APPENDIX D

LEXSEE 513 F.3D 432

United States v. Kay

Nos. 05-20604

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

513 F.3d 432*; *2007 U.S. App. LEXIS 24946

October 24, 2007, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by *United States v. Kay, 513 F.3d 461, 2008 U.S. App. LEXIS 1047 (5th Cir. Tex., 2008)*
US Supreme Court certiorari denied by Kay v. United States, 2008 U.S. LEXIS 6775 (U.S., Oct. 6, 2008)

PRIOR HISTORY: [**1]
Appeals from the United States District Court for the Southern District of Texas. USDC No. 4:01-CR-914.
United States v. Kay, 359 F.3d 738, 2004 U.S. App. LEXIS 1740 (2004)

LexisNexis(R) Headnotes

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JUDGES: Before HIGGINBOTHAM, BARKSDALE, and CLEMENT, Circuit Judges.

OPINION BY: PATRICK E. HIGGINBOTHAM

OPINION [*439]

PATRICK E. HIGGINBOTHAM, Circuit Judge:

David Kay and Douglas Murphy, executives at an American company that exported rice to Haiti in the 1990's, paid Haitian officials to reduce duties and taxes on their rice. Kay disclosed this activity to the attorney for his employer, the SEC investigated, and Murphy and Kay were prosecuted for violating the Foreign Corrupt Practices Act ("FCPA" [**2] or "the Act"). The district court dismissed the indictment, concluding that the FCPA did not cover bribes to reduce duties and taxes. We reversed the dismissal of the indictment and remanded to the district court, finding that no prior law clearly controlled the issue but that the indictment fell within the scope of the FCPA. On remand, a jury convicted both Defendants of the counts charged in the indictment. We now affirm the FCPA and obstruction of justice convictions.

I

American Rice, Inc. ("ARI") is a publicly-held company incorporated in Texas and based in Houston that exports rice to various parts of the world. It exported rice to Haiti in the 1990's, a time of political chaos and rampant corruption in that country, through Rice Corporation of Haiti ("RCH"), a subsidiary incorporated in Haiti. During that time, Murphy was ARI's President and Kay was its Vice President for Caribbean Operations.

Haiti levied both duties and taxes on rice importers. ARI, through Murphy and Kay, took various steps to reduce those costs: purchasing from government officials licenses, called "franchises," permitting charities to import food without duty; paying for a "service

corporation" designation [**3] for RCH, which allowed the company to avoid paying sales and income taxes by claiming that it did not actually own the products it was importing; underreporting imports to reduce duties and taxes and paying officials to accept the underreporting; and paying officials to resolve another tax issue. While these payments, if made domestically, would surely pose serious issues of criminal liability, the standard practice of Haitian government officials was to routinely press companies like RCH to pay for local service, and almost all companies, including RCH's competitors, paid. In short, paying officials for government service and escape from obstacles to business including taxes was "business as usual" in Haiti during the 1990's.

In 1999, ARI retained a prominent Houston law firm to represent it in a civil suit. Preparing for this suit, the lawyers asked Kay for background information on ARI's rice business in Haiti. Kay volunteered that he had taken the actions mentioned above, explaining that doing so was part of doing business in Haiti. Those lawyers informed ARI's directors. The directors self-reported these activities to government regulators.

The SEC launched an investigation into [**4] ARI, Murphy, and Kay. Murphy and Kay were eventually indicted on twelve counts of violating the FCPA, *15 U.S.C. § 78dd-2*, *78ff*, which makes it a crime to (1) "willfully;" (2) "make use of the mails or any means or instrumentality of interstate commerce;" (3) "corruptly;" (4) "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to;" (5) "any foreign official;" (6) "for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage;" (7) "in order to assist such [corporation] in obtaining [*440] or retaining business for or with, or directing business to, any person." The Government never charged ARI, or Defendants civilly, under the FCPA.

