UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. S2-4:02 CR 529 CDP DDN
	)	
P&S FOODS, INC.,	)	
PETER SARANDOS, SR.,	)	
DAVID SARANDOS,	)	
MARK RUSTEMEYER, and	)	
DARRELL HERRING,	)	
	)	
Defendants.	)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). A second evidentiary hearing was held on September 2, 2003.[1]

From the evidence adduced at the hearing, including the testimony of defendants Peter Sarandos, Sr. (Peter Sarandos), and Darrell Herring, as well as evidence submitted before the hearing, the undersigned makes the following findings of fact and conclusions of law:

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[1]On December 16, 2002, the undersigned filed an Order and Recommendation, following an evidentiary hearing held on December 13. (Doc. 51.) After a first superseding indictment was filed on March 27, 2003 (Doc. 66), defendants filed additional motions regarding that indictment, which were the subject of a June 20, 2003 Order and Recommendation (Doc. 97). No responses or objections to either Order and Recommendation have been filed. Subsequent to the filing of a second superseding indictment on June 26, 2003, defendants filed motions regarding the issues presented therein which are the subject of the instant Order and Recommendation.

FACTS

1. Peter Sarandos was the sole shareholder of Pete's Market, Inc.

2. Pete's Market, Inc., was incorporated in 1971 for the purpose of owning a grocery store at 5899 Delmar in St. Louis, Missouri (the Delmar Store) and never owned any other store.

3. Mohommed Bahhur testified to the grand jury (apparently on May 24, 2001), that he had operated the Shur-Sav Market at 5899 Delmar in St. Louis, Missouri (the Delmar Store), for six months. (Doc. 136 Ex. 1.)

4. Bahhur's partner, Yusri Jaouni, testified to the grand jury that the Delmar Store was acquired from Peter Sarandos, on October 7, 2000, and that Peter Sarandos remained the landlord for the building but did not provide any assistance in terms of running the store and returned to the store only once after selling it. (Id. Ex. 2.)

5. An October 6, 2000 stock purchase agreement between seller Peter Sarandos and buyers Bahhur, Jaouni, and another individual called for Peter Sarandos to transfer fifteen percent of the stock in Pete's Market, Inc., at the closing on October 6, 2000. It also directed the transfer of all remaining shares on the second anniversary of the closing date unless the buyers were able to obtain a liquor license sooner, in which case they could accelerate the transfer. (Id. Ex. 3.)

6. The buyers had cited to Peter Sarandos a St. Louis City ordinance that would allow them to retain the store's liquor license as long as they only took fifteen percent of the stock.

7. After October 6, 2000, Peter Sarandos continued to own the real estate and the building at 5899 Delmar. He became the landlord of the store's new operators.

8. Peter Sarandos submitted to the Missouri Secretary of State a 2001 Annual Registration Report for Pete's Market, Inc.

The report, received by the Secretary of State in July 2001, lists Peter Sarandos as the corporation's president; he signed the report as "Peter Sarandos Pres." (Doc. 143 Attach.)

8. Defendant Herring worked for Peter Sarandos at the Delmar Store prior to October 6, 2000, and continued working there after that date.

9. Regarding his grand jury testimony, defendant Rustemeyer was not informed of his Fifth Amendment rights. The grand jury subpoena requested him not to disclose the existence of the subpoena. He did not believe he could, and did not, consult an attorney prior to reporting to the grand jury. No one advised him that he could request an attorney and he was not given a written advise-of-rights form.

1. Motions to strike for multiplicity.

Defendants P&S Foods, Inc., Peter Sarandos, David Sarandos, and Mark Rustemeyer have moved to strike either Count II or Count III and Count VII or VIII as multiplicitous (Doc. 132), and to strike Count V or VI as multiplicitous (Docs. 127, 133).[2]

A. The counts

Count II of the second superseding indictment charges that on March 23, 1999, defendants

> prepared, packed, and held for sale poultry and poultry products, including chickens, turkeys, and pre-packaged sliced turkey and lunch meat, which . . . were located in the freezer and cooler of the Delmar Store, had been transported in commerce, and were capable of use as human food, in a manner which caused them to become adulterated, in that the poultry and poultry products were prepared, packed, and held under insanitary conditions whereby they may have been contaminated with

[2]A motion to strike counts V and VI was filed twice.

> filth or may have been rendered injurious to health, and these acts involved an intent to defraud and a distribution or attempted distribution of an article that was adulterated, in violation of the [Poultry Products Inspection Act (]PPIA[), 21 U.S.C. §§] 453(g)(4), 458(a)(3), and 461(a).

