IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 08-CR-522**
NAM QUOC NGUYEN, et al.	**:**	

ORDER

AND NOW, this day of , 2009, after a review of the motions of the defendants and the government's responses thereto, it is hereby ORDERED as follows:

a. Motion to Dismiss of Defendants Nam Quoc Nguyen, Nexus Technologies, Inc., and An Quoc Nguyen is DENIED;

b. Motion of Defendants Nam Quoc Nguyen, Nexus Technologies, Inc., Kim Anh Nguyen, and An Quoc Nguyen for a Bill of Particulars is DENIED; and

c. Motion of Defendants Nam Quoc Nguyen, Nexus Technologies, Inc., Kim Anh Nguyen, and An Quoc Nguyen to Amend Schedule of Pretrial Submissions and to Set a Discovery Cut-Off Date is DENIED and it is hereby ordered that Rule 15 motions shall be filed on or before _____.

BY THE COURT:

_____
HONORABLE TIMOTHY J. SAVAGE
United States District Court

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GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS, FOR A BILL OF PARTICULARS, AND TO AMEND SCHEDULE OF PRETRIAL SUBMISSIONS

COMES NOW the United States, by and through its undersigned counsel, and hereby opposes defendants' Motion to Dismiss (Doc. 99), Motion for a Bill of Particulars (Doc. 95), and Motion to Amend Schedule of Pretrial Submissions and to Set a Discovery Cut-Off Date (Doc. 97). Defendants Nexus Technologies, Inc. ("Nexus"), Nam Nguyen, and An Nguyen request that the Court order dismissal of the Indictment for failure to state a claim or, in the alternative, because the Foreign Corrupt Practices Act ("FCPA") is unconstitutionally vague. Defendants Nexus, Nam Nguyen, Kim Nguyen, and An Nguyen also filed motions seeking a bill of particulars and seeking a delay in the deadline for filing Rule 15 motions. The Government opposes the defendants' requests and respectfully contends that, for the reasons stated below, these motions should be denied.

BACKGROUND

A. Indictment

On September 4, 2008, a grand jury sitting in the Eastern District of Pennsylvania returned an Indictment charging the defendants and one other individual, in five counts, with conspiracy and violations of the Foreign Corrupt Practices Act. On October 29, 2009, a grand jury sitting in the Eastern District of Pennsylvania returned a Superseding Indictment. The 31-

page Superseding Indictment, including 68 overt acts, charges the defendants,[1] in 28 counts, with one count of conspiracy, in violation of 18 U.S.C. § 371; 9 counts of violating the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2 and 18 U.S.C. § 2; 9 counts of violating the Travel Act, 18 U.S.C. §§ 1952(a)(3) and 2; and 9 counts of money laundering, 18 U.S.C. §§ 1956(a)(2)(A) and 2, arising from the bribery scheme.

As alleged in the Superseding Indictment, paragraph 19, Nam Nguyen obtained lucrative contracts for Nexus from Vietnamese governmental agencies and companies by agreeing to pay bribes, typically described as "commissions," to individuals employed by such agencies and companies. The defendants established relationships with Vietnamese government officials and employees of customers, typically described as "supporters," who, in exchange for the bribes, assisted Nexus in obtaining business by providing confidential information, rigging bids, and other means.

Kim and An Nguyen paid the bribes as directed by defendant Nam Nguyen through a Hong Kong company, identified in the Superseding Indictment as HKC 1. Also under instructions from Nam Nguyen, HKC 1 then funneled bribes into Vietnam and to Vietnamese government officials and employees of customers on behalf of the defendants. The defendants then mischaracterized and concealed the transfer of funds to HKC 1 and the bribe payments in Nexus' books and records to prevent detection.

In paragraphs 7-10, the Superseding Indictment describes Nexus' foreign government customers as follows:

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[1] On June 29, 2009, Joseph T. Lukas, charged in the original Indictment, pled guilty to those charges in the original Indictment. He is named, but not charged, in the Superseding Indictment.

7. Southern Services Flight Company ("SSFC"), a customer of defendant NEXUS TECHNOLOGIES, was an airline owned and operated by the Vietnam People's Army based at Vung Tau Airport ("VTA") in Vietnam, which engaged in activities related to the Vietnamese Government's management of civil and military aviation at VTA. VTA was an agency and instrumentality of the Civil Aviation Administration of Vietnam. Southern Flight Management Center ("SFMC"), also a customer of defendant NEXUS TECHNOLOGIES, engaged in activities related to the Vietnamese Government's management of civil aviation at VTA and was an agency and instrumentality of the Civil Aviation Administration of Vietnam. As such, SSFC, SFMC, and VTA were agencies and instrumentalities of the Government of Vietnam within the meaning of the FCPA, 15 U.S.C. § 78dd-2(h)(2)(A).

8. Vietsovpetro Joint Venture ("VSP"), a customer of defendant NEXUS TECHNOLOGIES, was a joint venture wholly-owned and controlled by the Government of Vietnam and the Government of the Russian Federation ("Russia"), engaged in the exploitation of the natural resources of Vietnam. Accordingly, it was an agency and instrumentality of the Governments of Vietnam and Russia within the meaning of the FCPA, 15 U.S.C. § 78dd-2(h)(2)(A).

