat Inspection Act, 21 U.S.C. §§ 674 and 607(e), Limits District Court Jurisdiction Over Meat Misbranding Charges.

As set forth in the FMIA, Congress issued a "statement of findings" that codified its intent to regulate the sale of meat and meat food products in interstate or foreign commerce. Congress expressly stated its purpose to regulate meat and meat products, punish misbranding, under the authority of the Secretary of Agriculture.

> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare,

[3] *See also* 21 U.S.C. § 392 (exempting "meats and meat food products" from the provisions of Chapter 9 of the FDCA "to the extent of the application or the extension thereto of the" FMIA [21 U.S.C. § 601 *et seq*.].

> destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that **regulation by the Secretary** and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C. § 602 (emphasis added). As noted above, Congress expressly found the Secretary to be the appropriate agency to regulate the sale of meat and meat food products, which the U.S. Supreme Court has sustained. *Supra* at 6 (citing *Brougham v. Blanton Mfg. Co*., 249 U.S. 495 (1919)).

Section 607(e) of the FMIA specifically grants the Secretary the power to **conclusively determine** whether any labeling or marking is false in any particular. 21 U.S.C. § 607(e). This grant of power is important because the FMIA defines misbranding in section 601, in part, as false labeling:

> [t]he term 'misbranded' shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:
>
> (1) if its labeling is false or misleading in any particular.

21 U.S.C. § 601(n)(1). Thus, the FMIA conferred exclusive jurisdiction upon the Secretary to determine whether any meat or meat food products are misbranded under the FMIA based upon allegations of false or misleading labeling. The Congressional conferral of subject matter jurisdiction applies here because Midamar qualifies as a packer under the P&S Act[4] and the

[4] Midamar qualifies as a packer under the P&S Act because Midamar is engaged in the business of: (i) manufacturing or preparing meats or meat food products for sale or shipment in commerce and (ii) marketing meats or meat food products as a wholesale broker, dealer, or distributor in commerce. *See* 7

Indictment at issue involves allegations pertaining to Midamar's sale and labeling of meat or met food products in commerce.

2. The Secretary, Subject to Judicial Review in the Court of Appeals, Possesses Unfettered Prosecutorial Discretion.

The Secretary possesses the unfettered prosecutorial discretion to adjudicate or otherwise punish violations of the FMIA (i.e. misbranding predicated upon allegations of false or misleading labeling). To this end, the Secretary, upon investigation, exercises its prosecutorial discretion in one of three ways. First, sanctions may be employed, with our without a hearing, to punish violations of the FMIA. 9 C.F.R. § 350.6; *See also* 9 C.F.R. § 500.1 *et seq*. The regulations also provide the Secretary the authority, prior to the institution of a formal proceeding, to provide an establishment the opportunity to demonstrate or achieve compliance. *Id*. *See also* 7 C.F.R. § 1.133(b)(3)(citing 5 U.S.C. § 558).

Second, a formal regulatory proceeding may be instituted, and served upon the respondent pursuant to 7 C.F.R. 1.147(b), to determine, inter alia, whether a person has been responsible for the use without authority, or the imitation, of any marks or certificates of Federal meat inspection on or with respect to any meat or other product, or has otherwise been responsible for any fraudulent or deceptive practice with respect to such service. 9 C.F.R. § 350.6(b). Once the Secretary determines, via order, that a packer is unfit to engage in any business requiring inspection, the violating packer may appeal the order to the U.S. Court of Appeals pursuant to section 194 of the P&S Act. *See* 21 U.S.C. § 607(e). Via direct reference to 7 U.S.C. § 194, coupled with the applicability of the Rules of Practice for the Department of Agriculture (*See* 9 C.F.R. § 335.1(a)), Congress clearly expressed its intent that the Secretary is

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U.S.C. § 191. *See generally United States v. Great American Veal, Inc.*, 57 Agric. Dec. 504, 514 (USDA 1998) (recognizing the need for an assessment of a civil penalty through an administrative proceeding is a prerequisite to the initiation of an enforcement action in a federal district court.) As such, Midamar is subject to the provisions of both the P&S Act and the FMIA, but exempted from Chapter 9 of the FDCA.

to follow the procedures set forth in 7 U.S.C. § 193, subject to the packer's right of appeal to the U.S. Court of Appeals pursuant to 7 U.S.C. § 194, when determining whether any meat or meat food product is misbranded under the FMIA based on allegations that its labels or labeling is false or misleading in any particular. This is important because packers, like Midamar, or the officers or directors of said packers, are subject to criminal prosecution under 7 U.S.C. § 195 for failing to obey any order of the Secretary issued under 7 U.S.C. § 193.