(Doc. 98 at 10-11.) Count III charges that on that on March 23, 1999, defendants

> did sell and offer for sale in commerce meat and meat products, including ground chuck, which . . . were located in the self-service fresh meat display cases at the Delmar Store, were capable of use as human food, and were adulterated in that the meat and meat products were prepared, packed, and held under insanitary conditions whereby they meat and meat products may have been contaminated with filth or may have been rendered injurious to health, and the sale and offer for sale involved an intent to defraud and a distribution or attempted distribution of an article that was adulterated, in violation of the [Federal Meat Inspection Act (]FMIA[) 21 U.S.C. §§] 601(m)(4), 610(c) and 676(a) and [18 U.S.C. §] 2.

(Id. at 11.) Count V charges that on April 18, 2000, defendants

> did sell and offer for sale in commerce meat and meat products, including smoked pork products, which . . . were located in the self-service smoked meat display case at the Union Store,[3] were capable of use as human food, and were adulterated in that the smoked pork products consisted in whole or in part in of a filthy, putrid and decomposed substance or were for other reasons unsound, unhealthful, unwholesome, and otherwise unfit for human food, and the sale and offer for sale involved an intent to defraud and a distribution or attempted distribution

[3]Movants suggest the indictment identifies the wrong store, because no discovery produced related to an April 18, 2000 inspection of the Union Store, but there was a report regarding an inspection of the Delmar Store that day. They filed a memorandum to which they attached a letter from the government indicating Counts V, VI, and VIII should refer to the Delmar Store. (Doc. 128 Ex. 1.) The misidentification, movants state, does not change the analysis.

> of an article that was adulterated, in violation of [21 U.S.C. §§] 601(m)(3), 610(c), and 676(a) and [18 U.S.C. §] 2.

(Id. at 12-13.) Count VI charges that on April 18, 2000, defendants

> did sell and offer for sale in commerce meat and meat products, including ground beef and other beef products, which . . . were located in the self-service fresh meat case at the Union Store, were capable of use as human food, and were adulterated in that the meat and meat products were prepared, packed . . . , and held under insanitary conditions whereby the meat and meat products may have become contaminated with filth and may have been rendered injurious to health, and the sale and offer for sale involved an intent to defraud and a distribution or attempted distribution of an article that was adulterated, in violation of the FMIA, [21 U.S.C. §§] 601(m)(4), 610(c), and 676(a) and [18 U.S.C. §] 2.

(Id. at 13.) Count VII charges that on April 17, 2001, defendants

> prepared, packed, and held for sale in commerce meat and meat products, including beef trimmings and liver, fresh pork jowls, and other pork products, which . . . were located in the cooler and freezer at the Delmar Store, had been transported in commerce, and were capable of use as human food, in a manner which caused them to become adulterated, in that the meat and meat products were prepared, packaged, and prepared, packed, and held for sale under insanitary conditions whereby they may have been contaminated with filth or may have been rendered injurious to health, and these acts involved an intent to defraud and a distribution or attempted distribution of an article that was adulterated, in violation of the FMIA, [21 U.S.C. §§] 601(m)(4), 610(d) and 676(a) and [18 U.S.C. §] 2.

(Id. at 13-14.) Count VIII charges that on April 17, 2001, defendants

> prepared, packed, and held for sale poultry and poultry products, including turkey and chicken products, which . . . were located in the freezer at the Union Store, had previously been transported in commerce, and were capable

> of use as human food, in a manner which caused them to become adulterated, in that the poultry and poultry products were prepared, packaged, . . . packed, and held for sale under insanitary conditions whereby they may have been contaminated with filth or may have been rendered injurious to health, and these acts involved an intent to defraud and a distribution or attempted distribution of an article that was adulterated, in violation of the PPIA, [21 U.S.C. §§] 453(g)(4), 458(a)(3), and 461(a) and [18 U.S.C. §] 2.

(Id. at 14-15.)

B. The parties' arguments

Movants argue that the alleged crime in Counts II and III is holding products in an environment in which they become adulterated and that whether the products are poultry or meat is a distinction without a difference. Similarly, they assert that the focus in Counts VII and VIII is on insanitary conditions, not the product type. (Doc. 132.) Movants also assert two differences exist between Counts V and VI: (1) Count V involves smoked pork while Count VI involves ground beef; and (2) Count V alleges the pork consisted in whole or in part of a filthy, putrid, and decomposed substance, in violation of § 601(m)(3), whereas Count VI alleges the ground beef was prepared or packaged under conditions that may have caused the product to be contaminated with filth, in violation of § 601(m)(4). They contend the facts alleged in Count VI appear to constitute a lesser included or overlapping offense of Count V, because it is improbable that one could sell adulterated products without having held them under insanitary conditions. They note that § 601(m)(3) and (4) both define "adulterated," and they argue that the evidence required to prove Count V does not require proof of facts beyond those for Count VI. (Docs. 127, 133.)