In 2002, the district court granted a motion to dismiss the indictment, concluding that "payments to foreign government officials made for the purpose of reducing customs duties and taxes [do not] fall under the scope of 'obtaining or retaining [**5] business' pursuant to the text of the FCPA" [1] (*Kay I*). This court reversed on appeal (*Kay II*). After a rigorous analysis of the FCPA and its legislative history, we concluded that "in diametric opposition to the district court . . . [,] that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription," but "[i]t still must be shown that the bribery was intended to produce an effect - here, through tax savings - that would 'assist in obtaining or retaining business.'" [2] The panel left to the district court on remand whether further prosecution of this case would deny Defendants due process for want of fair warning.

1 *United States v. Kay, 200 F. Supp. 2d 681, 682 (S.D. Tex. 2002)*.

2 *United States v. Kay, 359 F.3d 738, 756 (5th Cir. 2004)*.

Back in district court, the Defendants moved to dismiss for lack of fair warning. The district court denied the motion. The Government then filed a superseding indictment repeating the first twelve counts but also charging both Defendants with conspiracy to violate the FCPA and Murphy with obstruction of justice for making false statements to the SEC during [**6] its investigation. A jury in Houston found Defendants guilty on all counts. Defendants renewed their lack of fair warning argument in post-trial motions to dismiss and arrest judgment, which the court denied. Murphy and Kay appeal, asserting several grounds, including lack of fair warning.

II

Defendants argue that the statute failed to give fair notice that their conduct was illegal and that proceeding to trial with the late arriving clarification of the Act violated their due process rights. The district court denied Defendants' motion to dismiss the indictment and the jury convicted Kay and Murphy. This court reviews *de novo* the district court's denial of a motion to dismiss an indictment. [3] We also review *de novo* the underlying substantive issue of whether application of this court's last opinion in this case violates the *Due Process Clause*. [4]

3 *United States v. Wilson, 249 F.3d 366, 371 (5th Cir. 2001)*.

4 *Cf. De Zavala v. Ashcroft, 385 F.3d 879, 883 (5th Cir. 2004)* ("We review due process challenges *de novo*.")

Bouie provides the appropriate standard of fair notice in the present case. The Supreme Court in *Bouie* recognized two fair notice concerns in criminal statutes, including the vagueness [**7] of the statute's language and courts' retroactive enlargement of the scope of a statute, whether the statutory language underlying that enlargement is clear on its face or vague. [5] The Court only applied the latter principle of retroactive enlargement to the facts in *Bouie*, however, since the terms of the statute were clear. [6] *Lanier* expanded upon these standards, in a manner consistent with *Bouie*, and summarized two additional tests for fair notice: the rule of lenity, and a "touchstone principle" of fair notice, which combines the standards of [*441] statutory vagueness and judicial enlargement to determine fair notice. [7]

5 *Bouie v. City of Columbia, 378 U.S. 347, 352, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).*

6 *Id. at 351.*

7 *United States v. Lanier, 520 U.S. 259, 266-67, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).*

Kay and Murphy address all four of the *Lanier* standards of fair notice in their appeal [8]: 1) enforcement of a vague statute, 2) the rule of lenity, 3) retroactive application of a "novel" interpretation of a statute, and 4) whether the statute, "standing alone or as construed," made the law reasonably clear when the criminal conduct occurred. [9] Under the fair notice principle of vagueness, they argue that this court's "finding that the statute was ambiguous [**8] as a matter of law . . . should have led the Court to dismiss this prosecution under the vagueness doctrine . . . ." [10] Although Defendants argue, and we agreed in *Kay II*, that the business nexus standard is ambiguous, [11] it does not follow that the standard requires guesswork or that the statutory language itself is vague.

8 Each defendant has adopted the other's arguments.

9 *Lanier, 520 U.S. at 266-67.*

10 Kay Br. at 53.

11 *Kay II, 359 F.3d at 746-47.*

The Court in *Lanier* defines a vague statute as one "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [12] The FCPA delineates seven standards that may lead to a conviction. All are phrased in terms that are reasonably clear so as to allow the common interpreter to understand their meaning. Defendants have, rather than showing vagueness, raised a technical interpretive question as to the exact meaning of "obtaining or retaining" business. Whether "obtaining or retaining" business covers the general activities that an entity undertakes to ensure continued success of a business or Defendants' more limited definition of [**9] contractual business is an ambiguity but not one that rises to the level of vagueness and unfair notice.