9. Petro Vietnam Gas Company ("PVGC"), a subdivision of PetroVietnam, was a customer of defendant NEXUS TECHNOLOGIES, which was wholly-owned and controlled by the Government of Vietnam and engaged in the exploitation of the natural resources of Vietnam. Accordingly, PVGC was an agency and instrumentality of the Government of Vietnam within the meaning of the FCPA, 15 U.S.C. § 78dd-2(h)(2)(A).

10. T&T Co. Ltd. ("T&T"), a customer of defendant NEXUS TECHNOLOGIES, was engaged in activities related to border security and was the procurement arm of Vietnam's Ministry of Public Security. Accordingly, T&T was an agency and instrumentality of the Government of Vietnam within the meaning of the FCPA, 15 U.S.C. § 78dd-1(h)(2)(A).

Superseding Indictment, pp. 3-4 (Doc. 106). For convenience, these organizations are referred to herein as the Vietnamese Government Organizations ("VGOs").

B. The Foreign Corrupt Practices Act

As applied to the defendants, the essential elements of a substantive offense under the FCPA are as follows:

- That they acted corruptly and willfully;
- That they made use of the mails or any means or instrumentalities of interstate commerce;
- That this use was in furtherance of an offer, payment, promise to pay, or authorization of the payment of money or anything of value;
- That they knew that the money or thing of value would be offered or given directly or indirectly to any foreign official;
- That the payment or thing of value was intended to influence any act or decision of such foreign official in his or her official capacity; and
- That the payment was made to assist in obtaining or retaining business for or with, or directing business to, any person.

See 15 U.S.C. § 78dd-2; *see also United States v. Bourke,* 05 Cr. 518 (S.D.N.Y.) (Jury Charge pp. 23-29).

A "foreign official" is defined by the FCPA as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality...." 15 U.S.C. § 78dd-2; *see also United States v. Bourke*, 05 Cr. 518 (Jury Charge, p. 27).

ARGUMENT

I. THE INDICTMENT PROPERLY PLEADS FCPA VIOLATIONS

A. Failure to State an Offense

Defendants first contend that all the counts against them should be dismissed for failure to sufficiently allege violations of the FCPA, based on defendants' challenge that the Indictment fails to properly allege that the VGOs identified in the Indictment qualify as "departments,

agencies, or instrumentalities" of the Government of Vietnam. Defendants' arguments, while meritless, are in any case arguments for trial and/or a post-trial motion pursuant to Federal Rule of Criminal Procedure 29, once the facts supporting the Government's allegation as to this element of the FCPA have been fully presented.

1. Standard for a Motion to Dismiss for Failure to State an Offense

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). In applying this rule, the Supreme Court has endorsed a two-part test to determine whether an indictment is sufficient. First, the indictment must state the elements of the offense and sufficiently apprise the defendant of the charges against which he must defend. Second, the indictment must provide a sufficient basis for the defendant to avoid a claim of double jeopardy. *See United States v. Banks,* 300 Fed. Appx. 145, 148 (3d Cir. 2008), citing *Russell v. United States*, 369 U.S. 749 (1962). Nothing more is required. Both the original and the Superseding Indictment, which now controls, satisfy this standard.

2. Discussion

Defendants' argument, which is fundamentally flawed, unfolds as follows: the Indictment must sufficiently allege that the recipients of the bribes are foreign officials. (1) A foreign official is defined as an officer or employee of a "foreign government or any department, agency,

or instrumentality thereof;" (2) because the VGOs cannot be departments or agencies,[2] they can only be instrumentalities of the Vietnamese Government; (3) the Indictment alleges that the VGOs were controlled by the Vietnamese Government; (4) control by a foreign government is insufficient to render an entity an instrumentality under the FCPA; and therefore (5) the Indictment fails. In short, they allege that because the Indictment refers to Vietnamese Government control of the VGOs which employed the bribe recipients, the Indictment is based on an "incorrect interpretation" of the FCPA or, in the alternative, the FCPA is unconstitutionally vague. (Def. Mot. pp. 1-2.)

Under the relevant legal standards, there is no question that the Superseding Indictment more than adequately pleads that the VGOs are agencies and instrumentalities of the Government of Vietnam (and in the case of VSP, the Russian Federation), and that employees of those organizations were acting "in an official capacity for or on behalf of" such government or department, agency, or instrumentality. The references in the Superseding Indictment to Vietnamese Government control of the VGOs do not prevent the Government in proving at trial other facts relevant the jury's determination that the bribe recipients were foreign officials. In fact, the public purpose of some of the organizations - such as the Southern Services Flight

[2] The defendants presume that the organizations at issue cannot be departments or agencies based solely on a single website listing ministries and ministry-level agencies of the Government of Vietnam. (Def. Mot. n. 1.) The defendants assert that the absence of the organizations identified in the indictment from the website "suggests" that they could "only credibly be premised on the term 'instrumentality.'" (Def. Mot. p. 6.) To base such a conclusion on one website which lists only ministries and "ministry level" agencies is absurd and in no way determinative of whether the organizations at issue are or are not departments or agencies of the Government of Vietnam. For example, the Federal Bureau of Investigation would not appear on a list of U.S. cabinet departments and cabinet-level agencies, but it is clearly an agency of the United States Government.