The government responds that neither Counts II and III nor Counts VII and VIII are multiplicitous because the PPIA counts involve different types of products than the FMIA counts. (Doc.

137 at 5-8.) As to Counts V and VI, the government argues that multiplicity does not exist because only Count V requires that the government prove the meat and meat products were in fact adulterated and only Count VI requires proof that those products were held in insanitary conditions. The government also argues that a violation based on § 601(m)(3) does not necessarily encompass a violation based on § 601(m)(4). (Id. at 2-5.)

Movants reply that the government misses the point because only § 610--and not § 601(m)--is the charging statute. (Doc. 148.)

C. Discussion

A multiplicitous indictment is one that charges a single offense in multiple counts. United States v. Whorton, 315 F.3d 980, 983 (8th Cir. 2003). The constitutional problem with multiplicity is that it may lead to multiple sentences for the same offense. See United States v. Street, 66 F.3d 969, 975 (8th Cir. 1995). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932); accord United States v. Ervasti, 201 F.3d 1029, 1039 (8th Cir. 2000).

Section 458(a)(3), which is cited in Count II, provides in relevant part that "[n]o person shall . . . do, with respect to any poultry products which are capable of use as human food, any act while they are being transported in commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such products to be adulterated or misbranded." 21 U.S.C. § 458(a)(3).[4] The definitions of "poultry" and "poultry

[4]Section 458(a)(3)'s essential elements are that (1) a person, (continued...)

product" include "any domesticated bird, whether live or dead," and "any poultry carcass, or part thereof; or any product which is made wholly or in part from any poultry carcass or part thereof," respectively. 21 U.S.C. § 453(e)-(f). The term "adulterated" includes any poultry product that "has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health." 21 U.S.C. § 453(g)(4).[5]

Section 610(c), which is cited in Counts III, V, and VI, provides in relevant part that, "with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products," no person shall "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 for transportation." 21 U.S.C. § 610(c).[6] Section 610(d), a violation of which is charged in Count

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[4](...continued)
(2) with respect to any poultry products which are capable of use as human food, (3) does any act while they are being transported in commerce or held for sale after such transportation, (4) which is intended to cause or has the effect of causing such products to be adulterated or misbranded. See 21 U.S.C. § 458(a)(3).

[5]The penalty provision applicable to the PPIA, which is cited in Counts II and VIII, raises the maximum penalty if the violation "involves intent to defraud, or any distribution or attempted distribution of an article that is adulterated." See 21 U.S.C. § 461(a). The FMIA's nearly identical penalty provision, 21 U.S.C. § 676(a), is cited in the other relevant counts. None of the issues raised in the instant pretrial motions concern the penalty provisions.

[6]Section 610(c)'s essential elements are that (1) a person, firm, or corporation, (2) with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of
(continued...)

VII, provides that, "with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products," no person shall "do, with respect to any such articles which are capable of use as human food, any act while they are being transported in commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such articles to be adulterated or misbranded." 21 U.S.C. § 610(d).[7]

Under the FMIA, the definition of "meat food product" includes "any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, or goats." 21 U.S.C. § 601(j). The term "adulterated" applies to any carcass, part thereof, meat or meat food product that "consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food," 21 U.S.C. § 601(m)(3), or that "has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated

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[6](...continued)
carcasses, meat or meat food products of any such animals, (3) sell, transport, offer for sale or transportation, or receive for transportation, in commerce, (4) any such articles which are capable of use as human food and are adulterated or misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation. See 21 U.S.C. § 610(c).

[7]Section 610(d)'s essential elements are that (1) a person, firm, or corporation, (2) with respect to meat or meat food products of any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses or parts of carcasses that are capable of use as human food, (3) performed any act while any such article is being transported in commerce or held for sale after such transportation, (4) which is intended to cause or has the effect of causing such articles to be adulterated or misbranded. See 21 U.S.C. § 610(d).

with filth, or whereby it may have been rendered injurious to health," 21 U.S.C. § 601(m)(4).

As a preliminary matter, the undersigned notes that movants do not challenge the facial sufficiency of Counts II, III, and V through VIII. Moreover, those counts are facially sufficient, because they charge every essential element of the alleged offenses. See United States v. Hernandez, 299 F.3d 984, 992 (8th Cir. 2002) (an indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution), cert. denied, 537 U.S. 1134 (2003); United States v. White, 241 F.3d 1015, 1021 (8th Cir. 2001) (an indictment is insufficient only if an essential element of substance is omitted). Any erroneous reference to the Union Store, as opposed to the Delmar Store, does not affect the indictment's facial sufficiency; it may, however, have other ramifications.