12 *Lanier, 520 U.S. at 266.*

Nor is the FCPA's business nexus test vague under *McBoyle*, which originally defined the vagueness standard in the context of fair warning. Similar to *Lanier*'s "common intelligence" test, the *McBoyle* test for vagueness requires that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed . . . so far as possible the line should be clear." [13] Imprecise general language in one of seven requirements for a bribery conviction under the FCPA does not draw a line so vague that Defendants were not reasonably aware of their potential for engaging in illegal activity under the FCPA when they made payments to Haitian officials to reduce tax and duty burdens through misrepresentation. Although ARI did not make corrupt payments to guarantee one particular contract's success, ARI ensured, through bribery, that it could continue to sell its rice without having to pay the full tax and customs duties demanded of it. Trial testimony indicates that ARI believed these payments were [**10] necessary to compete with other companies that paid lower or no taxes on similar imports [14] -- in other words, [*442] in order to retain business in Haiti, the company took measures to keep up with competitors. [15] The fact that other companies were guilty of similar bribery during the 1990's does not excuse ARI's actions; multiple violations of a law do not make those violations legal or create vagueness in the law.

13 *McBoyle v. United States, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931).*

14 Lawrence Henry Theriot, a consultant to ARI who provided "the eyes and ears of what the company needed to be alert to," discussed how "Haitian authorities were very aggressive in trying to collect the full amount of . . . taxes from Rice Corporation" and "'smugglers' were not paying

> the taxes on imported rice - or not paying a substantial part of the taxes . . . So, they proved to be very tough competitors against Rice Corporation, who was paying a substantial part of the taxes on the imported rice."
>
> 15 We reached a similar conclusion in *Kay II*, finding that "[b]ribing foreign officials to lower taxes and customs duties certainly *can* provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining [**11] or retaining business." *359 F.3d at 749*.

A man of common intelligence would have understood that ARI, in bribing foreign officials, was treading close to a reasonably-defined line of illegality. As the Supreme Court in *Boyce* held, "no more than a reasonable degree of certainty can be demanded [in a criminal statute]. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." [16] Defendants took this risk, and splitting hairs as to the illegality of one type of action under the business nexus test does not allow them to argue successfully that the FCPA's standards were vague.

> 16 *Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340, 72 S. Ct. 329, 96 L. Ed. 367 (1952)*. *Boyce* is a void for vagueness case but still applies in this case. The Court in *Bouie* clarified the distinction between "void for vagueness" and "fair notice" and the applicability of the void for vagueness test to fair notice questions. When a statute is void for vagueness, the language on its face is unclear. A statute that fails to provide fair notice, on the other hand, may be clear or unclear on its face but regardless, is applied to conduct outside [**12] of the scope of the statute, thus retroactively punishing the defendant for an act that he could not have reasonably expected to fall under the statute's prohibitions. The Court found that the fair notice doctrine is broader than the void for vagueness doctrine, since a conviction under a statute can violate the fair notice doctrine when a statute is void for vagueness *or* when a defendant is retroactively punished under an "expansion" of a clear statute. Void for vagueness analysis is, however, therefore, still applicable to the question of vagueness in a fair notice case. *See Bouie, 378 U.S. at 351-52*.

In addition to arguing that the statutory language was vague, Defendants, although recognizing that this court must apply its own precedent established by *Kay II*, alternatively assert that the district court erred in its retroactive application of *Kay II*'s interpretation of the FCPA to them. They argue that "*Kay II* extended criminal liability under the FCPA beyond the explicit terms of the Act." [17] In doing so, Defendants misconstrue *Lanier*'s and *Bouie*'s test for fair notice under retroactive application of a law. The *Bouie* fair notice test for retroactive enlargement ("where construction [**13] unexpectedly broadens a statute which on its face had been definite and precise" [18]) asks whether a court has held an individual "criminally responsible for conduct which he could not reasonably be proscribed" due to the statute's failure "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ." [19] Similarly, the *Lanier* fair notice test for judicial expansion of the scope of a statute is whether the court applied a "novel construction" of the statute to conduct not addressed by the statute or by previous cases. In *Bouie*, the state court had retroactively added a distinct category of illegal conduct to the [*443] statute - finding that individuals who remained in a restaurant after being asked to leave violated a statute that had previously only prohibited *entry* onto land after notification that such entry was illegal. [20] The state court, in expanding the trespass statute, drew upon the civil, not the criminal law, of trespass. [21]