Lastly, the matter may be referred to the Department of Justice for criminal prosecution after the Secretary complies with the notice provisions of 9 C.F.R. § 335.40, which requires the Secretary to notify the violator of its intent to report the violation for prosecution and provide the violator with an opportunity to "present its views" to the Secretary with respect to such proceeding. The Secretary's authority to criminal prosecute is set forth in 21 U.S.C. § 676.

(i) The Secretary Possesses Exclusive Prosecutorial Discretion

In 21 U.S.C. § 607(e), by reference to the procedures of the P&S Act, Congress therefore conferred criminal jurisdiction over misbranding issues based on allegations of false or misleading labeling to the Secretary under 21 U.S.C. § 607(e) and not to the district court by 18 U.S.C. § 3231. To be clear, in cases where 21 U.S.C. § 607(e) **does not apply**, the U.S. District Court's jurisdiction over criminal matters under 18 U.S.C. § 3231 is recognized under 21 U.S.C. § 674 and 21 U.S.C. § 676. When properly exercising its jurisdiction under 21 U.S.C. § 674, the U.S. District Court may, upon conviction, impose criminal penalties under the FMIA pursuant to 21 U.S.C. § 676, which states, in relevant part:

> [a]ny person, firm, or corporation who violates any provision of this chapter for **which no other criminal penalty is provided** by this chapter shall upon conviction be subject to…

21 U.S.C. § 676(a) (emphasis added). Section 676(a) must be read in conjunction with § 676(b), and is no removal of authority from the Secretary. Section 676(b) of the FMIA discusses the Secretary's authority and discretion with respect to minor civil **or criminal** violations, and states:

> [n]othing in this chapter shall be construed as requiring **the Secretary** to report for the institution of libel or injunction proceedings, **minor violations** of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice of warning.

21 U.S.C. § 676(b) (emphasis added). Although it could have, Congress did not limit the scope of the term "minor violations" to include: (i) only misdemeanors and not felonies, or (ii) violations that do not involve intent to defraud. Declining to define "minor violations," Congress empowered the Secretary to exercise discretion over **any violation** - 21 U.S.C. § 676(a) - of the FMIA, be it civil or criminal. 21 U.S.C. § 676(b). *See Dean Rubber Mfg. Co. v. U.S.*, 356 F.2d 161, 168 (8th Cir. 1966)(recognizing that "Congress has exclusively invested the Secretary with the authority to make judgment and refrain from prosecutions for minor violations" under 21 U.S.C. § 336). Indeed the Fifth Circuit, in *United States v. Rikard*, 552 F.2d 153, 155 (5th Cir. 1977), necessarily reached just this conclusion in rejecting the defendant's argument that §676(b) grant of unfettered prosecutorial discretion to the Secretary of Agriculture was unconstitutional. Reading "minor violations" to limit the Secretary's authority to misdemeanors would render the phrase "nothing shall be construed" as meaningless. *See Couvertier v. Gil Bonar*, 173 F.3d 450, 453 (1st Cir. 1999) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous."). *See also United States v. 449 Cases Containing "Tomato Paste"*, 212 F.2d 567, 572-73 (2d Cir. 1954) (holding that, in delegating prosecutorial authority to the Secretary under §336, "Congress considered such administrative control a wiser course than the hedging of power by various theoretical restrictions").

(ii) The Secretary's Exclusive Prosecutorial Authority Necessarily Extends to 18 U.S.C. 1001

Under Count I of the Indictment, the government charges the same false statements regarding mislabeling the slaughterhouse of origin and the Halal character of the products in export documents, as violations of 21 U.S.C §§610 (misbranding) and 611 (false statements in export statements), along with 18 U.S.C §1001 (false statements to an agency or department of the United States). While Congress may criminalize a singular source of conduct in multiple statutes, it does not follow that Congress intended to divest the Secretary from the very prosecutorial authority they gave him with under §676.