Turning to movants' arguments, the undersigned first concludes that Counts II and III, and Counts VII and VIII are not multiplicitous, because only the PPIA counts (II and VIII) require proof of acts done "with respect to any poultry products," see 21 U.S.C. § 458(a)(3), and only the FMIA counts (III and VII) require proof of acts done "with respect to . . . meat or meat food products," see 21 U.S.C. § 610. The fact that the statutory definitions of poultry products and meat food products do not overlap undermines movants' position. See United States v. Soape, 169 F.3d 257, 266 (5th Cir.) ("When the legislature writes two criminal statutes, and each statute contains an independent element from the other statute, [courts] presume that it intends to define two separate offenses that generally entail two punishments" (citing Missouri v. Hunter, 459 U.S. 359, 367 (1983)), cert.

denied, 527 U.S. 1011 (1999)). Moreover, the fact that there is a substantial overlap in the proof offered to establish two crimes does not prohibit conviction and punishment for both. Id.; cf. United States v. Jackson, 155 F.3d 942, 947 (8th Cir.) (convictions for 2 counts of possession of 5 or more identification documents for purposes of orchestrating a fraudulent check-writing scheme were permissible because fraudulent use of state identification documents and fraudulent use of federal identification documents require different elements), cert. denied, 525 U.S. 1059 (1998).

As to Counts V and VI, the undersigned disagrees with movants' suggestion that it is improbable one could sell adulterated products without having held them under insanitary conditions. Moreover, the possibility--not the probability--is what matters for multiplicity purposes. See United States v. Flores-Peraza, 58 F.3d 164, 166 (5th Cir. 1995) (the question to be decided is not whether defendant's violation of 8 U.S.C. § 1326(a) (reentry by removed alien) included a violation of 8 U.S.C. § 1325(a) (improper entry by alien), but whether all violations of § 1326(a) necessarily include violations of § 1325(a)), cert. denied, 516 U.S. 1076 (1996). Moreover, movants overlook the fact that Count V concerns products in the "self-service smoked meat display case," whereas Count VI concerns products in the "self-service fresh meat case."

For these reasons, the motion to strike for multiplicity should be denied.

2. Motion to strike surplusage.

Defendants P&S Foods, Inc., Peter Sarandos, David Sarandos, and Mark Rustemeyer have moved (Doc. 126) to strike surplusage from the second superseding indictment, arguing that paragraphs 3, 4, 12, 17, and 19[8] should be stricken in whole or in part as

[8]Paragraph 3 describes Shur-Sav, Inc. (Shur-Sav), as a (continued...)

irrelevant and that some of the surplusage may allow the jury to infer defendants were involved in uncharged crimes.[9]

Movants group their argument into three categories. In the first category, "Paragraphs Regarding Conduct Not Subject of Indictment," they argue that (1) paragraph 3 is irrelevant because Shur-Sav is not a defendant in this case and the Vernon Store was not the subject of any inspection noted in the superseding indictment; (2) paragraph 4's reference to Shur-Sav is irrelevant and should be stricken; (3) paragraph 17 should be stricken because September 19, 2001, is not identified as a date of violation of the FMIA or PPIA, and an unpleasant odor is not relevant to the charges; and (4) paragraph 19 should be stricken because October 8, 2002, is not identified as a date of violation of the FMIA or PPIA, and a missing drain cover and a hole in the ceiling are irrelevant. In the second category, "Irrelevant Paragraphs Incorporated Into Each Count," movants argue that, because the government incorporates by reference every background paragraph (i.e., paragraphs 1 through 20) into each separate count but for Count VII, the result is that, if read literally, a significant amount of irrelevant, immaterial, and unnecessary information is contained in each count. In the third category, "Paragraph Consisting Entirely

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[8](...continued)
Missouri corporation doing business as Shur-Sav Market at 6633 Vernon in St. Louis. Paragraph 4 states that Peter Sarandos was the president of P&S Foods, Inc., Pete's Market, Inc., and Shur-Sav. Paragraph 12 describes a compliance review by USDA officers at the Delmar Store on April 17, 2001. Paragraph 17 describes a September 19, 2001 inspection of the Union Store, where an unpleasant odor, stronger in the meat department, was found. Paragraph 19 describes observations from an October 8, 2002 inspection of the Union Store: no drain cover on a floor drain in the meat cutting room, a hole in the ceiling, dirty display cases, and an unpleasant odor in the store. (Doc. 98 at 1-5.)

[9]The indictment incorporates by reference paragraphs 1 through 20 into each charged count but for Count VII.

of Irrelevant Language," movants argue that paragraph 12 should be stricken because the Delmar Store was sold in October 2000.