Center and PetroVietnam Gas Company - are patently obvious in both the original and the Superseding Indictments. Moreover, the references to Vietnamese Government control do not demonstrate that the Indictment is based on an "incorrect interpretation" of the FCPA, as foreign government control is, in fact, sufficient to render an organization an "agency or instrumentality" of the Government of Vietnam. However, the Court need not reach that issue.

When an indictment directly tracks the statutory language, as does the Superseding Indictment here, it complies with Rule 7(c)(1) as long as there is sufficient factual detail in the indictment to allow the defendant to prepare his defense. *United States v. Hodge*, 211 F.3d 74, 77 (3d Cir. 2000); *United States v. Rankin*, 870 F.2d 109, 111 (3d Cir. 1989). Contrary to the defendants' claim, it is not even required that an indictment explicitly allege all of the elements of an offense as long as they are implied somewhere in the indictment. *Government of Virgin Islands v. Moolenaar*, 133 F.3d 246, 249 (3d Cir. 1998). Also, an indictment that uses a defined legal term of art "sufficiently charges the component parts of the term." *United States v. Cefaratti*, 221 F.3d 502, 507 (3d Cir. 2000) (internal quotation marks and citations omitted).

While the Government must prove at trial that the individuals to whom bribes were directed were foreign officials, there is no requirement that the Indictment itself must plead all the facts relevant to a determination that they were officials. Defendants cited to no case that requires such a pleading, because there is no such case. To the contrary, the Government is not limited in its proof to that listed in the Indictment. *United States v. Adamo*, 534 F.2d 31, 38 (3d Cir. 1976).

The Superseding Indictment (like its predecessor Indictment) in this case alleges that the individuals who received bribes were employees of departments, agencies, and instrumentalities

of foreign governments (Superseding Indictment, pp. 3-4). The defendants construct their entire argument on the fact that the Indictment contain a reference to the fact that the entities involved were foreign government-controlled. In fact, the Indictment is not required to even state that the entities were government-controlled for the indictment to remain valid.

Pursuant to the Third Circuit's straightforward holding in *Moolenaar*, the express allegation that the VGOs were departments, agencies, and instrumentalities of a foreign government is in and of itself more than sufficient, even without the statement regarding government control. *Government of Virgin Islands v. Moolenaar*, 133 F.3d at 249. These portions of the charges not only imply the "foreign official" element of the FCPA, they clearly state that the element is present.

In an indictment charging violations of the FCPA, the Government is not required to provide all the individual facts - whether they be related to government control, government ownership, or public purpose - that give rise to the entities identified in the indictment being departments, agencies, or instrumentalities of the Government of Vietnam.[3] To require the Government to plead all those factors with such specificity would render FCPA indictments unnecessarily complicated and, in any case, is tantamount to a preview of the Government's case-in-chief at trial regarding an element of the crime.[4]

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[3] The Government does not concede that it is predicating its argument that the VGOs are departments, agencies, and instrumentalities based solely on government control rather than government ownership or public purpose. As detailed in the Superseding Indictment, for example, all of the VGOs serve public functions.

[4] Defendants' arguments plainly go to the sufficiency of the evidence on the charges, which is not a matter for consideration at this stage in the proceedings. *See Costello v. United States*, 350 U.S. 359, 363-64 (1956). In considering a motion to dismiss, the court does not attempt to determine whether sufficient evidence exists to support the allegations made therein. *See e.g.*

B. Defendants' Arguments Have Been Mooted by the Superseding Indictment

In addition to including money laundering, Travel Act, and additional FCPA charges, the Superseding Indictment alleges additional facts relating to government ownership and the public purpose of the organizations that render the defendants' baseless motion moot. Not only did the original Indictment sufficiently alleged an offense, the Superseding Indictment alleges precisely the elements of ownership and public purpose that the defendants claim are required to properly state a claim.

On October 30, 2009, defendants Nexus and Nam Quoc Nguyen requested the Court's permission to file any renewed motions to dismiss based on the Superseding Indictment by November 9, 2009, with the Government's responses due on November 23, 2009. The Government informed the Court, also on October 30, 2009, that it does not object to the proposed schedule. Should the defendants, with reference to the Superseding Indictment, choose to renew