18 U.S.C §1001 begins with a jurisdictional statement that provides that "[e]xcept as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States…." The Supreme Court has held that the term "jurisdiction" in §1001 "covers all matters codified by to the authority of an agency or department." *United States v. Rodgers,* 466 U.S. 475, 479 (1984).

In this case, the government has, in fact, alleged that the false statements made in violation of §1001 are within the jurisdiction of the Secretary. *See* Indictment, pg. 25, ¶25. The term "jurisdiction" under §1001 necessarily means that the alleged false statements made must be under the authority of the Secretary regulate. *United States v. Richmond,* 700 F.2d 1183, 1187-88 (8th Cir. 1983) (construing agency jurisdiction as "the power to make final or binding determinations…, i.e., the power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem…").

The Eighth Circuit's holding in *Richmond* that a component of jurisdiction is the agency's ability to adjudicate rights compels the Secretary necessarily must exercise the right to adjudicate the statements at issue in order for jurisdiction exist under §1001. Given that the

Secretary necessarily has the right to adjudicate the false statements as a basis for §1001, it does not follow the Secretary does not enjoy the same prosecutorial discretion, with respect to §1001, as he does for the same statements under 21 U.S.C. §§610 and 611.

(iii) The Secretary Previously Exercised its Prosecutorial Authority

In this case, the Secretary already exercised its discretion under the FMIA and its governing regulations because the Secretary, by and through the Food Safety Inspection Service ("*FISIS*") and the Office of Program Evaluation, Enforcement and Review ("*OPEER*"), investigated the Defendant and subsequently sanctioned them on February 8, 2010 via written notice withdrawing their inspection services without a hearing pursuant to 9 C.F.R. 350.6(b) (the "*Withdrawal Letter*"). *See also* 21 U.S.C. §§ 671 and 676(b). The Secretary's Withdrawal Letter was based upon the exact same allegations contained in the Indictment (e.g. misbranding predicated upon allegations of false or misleading labeling, falsification of export documents for Indonesia and Malaysia, etc.) and **provided Midamar with an opportunity to achieve compliance** prior to the institution of any formal proceeding to withdraw or suspend Midamar's services by stating that:

> [a]t such time that your establishment provides sufficient written assurances, which are designed to preclude further improper application of FSIS regulation, FSIS may reinstate the services.

The Secretary's Rules of Practice provide that in any case, "**except one of willfulness** or in which **the public health, interest, or safety requires**," prior to the institution of a formal proceeding… the "Administrator,[5] in an effort to effect an amicable or informal settlement of the matter, shall afford such person an opportunity… to demonstrate or achieve compliance with the applicable statute, regulation, or standard…." 7 C.F.R. § 1.133(b)(3); *See also* 12B. Fed. Proc.,

[5] Administrator means any officer or employee of the Department of Agriculture to whom authority has heretofore been delegated. *See* 9 C.F.R. § 550.2(c).

L. Ed. 34:9. On May 2, 2011, the Secretary issued a decision on Midamar's appeal[6] of the Administrator's prior declination to reinstate Midamar's voluntary reimbursable inspection services. In that decision, the Secretary confirmed that "the opportunity to demonstrate compliance was provided to the establishment [Midamar] within the letter, dated February 8, 2010, withdrawing services." On July 28, 2011, the Secretary accepted Midamar's corrective action plans and confirmed its compliance with the FMIA via letter reinstating the previously withdraw inspection services. Attached hereto as Exhibit A, and incorporated herein by this reference, is the Declaration of William Aossey attaching true copies of the aforementioned letters and appellate decision.

In light of the above, it is clear that the Secretary deemed the Defendant's alleged misbranding violations to be "minor violations" and elected to address said violations via sanction pursuant to regulation and not criminal prosecution pursuant to 21 U.S.C. § 676. Similarly, because the Secretary provided the Defendant with an opportunity to achieve compliance under 9 C.F.R. 350.6(b), it is clear that the Secretary did not consider the Defendant's conduct to be either "willful" or a threat to the "public health, interest, or safety." The foregoing represents the Secretary's exercise of its prosecutorial discretion and its subsequent acceptance of the Defendant's demonstration of compliance in resolution of the issues identified in the Secretary's February 8, 2010 withdrawal of services letter.