The government responds as follows. Paragraph 3 is simply descriptive, is not prejudicial or inflammatory, and is relevant to the charges because the government will offer evidence at trial that the Vernon Store sold adulterated meat and that Peter Sarandos had day-to-day involvement in his stores. Shur-Sav should not be stricken from paragraph 4 "[f]or the reasons stated above." As to paragraphs 17 and 19, the unpleasant odors and other conditions were detected in September 2001 and October 2002--during the conspiracy alleged in Count I[10]--and are probative of the existence of insanitary conditions, defendants' knowledge of such conditions, and their intent to defraud. Paragraphs 1 through 20 are properly incorporated into other counts, because a jury may consider insanitary conditions existing on dates other than those alleged in the specific counts of the indictment to determine defendants' knowledge of such conditions and intent to defraud.

Upon a defendant's motion, a district court may strike surplusage from an indictment. See Fed. R. Crim. P. 7(d). Rule 7(d) motions are rarely granted. See United States v. Eisenberg, 773 F. Supp. 662, 696 (D.N.J. 1991). A Rule 7(d) motion "is addressed to the sound discretion of the District Court and should be granted only where it is clear that the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter." Dranow v. United States, 307 F.2d 545, 558 (8th Cir. 1962); accord United States v. Oakar, 111 F.3d 146, 157 (D.C. Cir. 1997). Allegations that describe an essential element of the offense are not surplusage. 1 Wright, Federal Practice and Procedure, Criminal 3d § 127, at 635 (1999 ed.).

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[10]Count I charges a conspiracy that began prior to March 1999 and continued until April 2003.

Some of movants' challenges clearly lack force. For example, paragraph 12 is relevant because the facts indicate that Peter Sarandos retained 85 percent ownership of the Delmar Store after October 6, 2000. At this early stage of the proceedings, it is not clear that the other allegations contained in the paragraphs to which defendants object are not relevant to the charges made or contain inflammatory and prejudicial matter. See Dranow, 307 F.2d at 558. The motion to strike surplusage, therefore, is denied without prejudice.

3. Motions for severance.

Defendants David Sarandos (Doc 135), Darrell Herring (Doc. 130), and Mark Rustemeyer (Doc. 134) have each moved for severance. They assert that statements made by and admissible against their codefendants may be introduced at trial and that they will not be able to cross-examine the statement-makers. Further, David Sarandos and Rustemeyer argue that in a joint trial the jury would be unable to make an individualized assessment of guilt. David Sarandos adds that neither a limiting instruction at trial nor redaction would cure the problems associated with his codefendants' statements. Rustemeyer contends that Peter and David Sarandos "likely" will testify on his behalf if he is granted a separate trial and will state that he had no ownership interest in the Union Store, did not have any direct responsibility for the meat department at that store, and did not work at the Delmar Store during the relevant time. Moreover, Herring argues that, should his codefendants elect to testify, he would be forced either to testify in his own behalf or to have the jury make an adverse inference from his non-testimony, which would deprive him of his Fifth Amendment rights.

If the joinder of offenses or defendants in an indictment appears to prejudice a defendant, "the court may order separate

trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). "In a ruling on a motion for severance, a court must weigh the inconvenience and expense of separate trials against the prejudice resulting from a joint trial of codefendants." United States v. Pherigo, 327 F.3d 690, 693 (8th Cir. 2003), cert. denied, 123 S. Ct. 2663 (2003). Persons charged in a conspiracy generally should be tried together. United States v. Brown, 331 F.3d 591, 595 (8th Cir. 2003); accord United States v. Dijan, 37 F.3d 398, 402 (8th Cir. 1994) (rarely, if ever, will it be improper for coconspirators to be tried together), cert. denied, 514 U.S. 1044 (1995). To grant a motion for severance, the necessary prejudice must be "severe or compelling." United States v. Warfield, 97 F.3d 1014, 1018 (8th Cir. 1996), cert. denied, 520 U.S. 1110 (1997). This is because "a joint trial gives the jury the best perspective on all of the evidence and, therefore, increases the likelihood of a correct outcome." United States v. Darden, 70 F.3d 1507, 1528 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996).

At this stage of the proceedings, the undersigned cannot say that severance is required, as limiting instructions or redaction may be employed at trial. See United States v. Yousef, 327 F.3d 56, 103 (2d Cir.) (severance was not warranted in prosecution in which codefendant's statement identifying defendant as a bombing participant was admitted, inasmuch as the court properly chose to redact any direct reference to defendant; nothing in redacted statement implicated defendant or made fact of redaction obvious, and jury instructions cured any prejudice resulting from allegedly mutually antagonistic defenses), cert. denied, 123 S. Ct. 2095 (2003); United States v. Kuenstler, 325 F.3d 1015, 1024 (8th Cir. 2003) (severance should not be granted if less drastic measures will suffice to cure any risk of prejudice); United States v. Ortiz, 315 F.3d 873, 898 (8th Cir. 2002) ("[Rule] 14 does not

require severance to cure prejudice, but allows courts to order 'whatever other relief justice requires' in the particular situation.").