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United States v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987) (insufficient indictments may only be dismissed, pursuant to Rule 12 (b) of the Federal Rules of Criminal Procedure, based on a legal infirmity in the indictment, and not upon a determination of the facts that may or may not be developed at trial). Rather, if there are disputed facts, the Government is "usually entitled to present its evidence at trial and have its sufficiency tested by a motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure." *United States v. Yakou,* 428 F.3d 241, 247 (D.C. Cir. 2005). Defendants' motion, in essence, is actually a request that the Court review the sufficiency of the evidence at this pre-trial stage, rather than at the close of the Government's case. The question of what is a foreign official is a matter not for the court to decide pre-trial, but rather for the jury to resolve. See e.g. *United States v. Bourke,* 05 Cr. 518 (Jury Charge, p. 27). As discussed *infra*, the Indictment fairly informs Defendant of the charges, and that is the end of the inquiry at this stage in the proceedings. Faced with an Indictment that is legally sufficient on its face, Defendant attempts to reach beyond the Indictment to predict what proof the Government will offer at trial. Defendant struggles to find some ambiguities and what he anticipates will be shortcomings in the Government's proof at trial. Defendant notably ignores the basis of an appropriate motion to dismiss - Federal Rule of Criminal Procedure 12(b)(3)(B) - "a motion alleging a defect in the indictment." In doing so, Defendant invites the Court not just to undertake a legal analysis of facial validity of the Indictment, but to perform the jury's task of evaluating the evidence on the issue of an element of the crime.

any of the arguments made in their Motion to Dismiss, notwithstanding their infirmity, the Government will respond to them fully at that time.

II. THE DEFENDANTS ARE NOT ENTITLED TO A BILL OF PARTICULARS, AND AN EXTENSION OF THE DEADLINE FOR FILING RULE 15 MOTIONS IS NOT WARRANTED

Defendants Nam Quoc Nguyen, Nexus Technologies, Inc., Kim Anh Nguyen, and An Quoc Nguyen jointly filed a Motion for a Bill of Particulars pursuant to Federal Rule of Criminal Procedure 7(f). Under Rule 7(f):

> The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

A bill of particulars is not a discovery tool. Rather, a bill of particulars is meant as a complement to an indictment, and should be compelled only if the indictment is too vague and indefinite to inform a defendant of the charges brought against him. *See, e.g., United States v. Moses*, 2002 WL 32351156 (E.D. Pa. 2002) (citing *United States v. Addonizio*, 451 F.2d 49, 63-64 (3d Cir. 1971)). Put another way, a bill of particulars "is intended to give the defendant only the minimum amount of information necessary to permit the defendant to conduct his own investigation." *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (describing the role of bills of particulars). *See also United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 349 (D. Conn. 1990) (collecting cases) ("The ultimate test must be whether the information sought is necessary, not whether it is helpful.")

As the Third Circuit stated in *United States v. Urban*, 404 F.3d 754 (3d Cir. 2005), a bill of particulars is appropriate in only very limited circumstances:

> The purpose of a bill of particulars is "to inform the defendant of the nature of the charges brought against him, to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." *Addonizio*, 451 F.2d at 63-64. Only where an indictment fails to perform these functions, and thereby "significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial[,]" *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir.1989) (citing *Addonizio*, 451 F.2d at 62-63), will we find that a bill of particulars should have been issued.

Id. at 771-72.

For the above reasons, the granting of a bill of particulars is not a matter of right, but is within the discretion of the trial court after considering all the attendant circumstances. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927); *United States v. Armocida*, 515 F.2d 49, 54 (3d Cir. 1975). Such circumstances include whether or not the indictment contains sufficient detail to notify a defendant of the charges against him and whether or not the government provided the defense with all discovery necessary to prepare a defense and avoid unfair trial surprise. *Urban*, 404 F.3d at 771-72 (extensive discovery helped negate need for bill of particulars).

In this case, the defendants cannot fairly contend that they are unable to divine the theory of the Government's case. The Superseding Indictment runs 31 pages and details 68 overt acts, including at least nine specific payments, and contains great detail about how the bribery scheme was perpetrated. In addition, the Government has produced in discovery copies of multiple hard drives, thousands of e-mails, all interview memoranda, all documents seized pursuant to multiple search warrants, documents obtained by the investigative agencies pursuant to administrative and grand jury subpoenas, and documents secured from overseas through mutual legal assistance requests. In addition, the grand jury presentation on the original Indictment addressed each overt

act specifically, and documents relating to those overt acts were entered as grand jury exhibits. Those exhibits have been separately produced to the defense, providing a virtual outline of the government's evidence, overt act by overt act. The remaining allegations can be easily detailed from the voluminous discovery already produced in this case. Thus, the defendants' motion for a bill of particulars should be denied.

1. The Indictment in this Case is Sufficiently Detailed and Provides All Required Notice to the Defense

Although Federal Rule of Criminal Procedure 7(c) requires nothing more than a "plain, concise, and definite written statement of the essential facts constituting the offense charged," the Superseding Indictment in this case goes much further. The 31-page Superseding Indictment in this case is a detailed, "speaking" indictment, which comprehensively describes the conduct with which the defendants are charged. The 68 overt acts are arranged by the foreign governmental entity whose official(s) received the bribe and describe the conduct chronologically, including as an overt act each interstate wire communication which forms the basis of a substantive charge. Equally important, the manner and means section describe the manner in which the defendants carried out the objects of the conspiracy. In short, the allegations of the Superseding Indictment provide ample information from which the defendants can understand the theory of the charges against them. The detailed overt acts and descriptions of the conspiracy inform defendants of the Government's case in sufficient detail to enable them to prepare a defense, avoid surprise, and plead double jeopardy.

