

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-60027-Cr-ZLOCH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK HERNANDEZ, et al.,

Defendants.

**UNITED STATES' UNOPPOSED MOTION TO DISMISS INDICTMENT
WITH PREJUDICE PURSUANT TO FED.R.CRIM.P. 48(a)**

The United States of America, by and through the undersigned Assistant United States Attorney and pursuant to Fed. R. Crim. P. 48(a), hereby files this unopposed motion to dismiss the indictment with prejudice as to defendants Frank Hernandez, Emmanuel Antonio, Lawrence D. Pinkoff, E.V.A. Global, Inc., Theophilos Antoniou, Tropic Spiral Systems, Inc., Serge Francois, Concept RX, Inc., and Hannibal Edwards, M.D., and in support thereof states:

1. On February 2, 2007, a federal grand jury sitting in the Southern District of Florida charged defendants Hernandez, Antonio, Pinkoff, E.V.A. Global, Inc, Antoniou, Tropic Spiral Systems, Inc., and Concept, RX, Inc. with conspiracy to distribute Schedule III and Schedule IV controlled substances, in violation of 21 U.S.C. § 846 (Count 1); and defendants Hernandez, Antonio, Pinkoff, E.V.A. Global, Inc., Antoniou, Tropic Spiral Systems, Inc., Francois, Concept RX, Inc. and Edwards with distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1)

(Counts 2 through 12) (Docket Entry (DE) 3).

2. This matter proceeded to trial against defendants Hernandez, Pinkoff, Francois, Concept RX, Inc. and Edwards. On March 10, 2009, as a consequence of improper actions taken by members of the jury, this Court granted the defendants' unopposed motion for a mistrial (DE 1163).

3. During the trial in this matter, the United States became aware of additional facts that it did not previously possess. As a result of these new facts and the advice of counsel defense developed at trial, and after careful review of the entire record in this case, the United States has determined that the case against Hernandez, Pinkoff, Francois, Concept RX, Inc., and Edwards should not be retried.¹

4. On September 19, 2007, prior to the commencement of trial, defendants Antonio, EVA Global, Inc., Antoniou, and Tropic Spiral Systems, Inc. pled guilty to Count 1, the conspiracy count of the indictment. As with the other defendants, the United States has recently learned that the same advice of counsel defense would have been available to defendants Antonio, E.V.A. Global, Inc., Antoniou, and Tropic Spiral Systems, Inc. had they proceeded to trial. As a result of the new facts that came to light during trial, the United States respectfully submits that a fair and just

¹ The United States' review of this matter included the case against defendants Steve Marhee, Edgar Cruz, Thomas Walker and Everett Echols, M.D., whose charges were dismissed with prejudice by the Court mid-trial (DE 1140). The United States has determined that the newly discovered evidence supporting an advice of counsel defense also applies to defendants Cruz, Marhee and Walker. The United States is currently undertaking a review of this case as to Dr. Echols in light of: 1) this court's order of dismissal regarding Dr. Echols and the above mentioned co-defendants; 2) the United States' current request to dismiss the indictment against some of the other defendants on the basis of advice of counsel defenses; 3) the manner in which Dr. Echols was charged in conjunction with the other defendants in the indictment; and 4) the evidence adduced at trial.

reason exists under Fed. R. Crim. P. 11(d)(2)(B) for defendants Antonio, E.V.A. Global, Inc., Antoniou, and Tropic Spiral Systems, Inc.'s guilty pleas to be withdrawn, and the indictment against them to be dismissed with prejudice pursuant to Fed. R. Crim. P. 48(a). *See United States v. Matta*, 937 F.2d 567, 568 (11th Cir. 1991) (the government may move to dismiss indictment with leave of Court and such dismissal is ordinarily without prejudice unless explicitly stated otherwise). The United States also requests that the preliminary order of forfeiture entered against defendants Antonio and Antoniou be vacated.