Severance need not be granted "on the ground that a defendant wants to call a codefendant as a witness, unless the defendant shows that the codefendant is likely to testify at a separate trial and the testimony would exculpate him." United States v. Garcia, 647 F.2d 794 (8th Cir.) (emphasis added; internal quotation omitted), cert. denied, 454 U.S. 970 (1981). Rustemeyer failed to satisfy the first prong of the Garcia test with respect to the Sarandos defendants. While Rustemeyer's attorney did suggest the Sarandoses would "likely" take the witness stand, there was no independent evidence, such as affidavits by the Sarandoses, of their willingness to do so. See United States v. Caspers, 736 F.2d 1246, 1249 (8th Cir. 1984) (defendant failed the Garcia test in part because of lack of independent evidence of codefendant's willingness to testify on Caspers's behalf); United States v. Jackson, 549 F.2d 517, 524 (8th Cir.) (the codefendants' pretrial stance, that they would not waive their Fifth Amendment rights at the forthcoming joint trial, could not be considered equivalent to assurances that they would testify for the movant at a separate trial), cert. denied, 430 U.S. 985 (1977); see also United States v. Causey, 834 F.2d 1277, 1287 (6th Cir. 1987) ("a motion for severance on the ground of absence of a codefendant's testimony must be accompanied by more than a basic, unsupported contention that a separate trial would afford the defendant exculpatory testimony"), cert. denied, 486 U.S. 1034 (1988). Moreover, most of what Rustemeyer identifies as the likely testimony of the Sarandoses, e.g., that Rustemeyer had no ownership interest in the Union Store, is not "substantially exculpatory"; the superseding indictment does not allege that he has such an interest. See Darden, 70 F.3d at 1527 (to be substantially exculpatory, the

testimony must do more than merely tend to contradict a few details of the government's case).

Finally, Herring's assertion that, should his codefendants elect to testify on their own behalf, he would be forced to testify in his own behalf or to have the jury make an adverse inference from his non-testimony is flawed in multiple respects. First, it is unknown at this point if any codefendant will choose to testify. Second, his codefendants' trial strategy is also unknown at this point. See United States v. Basile, 109 F.3d 1304, 1309 (8th Cir. (codefendants were not entitled to severance of their trial, where one codefendant made no concerted effort to depict other codefendant as perpetrator of crimes to exclusion of all other possible suspects and other codefendant's defense strategy was primarily to undermine the government's case), cert. denied, 522 U.S. 873 and 522 U.S. 866 (1997). Third, Herring overlooks the fact that the jury could be instructed not to make an adverse inference from his choosing not to testify. See United States v. Abfalter, Nos. 01-3691, 02-1130, 2003 WL 21991745, at *3 (8th Cir. Aug. 22, 2003) (the mere existence of generally antagonistic defenses does not necessitate a severance); Robinson v. Crist, 278 F.3d 862, 866 (8th Cir. 2002) (noting that the jury was instructed of the defendant's privilege not to testify).

The motions for severance will be denied without prejudice.

4. Motions to dismiss or suppress.

Defendants Mark Rustemeyer and Darrell Herring have each moved to dismiss the indictment or in the alternative to suppress their grand jury testimony. Rustemeyer maintains that the combination of a failure to give Fifth Amendment warnings and the failure to notify him of his "target" or "suspect" status prior to his grand jury testimony resulted in the compulsion of self-incrimination prohibited by the Fifth Amendment. (Doc. 125 at 4.) Herring's

motion relates to testimony he gave in 2001 before the initial indictment was filed and again in 2003 before the filing of the instant superseding indictment. Herring claims that (1) during his 2003 appearance before the grand jury he was not informed of any of his rights or the fact that criminal charges could be brought against him based on his statements; (2) based on the character of the questioning and interrogation of him before the grand jury on both occasions and on the government's informing him in 2001 that he was not a target of the investigation, he was misled into believing he was called to assist the government in its investigation rather than to memorialize potentially incriminating statements against him; and (3) the government abused the grand jury process to continue investigating a case about which an indictment had already been filed. (Doc. 124.)

Rustemeyer's motion should be denied as moot, the government argues, because it will not use Rustemeyer's grand jury testimony in its case-in-chief against him. The government advises, however, that it will use his grand jury testimony if he testifies at trial. Likewise, the government argues that it will not use Herring's 2003 grand jury testimony in its case-in-chief against him.