2. The Government Provided Extensive Discovery in an Organized Manner, Which Obviates the Need for a Bill of Particulars in This Case.

Moreover, where the government provides a defense with full and complete discovery, as here, the defendants have everything they need to prepare their defense and avoid unfair trial surprise.[5] In such a situation, a defendant is neither entitled to nor needs any further information in order to be adequately apprised of the charges. Thus, courts have consistently held that "[f]ull discovery . . . obviates the need for a bill of particulars." *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979); *United States v. Danton*, No. 95-635, 1996 WL 729848 at 12-13 (E.D. Pa. Dec. 11, 1996); *United States v. LBS Bank-New York, Inc.*, 757 F. Supp. 496, 507 (E.D. Pa. 1990); *United States v. Cole*, 707 F. Supp. 999, 1001 (N.D. Ill. 1989); *United States v. Nelson*, 606 F. Supp. 1378, 1390 (S.D.N.Y. 1978).

In this instant case, the defendants are seeking to have spoon-fed to them information that can be easily located in the discovery already provided. The Government has provided the defendants extensive electronic discovery, as well as numerous other documents and materials in the Government's possession concerning this matter, as detailed above. The Government went further, producing all witness statements well in advance of trial. In addition, the Government is in the process of reviewing, declassifying, and producing recordings of phone calls by and including the defendants, notwithstanding the fact that the Government will not introduce any of those calls in its case in chief. The Court has directed the Government to conclude the review and produce all the calls by no later than December 1, 2009.

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[5] All evidence underlying the Superseding Indictment was produced to the defense prior to September 1, 2009.

On October 29, 2008, the Government produced a discovery letter to the defense and listed all materials available for review in an attached inventory. *See* Exhibit A (initial discovery letter). The attached Inventory of Discovery listed those items available in the form of electronic discovery, as well as those items available in hard copy. Since providing the initial discovery letter, the government has continued to respond to many discovery requests by the defense and to provide additional documents received by the Government after the original discovery letter was sent. Therefore, there is no reason why the discovery in this case should fail adequately to answer the questions raised in the defendants' motion for a bill of particulars.[6]

The material provided to the defendants are more than sufficient to allow the defendants to determine for themselves the information they claim to need in a bill of particulars, particularly when one recognizes that the defense will have had nearly a year to work with the vast majority of discovery materials prior to trial. Thus, the extensive discovery in this case makes a bill of particulars unnecessary. *See United States v. Kirkham*, 2005 WL 827119, *8 (5th Cir. Apr. 11, 2005) (voluminous discovery meant that defendants were not surprised at trial, which rendered bill of particulars inappropriate); *United States v. McDade*, 827 F. Supp. 1153, 1187-88 (E.D. Pa. 1993) (lengthy indictment and voluminous discovery rendered bill of particulars unnecessary); *United States v. LBS Bank - New York*, 757 F. Supp. 496, 507 (E.D. Pa. 1990) (bill of particulars unnecessary in part because of voluminous discovery).

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[6] In contrast, the defendants have not produced any of the information requested in the Government's letter of October 29, 2008, including: (1) any and all books, papers, documents, and tangible objects in the possession, custody, or control of the defendants which they intend to produce as evidence in chief at trial and (2) reciprocal disclosure of *Jenks* material or any additional documents in the defendants' custody or control which have not been previously turned over pursuant to a federal grand jury subpoena.

3. Information Already Provided to the Defense is Sufficient

The issue of whether or not the Government had to provide the names of foreign officials who received bribes through a bill of particulars was addressed in *United States v. Carson*, 8:09-cr-0077 (C.D. Ca. May 18, 2009) (Doc. 75).[7] In *Carson*, the Court ruled that, where payments to foreign officials were made through an intermediary, the standard of particularity was met if the Government provided "the business affiliation of the individual who was intended to benefit from the payment." *Id.* at 4. Here, that information is directly provided in the Superseding Indictment itself - each payment specifically identifies the business affiliation of the recipient of each bribe.

Moreover, the Government should not be required to provide the names of the officials receiving the bribes, because it is not required to prove the identity of those officials at trial. In *United States v. Banks*, 300 Fed. Appx. 145 (3d Cir. 2008), the Third Circuit held that the indictment in that case was sufficient even though it omitted the full names of victims, because identifying the victims was "superfluous identifying information" that was not an element of the charged offense. As in *Banks,* the identities of the officials who received the bribes is superfluous here. The Government is not required to prove who received the bribes, or even that any official ever actually received the bribe, particularly when the bribes were paid through an intermediary. The Government need only prove that the defendant knew or should have known that all or a portion of the payment or gift would be offered, given, or promised, directly or

[7] This is the only Court order directly on point with this specific issue. Defendants also requested a bill of particulars containing the names of the officials who received bribes in *U.S. v. Kozeny*, No. 05 Cr. 518 (S.D.N.Y.), but the Court never ruled on the request. No such bill of particulars was ever provided to the defendants in *Kozeny*.

indirectly, to any foreign official. *See United States v. Bourke*, 05 Cr. 518 (S.D.N.Y.) (Jury Charge p. 27).