The government's Indictment usurps the Secretary's authority under the FMIA and seeks to replace the Secretary's discretion with its own, which this Honorable Court should not condone. Because the Secretary determined the Defendant's alleged misbranding violations to be minor violations, that were not willful and did not present a threat to the public health or safety,

[6] Midamar's filed an appeal the Administrator's decision not to re-instate its previously withdrawn inspection services for identification and export pursuant to 9 C.F.R. §§ 500.5(c) and 306.5.

the misbranding allegations are barred from criminal prosecution and the Grand Jury lacked the authority necessary to investigate said charges (and all other charges) and otherwise approve the Indictment, which renders it invalid.

C. The Indictment Calls on This Court To Make Factual Findings Due To Be Made By the Secretary of Agriculture, Under His Authority To Provide Penalties For Misbranding.

The Indictment includes 19 Counts and runs 23 pages. However, it is a complaint about the misbranding of meat sold by Midamar. All of its charges require a determination about the truthfulness of Midamar's labels accompanying meat provided for export. Even the wire fraud, money laundering, and forfeiture charges are grounded on a complaint about Midamar's labels.

The Indictment alleges in Count I a conspiracy to sell misbranded meat in violation of 18 U.S.C. § 371. *See* Indictment at 8-17. The statutes underlying conspiracy charge are 21 U.S.C. § 610, which refers to "articles that had been misbranded," and 21 U.S.C. § 611, which refers "false statements on export certificates." Both charges includes allegations of "intent to defraud," and further allege a violation of the mail fraud statute, and the wire fraud statute, 18 U.S.C. §§ 1341, 1343. In addition, the Indictment alleges the conduct violates 18 U.S.C. § 1001 for allegedly making false statements to, using false documents within the jurisdiction of, and covering up material facts from, the USDA. *Id.* at 8-9.

The manner and means of the alleged conspiracy is said to be the generating of false documents concerning "the source and nature of beef products referenced in the certificates and writings." *Id.* at 9. The false documents are said to give certain false impression about the "accompanying shipments of beef products...." *Id.* at 9-10.

Many of these activities occurred between April 2007 and January 2010. The Indictment describes allegedly false information, including "labels" on "packages ... of beef products," some

of which were for "export," "boxes," and the fact that allegedly false documents "accompanied the respective beef shipments" *Id.* at 9-10. The false documents included Export Certificates and Letterhead Certificates which "accompanied the respective beef shipments...." *Id*. at 11.

A lengthy paragraph 53 of Count I (on pages 12 to 17) refers to alleged overt acts in furtherance of the conspiracy. It lists 22 specific Export Certificates dated between June 2007 and January 2010, and 22 Letterhead Certificates "for shipments" during the same time period, 22 Certificates of Islamic Slaughter "for exports of beef products" on dates between June 2007 and January 2010. Next, there are two subparagraphs h. and i. which allege the wire transmission or delivery by private commercial interstate carrier of Export Certificates, and Certificates of Islamic Slaughter in late 2009 through January 2010, and they all are alleged to be "pertaining to particular beef shipments."

Counts 2 through 8 (pages 17 and 18) allege that seven specific Export Certificates in October 2009 and January 2010 were false in describing the facility where the meat to which they referred was produced.

Counts 9 through 15 (on pages 18 to 19) are separate allegations of wire fraud in violation of 18 U.S.C. § 1343. These Counts give a separate paragraph number to each of 7 separately listed wire transactions between October 2009 and January 2010 which resulted in the receipt of money for MIDAMAR, and which were allegedly the result of false "marketing, sale and shipment of Halal beef" as part of the misbranding "scheme" described in the previous paragraphs. The amounts listed total $134,080.01. Paragraphs 75 to 77 on page 20 seeks forfeiture of monies "derived from proceeds traceable to the offenses[,]" as provided by 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

Counts 16 to 18 (on page 21) add charges of money laundering in violation of 18 U.S.C. § 1956(a)(2)(A), but again they incorporates the previous paragraphs, except those which merely refer to a statute, or merely incorporate the previous allegations. These Counts also give a separate paragraph number to each of 3 separate listed money transfer transactions occurring outside the United States said be made "with the intent to promote the carrying on of ...wire fraud...." between November 2009 and February 2010.