As to the other aspects of Herring's motion, the government argues that the transcript of the 2001 grand jury testimony (portions of which apparently are quoted in footnote 2 of the government's response) dispels any argument that Herring was misled regarding being a target of the investigation. Moreover, the government maintains that it advised him he was not a target at the time of his testimony because he was not believed to be a putative defendant and did not come within the Department of Justice's definition of "target," i.e., "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." Finally, the government

asserts that Herring was called before the grand jury in 2003 in order to examine him concerning other persons who may have been involved in FMIA and PPIA violations on dates other than those alleged in the pending indictment. (Doc. 137 at 14-19.)

As Rustemeyer recognizes (Doc. 125 at 2 n.2), the Supreme Court has not yet decided whether grand jury witnesses must be advised of their Fifth Amendment rights. Nor has the Eighth Circuit. In United States v. Hutchings, 751 F.2d 230, 234-35 (8th Cir. 1984), cert. denied, 474 U.S. 829 (1985), the Eighth Circuit held that, where a grand jury witness was served with a subpoena during regular working hours, the inspectors suggested to him that he speak with an attorney and provided him with a written statement of his right against self-incrimination and his right to consult and attorney, no actual or inherent compulsion could be shown. Although Rustemeyer argues that the facts leading up to and surrounding his grand jury experience are distinguishable from those in Hutchings, Hutchings did not create a rule requiring that an indictment be dismissed under differing facts. Cf. United States v. Williams, 504 U.S. 36, 49 (1992) ("[O]ur cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination "is nevertheless valid."). Moreover, "[b]ecause target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential-defendant warnings add nothing of value to protection of Fifth Amendment rights." United States v. Washington, 431 U.S. 181, 189 (1977); accord Hutchings, 751 F.2d at 235 ("[T]he Government need not warn a grand jury witness that he is a potential defendant."). Thus, the dismissal portion of Rustemeyer's motion should be denied.

In addition, the alternative portion of Rustemeyer's motion is moot because the government has indicated it will not use his grand

jury testimony in its case-in-chief against him. Although the government has left open the possibility of using Rustemeyer's grand jury testimony against him should he take the witness stand at trial, the use of such grand jury testimony has been permitted in certain contexts, e.g., a perjury prosecution. See United States v. Knox, 396 U.S. 77, 78 (1969) ("even the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury"); cf. United States v. Mandujano, 425 U.S. 564, 580 (1976) (to extend the concepts of Miranda v. Arizona, 384 U.S. 436 (1966) to grand jury testimony "would require that the witness be told that there was an absolute right to silence, and obviously any such warning would be incorrect, for there is no such right before a grand jury").

Herring's arguments are also unavailing. First, Herring's challenge concerning the 2003 grand jury testimony is moot for the reasons Rustemeyer's motion is moot in part. Second, the portions of the grand jury transcript quoted by the government indicate that Herring was advised that, if he indicated he did not wish to answer a question the prosecutor would move on to other matters, that he could consult an attorney, that anything he said could be used against him in determining whether anyone should be charged or in a subsequent criminal proceeding, and that if he had an attorney he could consult the attorney outside the grand jury room. (Doc. 137 at 16-17 n.2.) Given the advisement of these rights, which Herring stated that he understood, he was hardly misled.

Finally, Herring's abuse-of-process argument lacks merit. Herring has not overcome his heavy burden. See United States v. Exson, 328 F.3d 456, 460 (8th Cir. 2003) ("The proceedings of a grand jury are afforded a strong presumption of regularity, and a defendant faces a heavy burden to overcome that presumption when seeking dismissal of an indictment."). The government's asserted reason for calling Herring to testify before the grand jury a

second time, coupled with the facts that after his testimony it added David Sarandos and Rustemeyer as defendants and added counts not included in the original indictment, proves fatal to Herring's assertions. See United States v. Wadlington, 233 F.3d 1067, 1073-74 (8th Cir. 2000) (a defendant seeking dismissal of an indictment based on prosecutorial misconduct must demonstrate "flagrant misconduct" and substantial prejudice; although it is improper to summon a grand jury witness for the sole or dominant purpose of preparing a pending indictment for trial, when the purpose of the proceeding is directed to other offenses, its scope cannot be narrowly circumscribed, and any collateral fruits from bona fide inquiries may be utilized by the government), cert. denied, 534 U.S. 1023 (2001).

The motions to dismiss or suppress should be denied.