Defendants claim in their Motion for a Bill of Particulars that not knowing the name of the individual acting on behalf of "Hong Kong Company" ("HKC 1") harms their ability to prepare for trial. Although the motion for a bill of particulars did not specifically request that the Government identify HKC 1 and its owner ("VN 1"), the Government identified them in an October 29, 2009 letter to the defense, notwithstanding the fact that the identity of HKC 1 and VN 1 were readily apparent from the bank records of HKC 1, which were separately provided to the defense on August 25, 2009, with a cover letter specifically naming HKC 1. The letter of October 29, 2009, also provides the identities of all pseudonyms appearing in the Superseding Indictment, although they are also readily apparent from documents already produced.

Therefore, the information already provided to the defendants more than sufficiently provides the defendants with enough information to develop a meaningful defense.

4. Defendants Do Not Need Additional Information in Order to File Rule 15 Motions

The Court's scheduling order dated October 1, 2009, set a deadline of October 16, 2009 for filing motions to take depositions pursuant to Federal Rule of Criminal Procedure 15 of October 16, 2009. At the time of the status conference, no defendant raised any objections to that deadline.

On the very date the Rule 15 motions were due, the defendants requested a postponement of the October 16, 2009 deadline on the grounds that they had not yet received all discovery of

voice interceptions discussed at the status conference and on the grounds that they required the identities of the foreign officials who were the recipients of bribes.[8]

The defendants were fully informed of the limited discovery that remained to be produced at the status conference, at which time they agreed to the October 16, 2009 deadline. There is no reason to believe that this limited remaining discovery - recordings of phone calls made and received by Kim and An Nguyen, conversations which the defendants themselves participated in a therefore know about - will contain information above and beyond that already provided that would be relevant to identifying individuals from whom the defendants would seek Rule 15 depositions. In the event that any further individuals are identified, the defense could seek an additional Rule 15 deposition at that time, but there is no reason to delay such requests for whatever individuals have already been identified by the defense.

In addition, the defendants were well aware of what information was and was not present in the Indictment at the time of the October 1, 2009 status conference. None of the reasons for an extension described by the defendants in their motion are new and they were fully apprised of those facts at the time of the status conference. Had they had concerns regarding the deadline based on these issues, they should have been raised at the time of the status conference, not on the date the Rule 15 motions were due.

In light of the voluminous discovery already produced and the fact that the defendants have had adequate disclosure regarding the bribe recipients, as discussed above, there is no

[8] Defendants also request that the Court set a discovery cut off date. The Court already did so during the October 1, 2009 status conference - December 1, 2009.

reason for the defendants to receive an extension of the deadline to file Rule 15 motions and further delay of the filing of said motions has the potential to significantly delay trial.

5. Conclusion

A motion for a bill of particulars should be granted only if the failure to do so would prevent the defendants "from developing a meaningful defense against surprise evidence." *United States v. Eufrasio*, 935 F.2d 553, 575 (3d Cir. 1991). Clearly such is not the case here. As discussed above, "the indictment provided more than enough information to allow the [defendants] to prepare an effective trial strategy. Moreover, the [defendants] had access through discovery to the documents and witness statements relied upon by the government in constructing its case." *United States v. Urban*, 404 F.3d at 771-72. Given the detail contained in the Superseding Indictment and given the extensive discovery provided to the defendants, there is no justification for a bill of particulars here.

Because there is no need for a bill of particulars and because the defendants already have all necessary information to file requests for depositions pursuant to Rule 15, no further extensions should be granted for filing that request. Both motions should be denied.

CONCLUSION

For all the foregoing reasons, the Government respectfully submits that the defendants' motions should be denied.

Respectfully submitted,

MICHAEL LEVY
United States Attorney

//s//
JENNIFER ARBITTIER WILLIAMS
Assistant United States Attorney

STEVEN A. TYRRELL
Chief, Fraud Section
Criminal Division, Department of Justice

//s//
KATHLEEN M HAMANN
Trial Attorney, Fraud Section

CERTIFICATION

I certify that on this date a true and correct copy of the foregoing document has been served upon the following counsel via electronic means:

Catherine M. Recker
Amy B. Carver
Welsh & Recker, P.C.
2000 Market Street, Suite 2903
Philadelphia, PA 19103

Martin J. Weinstein
Willkie Farr & Gallagher LLP
1875 K Street NW
Washington, DC 20006

Jeffrey M. Miller
Nasuti & Miller
Public Ledger Building
Suite 1064
150 S. Independence Mall West
Philadelphia, PA 19106

Daniel J. Tann
Law Offices of Daniel J. Tann
1420 Walnut Street, Suite 1012
Philadelphia, PA 19102

Cornell Moore
1420 Walnut Street, #1012
Philadelphia, PA 19102

Christopher Lombardo
1500 JFK Boulevard, Suite 600
Philadelphia, PA 19102

//s//
KATHLEEN M HAMANN
Trial Attorney, Fraud Section

Date: October 30, 2009

Exhibit A

U.S. Department of Justice

United States Attorney

Eastern District of Pennsylvania

Jennifer Arbittier Williams
Direct Dial: (215) 861-8474
Facsimile: (215) 861- 8618
Email: jennifer.a.williams@usdoj.gov