5. Undersigned counsel has conferred with opposing counsel pursuant to S.D. Fla. L.R. 88.9, and is authorized to represent that defendants Frank Hernandez, Emmanuel Antonio, Lawrence D. Pinkoff, E.V.A. Global, Inc., Theophilos Antoniou, Tropic Spiral Systems, Inc., Serge Francois, Concept RX, Inc., and Hannibal Edwards, M.D. do not oppose this motion.

6. Pursuant to Rule 88.9, counsel for the government has conferred with counsel for defendants Antonio, Antoniou, E.V.A. Global Inc., Tropic Spiral Systems Inc., Hernandez, Pinkoff, Francois, Concept RX Inc., and Edwards. None of these defendants opposes this motion.

WHEREFORE the United States requests that this Court: (1) permit defendants Antonio, E.V.A. Global, Inc., Antoniou, and Tropic Spiral Systems, Inc. to withdraw their guilty pleas; (2) dismiss the indictment in this case with prejudice as to Frank Hernandez, Emmanuel Antonio, E.V.A. Global, Inc., Lawrence D. Pinkoff, Theophilos Antoniou, Tropic Spiral Systems, Inc.,

SergeFrancois, Concept RX, Inc., and Hannibal Edwards, M.D., and (3) vacate the preliminary order of forfeiture entered against defendants Emmanuel Antonio and Theophilos Antoniou.²

Respectfully Submitted

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

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² A proposed order is attached for the Court's convenience. Because a written order has not been entered memorializing the Court's oral dismissal of the indictment with prejudice as to defendants Steve Marhee, Edgar Cruz, Thomas Walker and Everett Echols, that ruling has been included in the proposed order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on _____, 2009, the foregoing was electronically filed with the Clerk of the Court using CM/ECF.

S/ Ellen L. Cohen
ELLEN L. COHEN
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-60027-Cr-ZLOCH

UNITED STATES OF AMERICA,

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vs.

FRANK HERNANDEZ, et al.,

Defendants.

ORDER DISMISSING INDICTMENT WITH PREJUDICE

This matter comes before the Court on the Unopposed Motion of the United States of America to Dismiss the Indictment With Prejudice Pursuant to Fed.R.Crim.P. 48(a) as to defendants Frank Hernandez, Emmanuel Antonio, E.V.A. Global, Inc., Lawrence D. Pinkoff, Theophilos Antoniou, Tropic Spiral Systems, Inc., Serge Francois, Concept RX, Inc., and Hannibal Edwards, M.D.

Having considered the motion and the record in this cause, and being fully advised in the premises, it is hereby **ORDERED and ADJUDGED** that:

a. Defendants Antonio, E.V.A. Global, Inc., Antoniou, and Tropic Spiral Systems, Inc. guilty pleas are hereby **WITHDRAWN**;

b. The United States Motion' to Dismiss with Prejudice with regard to Defendants Frank Hernandez, Emmanuel Antonio, E.V.A. Global, Inc., Lawrence D. Pinkoff, Theophilos Antoniou, Tropic Spiral Systems, Inc., Serge Francois, Concept RX, Inc., and Hannibal Edwards, M.D. is

GRANTED;

c. The Court hereby memorializes its earlier *ore tenus* Order and the motions of defendants Steve Marhee, Edgar Cruz, Thomas Walker and Everett Echols, M.D, to dismiss the indictment with prejudice are hereby **GRANTED**.

d. The Preliminary Order of Forfeiture entered against defendants Emmanuel Antonio, and Theophilos Antoniou, entered on March 30, 2009, is hereby **VACATED**.

e. All pending matters in this case are now declared **MOOT** and this case is hereby **CLOSED**.

DONE AND ORDERED in chambers, in Fort Lauderdale, Florida, this _____ day of _____, 2009.

WILLIAM J. ZLOCH
UNITED STATES DISTRICT JUDGE

cc: All counsel of record.