> 17 Kay argued: "Because *Kay II* extended criminal liability under the FCPA beyond the explicit terms of the Act, defendant could not have had fair notice at the time of their conduct that the conduct was subject to criminal [**14] punishment under *Kay II*."
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> 18 *Bouie, 378 U.S. at 353*.
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> 19 *Id. at 351*.
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> 20 *Id. at 349-50*.
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> 21 *Id. at 357-58*.

We are not persuaded that this court in *Kay II* or the district court in applying it, expanded the scope of the FCPA or created a new and independent principle of law. The explicit terms of the FCPA do not include either language relating specifically to contracts or defining more general business practices that may fall under the business nexus test, with the exception of the Act's allowance of "grease" payments. We are not persuaded that the district court's determination that the facts of the

case fell within the FCPA's terms of illegality extended the Act beyond its explicit terms.

Our in-depth investigation of one factor's - the business nexus test's - applicability to a specific action, out of a total of seven factors that define illegal bribery under the FCPA, was not an extension of the Act's terms but rather an interpretation and application of its meaning to the facts of the case. A person of common intelligence should have been reasonably aware of this meaning in the 1990's. Paying taxes and customs duties is inherent to foreign business, and decreasing these payments through bribery, [**15] as Defendants have admitted, was common practice in Haiti. If bribery to obtain favorable tax and customs obligations was indeed as common as established in the record, then it is reasonable to imply that businesses viewed these practices as one of the only guarantees of maintaining a successful business in Haiti in the 1990's. It is not therefore a novel application of the law for the district court to find that Defendants made these payments for the purpose of "retaining business."

Defendants rely to a large extent on this court's investigation of the FCPA's legislative history in arguing that the district court retroactively applied law beyond the original scope of the Act, and they assert that "[r]eliance on legislative history (much less history as sparse as the FCPA's) to resolve the meaning of a criminal statute is rarely appropriate." We do not agree. As we discuss in further detail when we turn to the rule of lenity, the Supreme Court has found, since *Crandon* [22] and *Hughey*, [23] that courts should rely on all available sources, including legislative history, when interpreting a potentially ambiguous statute and should find ambiguity only when none of those sources adequately [**16] resolve the issue. [24] This court's investigation of the FCPA's legislative history does not indicate that in interpreting the Act, we required the district court to use a novel application of the law or that the FCPA is vague. Rather, the history serves as additional support for the court's resolution of the ambiguity of the business nexus test. This Court looked to numerous aspects of the Act - its text, its title, its "grease payments" exception, the dictionary definition of "business," and the Act's legislative history. And although we found that "the statute itself" was "amenable to more than one reasonable interpretation" and therefore "ambiguous as a matter of law" [25] absent its legislative history, this does not indicate that we established a new interpretation of the law.

22 *Crandon v. United States, 494 U.S. 152, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990)*.

23 *Hughey v. United States, 495 U.S. 411, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990)*.

24 *See infra* note 40 and accompanying text.

25 *Kay II, 359 F.3d at 746*.

[*444] A third test under *Lanier* - that case's "touchstone principle" - raises similar questions of retroactivity and vagueness in asking "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that [**17] the defendant's conduct was criminal." [26] This addresses both interpretation of the statute "standing alone" and a court's enlargement of a statute in "construe[ing]" the statute, whether by interpreting the statute or applying relevant case law. The FCPA was just as clear in the 1990's - when Defendants' relevant conduct occurred - as it is today. In *Kay II* we determined that the FCPA was not void for vagueness [27] but rather contained an ambiguous provision. Defendants here fail in their understandable and able effort to inflate the ambiguity of the business nexus test into an issue of unfair notice under vagueness and retroactivity principles.

26 *Lanier, 520 U.S. at 267*.

27 *Kay II, 359 F.3d at 744 n.16*.