615 Chestnut Street
Suite 1250
Philadelphia, Pennsylvania 19106-4476
(215) 861-8200

October 29, 2008

Via Facsimile and U.S. Mail

Catherine M. Recker, Esquire
Welsh & Recker, P.C.
2000 Market Street
Suite 2903
Philadelphia, PA 19103

Cornell Moore, Esquire
1451 E 110th Street
Cleveland OH 44106

Daniel J. Tann, Esquire
Law Offices of Daniel J. Tann
1420 Walnut Street
Suite 1012
Philadelphia, PA 19102

Jeffrey M. Miller, Esquire
Nasuti & Miller
The Bourse Building, Suite 860
111 S. Independence Mall E
Philadelphia, PA 19106

RE: Discovery in United States v. Nam Quoc Nguyen, et al.
Criminal No. 08-Cr-522

Dear Counsel:

Enclosed please find the Grand Jury testimony of FBI Special Agent Dennis Danieluk, with all exhibits. All other discovery in this case is now available for your inspection and copying.[1] To assist you in your trial preparation, enclosed please find a detailed list of

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[1] Rule 16 makes clear that the discovery materials sought by the defense may be copied only at the expense of the defense, not the government. The provisions of the rule state that the government is required only to "make available" the materials for copying. Specifically, with respect to a defendant's written or recorded statement, Rule 16(a)(1)(B) states:

> Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following . . . .

With regard to documents subject to discovery, Rule 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects,

discoverable materials under Fed. R. Crim. P. 16(a)(1) (marked as Attachment A). All discovery materials are provided for trial preparation and use at trial only. None of the materials may be disclosed or displayed to any person for any other purpose.

With regard to your inspection and copying of these discovery materials, there are several ways you may choose to proceed. You may:

(1) request a copy be made of all of the materials listed in the Attachment; or

(2) review the list of documents in the Attachment and let me know which documents you wish to have copied; or

(3) set up an appointment with me to review and inspect the documents and then let me know which documents you wish to have copied.

Once you have decided how you would like to proceed and what, if any, documents you want copied, there are two ways the documents can be copied. We can either copy them for you and charge you at the rates listed in the enclosed Cost Schedule for Discovery Materials, or we can deliver the documents (except for grand jury materials which we must copy ourselves) to an outside copy center which must be paid by you for its copying services at the time of delivery. Our fee schedule for in-house copying represents our actual costs.

For those materials which we copy for you, we will notify you when they are ready to be picked up from our office receptionists on the 12th Floor at the U.S. Attorney's Office, 615 Chestnut Street, Philadelphia, PA. We require payment in full for the copying costs by check at the time of pick-up. Please make the check payable to the United States Attorney's Office and deliver it to our receptionists as they are the office personnel authorized to receive your check. They have been instructed to deliver discovery packages only upon receipt of payment. *Please do not send payment prior to pick-up.*

Please contact me as soon as possible to let me know how you choose to proceed. In the meantime, this letter and attached list and enclosures shall serve to discharge the government's obligations under Federal Rule of Criminal Procedure 16(a)(1).

> buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control . . . .

With respect to reports of examinations and tests, Rule 16(a)(1)(F) states:

> Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment . . . .

A. Rule 16(a)(1)(A), (B) -- Statements of Defendant

See attached.

B. Rule 16(a)(1)(D) -- Defendant's Prior Record

If your client has a prior criminal record, a copy of this material is enclosed and supplied without charge as required under Fed. R. Crim. P. 16(a)(1)(D).

C. Rule 16(a)(1)(E) -- Documents and Tangible Objects.

See attached.

D. Rule 16(a)(1)(F) -- Reports of Examinations and Tests.

See attached.

E. Rule 16(a)(1)(G) – Expert Witnesses

The government has not yet determined whether it will use expert testimony in this case. If the government does decide to present expert testimony at trial, I will provide you with all required disclosures before the deadline established by the court, without charge as required under Fed. R. Crim. P. 16(a)(1)(F).

F. Brady Material.

The government recognizes not only its continuing duty to disclose under Rule 16(c), but also its duty to disclose possible exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). The government has searched its files and, except for the materials made available to date, it is unaware of evidence that might be construed as *Brady* materials. If additional material should be discovered, it will be provided.

The government also recognizes its responsibilities under *Giglio v. United States*, 405 U.S. 150 (1972), to provide defendant with information about any promises made to a government witness whose reliability may be determinative to the defendant's guilt or innocence. The government has searched its files and, except for the materials made available to date, it is unaware of evidence that might be construed as *Giglio* materials. If additional material should be discovered, it will be provided.

G. Jencks Material.

The government will provide all *Jencks* material before the deadline established by the

court. At this time, however, the government is providing several items that may constitute *Jencks* and/or *Brady* material. Additional materials may be provided before trial.