Count 19 (on pages 21 and 23) alleges the money laundering in the previous counts was part of a conspiracy in violation of 18 U.S.C. § 1956(h), and that, pursuant to 18 U.S.C. § 982(a)(1), on conviction, the conspirators should forfeit of "any property, real or personal, involved in such offense, and any property traceable to such property." Forfeiture is also sought of any substitute property pursuant to 21 U.S.C. § 853(p) and 28 U.S.C. § 982(b)(1).

In summary, because of the way in which the counts are linked, and based on charges of improper labeling of meat products, no conviction can be obtained without the jury making a finding of improper labeling, i.e., misbranding. Accordingly, on this Indictment, the jury must make the same kind of findings that the Secretary of Agriculture is due to make as part of his responsibility under 21 U.S.C. § 607(e). Accordingly, the Indictment must be dismissed.

II. THE INDICTMENT DENIES DEFENDANT PROCEDURAL RIGHTS AND IS INSUFFICIENT TO SUPPORT THE CHARGES AGAINST THE DEFENDANT.

A. The Indictment Is Defective Because The Prosecution Failed To Follow The Procedures Necessary To Prosecute The Defendant.

In this case, the prosecution overstepped its authority and rushed to institute this criminal action. In so doing, it failed to provide the Defendant with proper notice of the alleged violations identified in the Indictment. *See* 7 C.F.R. § 1.133(b)(3) (citing 5 U.S.C. § 558). By failing to give this required notice, the government deprived the Defendant of an opportunity to cure the alleged

violations. The prosecution further failed to initiate, or cause to be initiated, an administrative proceeding against Midamar. *See* 21 U.S.C. § 607(e) and 7 C.F.R. § 1.133(b)(1). The prosecution also failed to comply with § 335.40 by failing to provide the Defendant with "reasonable notice" "that the Secretary intends to report the violation for prosecution" and providing an "opportunity to present the violator's views to the Secretary **before any violation of the FMIA is reported to the Department of Justice**," which would have been required because the Secretary did not consider the Defendant's alleged violations willful. *See* 9 C.F.R. § 335.40 (emphasis added) and *Supra*. These steps the prosecution skipped are conditions precedent to its ability to maintain any type of criminal action. The prosecution thus violated the Defendant's procedural rights set forth in the FMIA, the P&S Act, and the Rules of Practice (9 C.F.R. § 335.1(a)). This same conduct also is heavy handed and unwarranted government conduct that this Court should not condone. *See generally United States v. Henderson-Durand*, 985 F.2d 970, 973 (8th Cir. 1993) (defendant's claim of outrageous government conduct proper in a pretrial motion pursuant to Rule 12(b)(2)), *cert. denied*, 510 U.S. 856 (1993).

B. Certain of The Alleged Overt Acts of Making or Using False Statements and Documents Fall Outside the Statute of Limitations.

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. 18 U.S.C. § 3282(a). *See also* 28 U.S.C. § 2462. The Defendant objects to government's prosecution of, use, or presentment of evidence relating to any and all allegedly overt acts outside the applicable statute of limitations. Specifically, any alleged overt act that occurred on or before October 23, 2009 is outside the aforementioned statute of limitation and should dismissed. Moreover, the

government should not be allowed to present evidence regarding any such time barred acts. *See* Indictment, pgs. 12-17, ¶ 53.

WHEREFORE, for the reasons set forth above, the Defendant respectfully requests that this Court grant the instant motion and dismiss the Indictment in its entirety.

Respectfully Submitted:

s/ *Haytham Faraj*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Motion to Dismiss, along with all exhibits thereto, if any, was served upon all counsel of record in the above styled case, via the Court's CM/ECF system, this 22nd day of June 2015.

/s/ Haytham Faraj