Defendants also make the most of the impact of sparse prior judicial interpretation, arguing: "In all prior reported prosecutions under the statute, the Government had charged only defendants whose conduct aimed at obtaining or retaining business by, for example, paying a bribe to secure a government contract." This by no means indicates that this narrow type of payment is the only conduct covered by the business nexus test, as suggested. Kay and Murphy's unlucky status as two of the [**18] few individuals that the Government has vigorously prosecuted under the Act does not permit them to argue successfully that they were unaware of the boundaries of illegality under the Act in the 1990's. As the Court in *Lanier* points out, the lack of prior court interpretations "fundamentally similar" [28] to the case in question does not create unfair notice. Defendants cannot therefore rely on the fact that courts have only interpreted the meaning of the business nexus test in the context of contracts to argue that they had inadequate notice of other reasonable applications of that test.

28 *Lanier, 520 U.S. at 269*.

The Supreme Court has held that a defendant received fair notice under retroactive applications of law broader than *Kay II*'s clarification of the ambiguity of a statute. In *Rogers*, for example, the Court upheld the Tennessee Supreme Court's retroactive abolition of the infrequently-used common law principle that a defendant could not be found guilty of murder if the victim survived the injury by at least a year and a day. [29] The Court found that although Tennessee had not officially abolished the principle when the murder occurred, the law's rarity and the fact that many other [**19] jurisdictions had abolished it should have alerted defendant to the possibility that the law was no longer applicable. [30] Courts daily analyze the law's "fit" with the criminal act in question, and without some flexibility of interpretation and clarification, courts would be unable to apply effectively criminal laws to the specific facts of each case. As *Rogers* states, courts require "substantial leeway . . . as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevaluating and refining them as may be necessary to bring the common law into conformity with logic and common sense." [31] To find unfair notice whenever a court specified new types of acts to which a criminal statute applied [*445] would stifle courts' ability to interpret and fairly apply criminal statutes.

29 *Rogers v. Tennessee, 532 U.S. 451, 462, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001)*.

30 *Id. at 464*.

31 *Id. at 461-62*.

When a statute is not vague but contains ambiguity, as occurs here under the FCPA, we must still consider the rule of lenity: while the "touchstone" of fair notice is reasonable clarity of the illegality of conduct when it occurred, "the touchstone of the rule of [**20] lenity is statutory ambiguity." [32] As the Court in *Lanier* applied the lenity doctrine, it "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." [33] The rule is, however, a last resort of interpretation, [34] and "[t]he mere possibility of articulating a narrower construction [or an act] . . . does not by itself make the rule of lenity applicable." [35] The rule only applies in situations of ambiguity more extreme than here, where, "'after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." [36] To address potential statutory ambiguity, the Supreme Court has relied upon "common usage," [37] dictionaries, [38] the societal circumstances surrounding the passage of an act, [39] legislative intent derived from the language of an act, [40] and legislative history [41] to clarify a law's meaning and thus avoid the rule of lenity. In *Dixson*, where petitioners argued that they did not fall within the scope of the federal bribery statute, the Supreme Court (like this court in *Kay II*) found that the words of the statute could support either petitioners' or the Government's interpretation [**21] of the statute and that one of the statute's terms was ambiguous. The Court used legislative history to clear up the ambiguity and found that petitioners could not, therefore, rely upon the rule of lenity. [42] Later, the Supreme Court in *Hughey* attempted to bar legislative history as a means of clarifying ambiguity and avoiding application of the rule of lenity, [43] but the Supreme Court and the Fifth Circuit have since affirmed that legislative [*446] history is an appropriate means of clarification under the rule. [44] Here, where the legislative history shows that "Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements," [45] the FCPA is not sufficiently ambiguous to merit application of the rule of lenity.

32 *Moskal v. United States, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990)* (internal quotations omitted).

33 *Lanier, 520 U.S. at 266*.

34 *Moskal, 498 U.S. at 108*.

35 *Smith v. United States, 508 U.S. 223, 239, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993)*.

36 *Reno v. Koray, 515 U.S. 50, 65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995)* (internal quotations and citations omitted).

37 *Smith, 508 U.S. at 240*.

38 *Id*.