H. Rule 16(b) -- Disclosure by Defendant.

The government hereby requests disclosure, under Rule 16(b)(1)(A), of any and all books, papers, documents and tangible objects that are in the possession, custody or control of defendant and which defendant intends to produce as evidence in chief at trial. The government further requests disclosure, under Rule 16(b)(1)(B), of all reports or results of physical or mental examinations and of scientific tests or experiments made in connection with this case and which are in the control of defendant and which defendant intends either to: (1) introduce as evidence in chief at the trial; or (2) which were prepared by a witness whom defendant intends to call.

The government also requests reciprocal disclosure of *Jencks* material pursuant to Rule 26(2) and *United States v. Nobles*, 422 U.S. 225 (1975). The government also demands any additional documents in defendant's possession or control which have not been previously turned over pursuant to a federal grand jury subpoena.

I. Notice of Alibi.

Your client is charged with offenses, the times, dates and places of which are detailed in the Indictment. Under Rule 12.1, the government hereby demands notice of any claimed alibi.

J. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

Under Rule 12.2 of the Federal Rules of Criminal Procedure the government hereby demands notice of the defendant's intention to rely upon the defense of insanity and/or his intention to introduce expert testimony relating to the mental condition of the defendant.

K. Stipulations

We expect the government to call approximately eight witnesses in this case. This number can be reduced if we can stipulate to the testimony of certain witnesses. At your convenience, I would like to discuss such stipulations.

L. Guilty Plea

If your client is interested in resolving the instant charges by way of a guilty plea please call me.

Once you have had an opportunity to review the discovery materials, please feel free to contact me to discuss the case or to resolve any questions you may have. I can be reached at (215) 861-8474.

Very truly yours,

LAURIE MAGID
Acting United States Attorney

JENNIFER ARBITTIER WILLIAMS
Assistant United States Attorney

Enclosures (by U.S. Mail only)

cc: Kathleen M. Hamann
Trial Attorney
Fraud Section, Criminal Division
Department of Justice

Cost Schedule for Discovery Materials

U. S. Attorney's Office
Eastern District of Pennsylvania

Copying, Black and White	
letter or legal	$ .12 per page
oversize, 11" x 17"	$ .18 per page
Copying, Color	
letter or legal	$ .36 per page
oversize, 11" x 17"	$ .40 per page
Scanning	$ .17 per page
CD Production	$ 9.50
DVD Production	$ 20.00
Cassette Tape Production	$ 3.00
Tabs	$ 2.75 per set
Shipping	Actual expense

Note: Checks should be made payable to The U. S. Department of Justice.

Attachment A

Inventory of Discovery

1. FBI Memorandum of Nam Quoc Nguyen interview on 05/18/2008

2. FBI Memorandum of Kim Anh Nguyen interview on 05/18/2008

3. FBI Memorandum of An Quoc Nguyen interview on 05/18/2008

4. FBI Memorandum of Nam Quoc Nguyen interview on 05/30/2008

5. FBI Memorandum of Kim Anh Nguyen interview on 05/30/2008

6. FBI Memorandum of An Quoc Nguyen interview on 06/17/2008

7. FBI Memorandum of Penni Weninger interview on 08/25/2008

8. FBI Memorandum of Penni Weninger interview 08/25/2008

9. FBI Memorandum of Joseph T. Lukas interview on 09/05/2008

10. FBI Memorandum of Keiki Schrottke interview on 09/25/2008

11. FBI Memorandum of Keiki Schrottke interview on 09/26/2008

12. Items Related to Search of 537 Washington Avenue, Philadelphia, PA

    a. Search Warrant

    b. Items seized pursuant to search warrant:

        i. 29 boxes of business records

        ii. 28 CD-ROMS

        iii Two digital hard drives[2]

[2] Under the terms of my letter dated October 24, 2008, all of the defendants have agreed that the government may make all imaged hard drives available in their entirety, to all defendants in this case. Please let me know if you wish to obtain an image of any of the computer drives

iv. One USB drive

v. Three CPU towers

13. Items related to Search of 415 S. 49th Street, Philadelphia, PA

a. Search Warrant

b. Items seized pursuant to search warrant:

i. Six boxes of business documents, banking documents, and emails

ii. Nexus Technologies checks

iii. Two CPU towers

iv. Two IBM Thinkpad laptops

14. Items related to search of laptop computer in possession of Nam Nguyen at the time of his arrest:

a. Search Warrant

b. Laptop hard drive

15. Items produced by the following third parties:

a. Advanta Bank Corp.

b. Avionics Specialists, Inc.

c. Bank of America

d. BNSF Logistics (also known as Diversified Freight Logistics)

e. Commerce Bank

f. Compass Bank

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listed in this inventory. Once you specify which hard drives you would like imaged, I will ask you to provide the government with a hard drive of the appropriate size, and the FBI will image the requested drive(s) for you.

g. DHL

h. Federal Express

i. First Union Bank (now Wachovia Bank)

j. Ipsen, Inc.

k. L3 Communications

l. PNC Bank

m. Scott Health and Safety

n. Telesystems International Corp.

o. Tyco International

p. Wachovia Bank

q. Xilinx, Inc.

16. Items seized from trash at 537 Washington Avenue, Philadelphia, PA