UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	
- against -	:	**MEMORANDUM OPINION AND ORDER**
	:	
VIKTOR KOZENY, FREDERIC BOURKE, JR. and DAVID PINKERTON,	:	**05 Cr. 518 (SAS)**
	:	
Defendants.	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

On June 21, 2007, this Court issued an Opinion and Order (the "June 21 Opinion") dismissing the Indictment as time-barred as to defendants Pinkerton and Bourke ("defendants").[1] On July 5, 2007, the government timely moved for reconsideration of the June 21 Opinion only insofar as it dismissed Counts One, Eleven and Twenty-One of the Indictment. The government argues that those three counts should not have been dismissed because even under the Court's reading of section 3292, each of the counts on its face alleges conduct that occurred within the limitations period, *i.e.*, after July 22, 1998. Specifically, Count One, which charges both defendants with a conspiracy to violate the FCPA

[1] *See United States v. Kozeny*, No. 05 Cr. 518, 2007 WL 1821703 (S.D.N.Y. June 21, 2007). Familiarity with the June 21 Opinion is presumed and all terms used but not defined herein are to have the same meaning ascribed to them in that Opinion.

and the Travel Act, alleges an overt act taking place in September 1998, namely the payment of medical expenses for an Azeri official. Count Eleven charges Bourke with a substantive FCPA violation for that same September 1998 payment of medical expenses. Finally, Count Twenty-One, which charges defendants with money laundering conspiracy, alleges that the conspiracy lasted through September 1998.

On July 11, 2007, defendants submitted letter briefs in opposition to the motion to reconsider. In their oppositions, defendants do not (and cannot) dispute that Counts One, Eleven and Twenty-One each charges conduct within the limitations period pursuant to the Court's ruling in the June 21 Opinion. Rather, defendants attack the counts on other grounds. As to Count One, defendants argue that the alleged conspiratorial agreement to which defendants agreed ended in July 1998, when the Azeri officials were given a financial stake in Oily Rock. Thus, they argue, the overt act of payment of medical expenses in September 1998 was not in furtherance of the conspiracy. However, the Indictment on its face alleges that the conspiracy covered bribes paid "to induce the Azeri Officials to allow the investment consortium to participate in privatization, to ensure the privatization of SOCAR and other valuable Azeri State assets, and to permit the investment consortium to acquire a controlling interest in SOCAR and other valuable Azeri

State assets."[2] For purposes of evaluating a motion to dismiss, I must take the allegations of the Indictment as true. As alleged, the conspiracy continued beyond the two-thirds transfer, and payment of medical expenses for Azeri officials both before and after that transfer are within the scope of the conspiracy as charged. Whether the conspiratorial agreement was in fact as broad as the Indictment alleges, whether each defendant in fact subscribed to that agreement, and if and when the conspiracy ended are issues for the jury and cannot be decided at this stage.[3] Accordingly, Count One is timely. Likewise, Count Eleven is also timely

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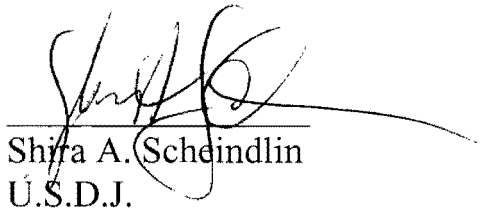
[2] Indictment ¶ 19.

[3] *See, e.g.*, *United States v. Sanchez*, No. 01 Cr. 277, 2003 WL 1900851, at *2 (S.D.N.Y. Apr. 17, 2003) (denying motion to dismiss the Indictment as time-barred because "whether [defendant's] return of the money was an act in furtherance of the conspiracy is an issue of fact for the jury"); *United States v. Benussi*, 216 F. Supp. 2d 299, 311 (S.D.N.Y. 2002) ("The precise scope of the conspiratorial agreement [is] an issue for the jury."), *aff'd sub nom*, *United States v. Salmonese*, 352 F.3d 608 (2d Cir. 2003). *Accord Grunewald v. United States*, 353 U.S. 396, 397, 399 (1957) (holding that the "crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy" and ordering a new trial so that the jury could determine the scope of the conspiracy). *See generally United States v. Alfonso* 143 F.3d 772, 777 (2d Cir. 1998) ("To the extent that the district court looked beyond the face of the indictment . . . we hold that, in the circumstances presented, such an inquiry into the sufficiency of the evidence was premature. . . . [T]he sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.").

because it alleges conduct that took place within the limitations period. Bourke's arguments as to the lack of detail of Count Eleven are unavailing; the count clearly puts Bourke on notice of the conduct with which he is charged, which is all that is required at this stage. Finally, as to Count Twenty-One, the Indictment plainly alleges that the conspiracy continued through September 1998, which makes it timely. Defendants' arguments as to the scope of the conspiracy, like those made with respect to Count One, are inappropriate at this stage. Whether the government ultimately will be able to prove that the conspiracy continued past July 1998 is an issue for trial, not for a motion to dismiss.

I conclude that Counts One, Eleven, and Twenty-One of the Indictment should not have been dismissed as time-barred. In the June 21 Opinion, I disposed of all of defendants' remaining arguments. Accordingly, the government's motion for reconsideration is granted, and Counts One, Eleven, and Twenty-One are hereby reinstated.

SO ORDERED:



Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
July 16, 2007

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