5. Motion to dismiss.

Defendants P&S Foods, Inc., Peter Sarandos, David Sarandos, and Mark Rustemeyer have moved for dismissal of Counts VII and VIII on the basis that Peter Sarandos sold the Delmar Store prior to April 18, 2000, the pertinent date for those counts, and that they did not work at the store or have any responsibility there at any time relevant to Counts VII and VIII.[11] Alternatively, they seek an in camera review of the evidence presented to the grand jury in support of those counts. (Doc. 136.) The government responds that, because the indictment is legally sufficient on its face, no basis exists for further inquiry into the manner by which the indictment was obtained. (Doc. 137 at 1-2.) Movants reply that the government failed to address the issue of probable cause. They

[11]As it presently stands, Count VIII concerns the Union Store, not the Delmar Store. Thus, whether the Delmar Store was sold prior to April 17, 2001, is of no consequence to Count VIII. In any event, the undersigned will analyze movants' argument as if Count VIII referred to the Delmar Store.

maintain that, based on the evidence presented to them in discovery, i.e., the grand jury testimony of the Delmar Store's new owners, Peter Sarandos was not involved in the store operations after the sale. They criticize the government's reliance on the 2001 Annual Registration Report, because the government has not represented that the report was presented to the grand jury. Citing United States v. Johnson, 767 F.2d 1259, 1276 (8th Cir. 1985), they maintain an indictment should be dismissed if there is not competent evidence presented to the grand jury. (Doc. 148.)

"It has long been settled that an indictment is not open to challenge on the ground that there was inadequate or insufficient evidence before the grand jury." See United States v. Nelson, 165 F.3d 1180, 1184 (8th Cir. 1999); accord United States v. Calandra, 414 U.S. 338, 345 (1974) ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence"). "An indictment returned by a legally constituted and unbiased grand jury . . . , if valid on its face, is enough to call for trial of the charge on the merits." Costello v. United States, 350 U.S. 359, 363 (1956).

In Johnson, 767 F.2d at 1275, the defendants argued that the indictment should have been dismissed because it was based on perjured testimony of an FBI agent. Admitting that his statement before the grand jury was untruthful when it was made, the agent contended that his answer was based on his belief at that time. The Eighth Circuit upheld the denial of the motion to dismiss, because it had not been shown that the agent's statements rose to the level of perjury, an indictment should not be dismissed if there is "some competent evidence to sustain the charge issued," and, even assuming that the agent perjured himself, the defendants had not shown that the grand jury heard no evidence competent to sustain the indictment. Id. at 1275.

Movants do not dispute the indictment's facial validity or the jury's constitution or impartiality. But reconciling Johnson with the cases holding that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence is not an easy task. Because (1) Johnson's discussion of competent evidence is arguably dicta, (2) movants have not cited any cases reversing the denial of a motion to dismiss an indictment on the basis of lack of knowledge whether any competent evidence was presented to the grand jury, and (3) many Eighth Circuit and Supreme Court cases have upheld denials of motions to dismiss indictments on the basis of the reasons set forth in Calandra and Costello, the undersigned believes Counts VII and VIII should not be dismissed and that an in camera review of the evidence before the grand jury is unwarranted.

The motion to dismiss is without merit.

Whereupon,

IT IS HEREBY ORDERED that the motions of defendants David Sarandos (Doc. 135), Darrell Herring (Doc. 130) and Mark Rustemeyer (Doc. 134) for severance are denied without prejudice.

IT IS FURTHER ORDERED that the motion of defendants P&S Foods, Inc., Peter Sarandos, David Sarandos, and Mark Rustemeyer to strike surplusage (Doc. 126) is denied without prejudice.

IT IS HEREBY RECOMMENDED that the motion of defendants P&S Foods, Inc., Peter Sarandos, David Sarandos, and Mark Rustemeyer to strike either Count II or Count III and Count VII or VIII as multiplicitous (Doc. 132) be denied.

IT IS FURTHER RECOMMENDED that the motions of defendants P&S Foods, Inc., Peter Sarandos, David Sarandos, and Mark Rustemeyer, and to strike Count V or VI as multiplicitous (Doc. 127, 133) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendant Mark Rustemeyer to dismiss the indictment or in the alternative to suppress his grand jury testimony (Doc. 125) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendant Darrell Herring to dismiss or in the alternative to suppress statements (Doc. 124) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendants P&S Foods, Inc., Peter Sarandos, David Sarandos, and Mark Rustemeyer for dismissal of Counts VII and VIII (Doc. 136) be denied.

The parties are advised they have ten (10) days to file written objections to this Order and Recommendation. The failure to file objections may result in a waiver of the right to appeal issues of fact.

ORDER SETTING TRIAL DATE

As directed by the District Judge, this matter is set for a jury trial on the docket commencing **October 27, 2003, at 9:00 a.m.**

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of September, 2003.