39 *Id*. (discussing the high rate of drug-related [**22] murders in the United States when Congress passed a statute punishing criminals' use of firearms in drug trafficking).

40 *Id. at 240* ("Congress affirmatively demonstrated that it meant to include transactions like petitioner's as 'us[ing] a firearm' by so employing those terms . . . .").

41 *See, e.g., Reves v. Ernst & Young, 507 U.S. 170, 184 n.8, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)* ("Because the meaning of the statute is clear from its language and legislative history, we

have no occasion to consider the application of the rule of lenity.").

42 *Dixson v. United States, 465 U.S. 482, 491, 496, 104 S. Ct. 1172, 79 L. Ed. 2d 458 (1984)* (finding that "[i]f the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases" but that Congress was clear in its intent to broadly define the statutory term at issue).

43 *Hughey v. United States, 495 U.S. 411, 422, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990)* ("[L]ongstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." (internal citation omitted)).

44 *See, e.g., Moskal, 498 U.S. at 108* ("[W]e have always [**23] reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." (internal quotations omitted)); *see also Holloway v. United States, 526 U.S. 1, 10, 12, n.14, 119 S. Ct. 966, 143 L. Ed. 2d 1 (1999)* (relying upon legislative history to conclude that Congress did not intend for a crime to be interpreted narrowly, and affirming that "[t]he rule of lenity applies only if, after seizing *everything* from which aid can be derived, . . . we can make no more than a guess as to what Congress intended" (emphasis added) (internal quotations omitted)); *United States v. Reedy, 304 F.3d 358, 367 n.13 (5th Cir. 2002)* (quoting *Moskal*).

45 *Kay II, 359 F.3d at 749*.

In sum, under all four *Lanier* tests, Defendants have failed to show that the FCPA, and the district court's application of it, failed to provide them fair notice.

III

As Defendants indicate, the Government must prove, and a jury must find beyond a reasonable doubt, that Defendants both corruptly and *willfully* violated *subsections (a)* or *(g) of § 78dd-1 of the FCPA* to obtain a criminal conviction under the Act. [46] Here, a jury convicted [**24] Defendants on all counts for bribery that induced foreign officials to accept documents containing false reports of the quantities of rice that ARI imported to Haiti, thus reducing taxes and import duties in violation of FCPA, *15 U.S.C. § 78dd-1*, *78dd-2*. Defendants argue that the district court failed to adequately instruct the jury on the element of willfulness and thus gave improper instructions as to *mens rea*. We disagree.

46 *See 15 U.S.C. § 78ff(c)(2)(A)* ("Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates *subsection (a)* or *(g) of section 78dd-1* of this title shall be fined not more than $ 100,000, or imprisoned not more than 5 years, or both.")

The court's instructions to the jury indicated that "corruptly" was an element of the offense and defined a corrupt act as one that is "done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." The court also instructed the jury on the definition of an act done "knowingly" (thus incorporating the willfulness element into its instructions) [**25] and defined a knowing act as one "done voluntarily and intentionally, not because of accident or mistake." In response to a jury question as to whether "knowledge of the FCPA" could be "considered an accident or mistake," the court referred the jury to its definition of the term "knowingly." Defendants objected to the instruction given to the jury and proposed two alternative jury instructions, thus preserving error.

We review preserved error in jury instructions under an abuse of discretion standard [47] and ask "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them." [48] Under this standard, we [*447] must recognize that trial courts have "great latitude" in the court's decision to include or omit jury instructions. [49] The district court abuses its discretion only if a requested instruction "(1) is substantively correct; (2) is not substantially covered in the charge given to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present effectively a particular defense." [50] [**26] We find that the district court's instructions provided clear directions to the jury on all applicable principles of the

FCPA and that Defendants' first requested instruction was not substantively correct; and the second, although technically correct but unnecessarily detailed, was substantially covered in the jury charge. Nor did the court's omission of both of the instructions seriously impair Defendants' defense. The instructions still allowed Defendants to argue lack of knowledge of their bad acts, lack of intent to commit bad acts, and, more generally, lack of "corrupt" action.

47 *United States v. Daniels, 281 F.3d 168, 183 (5th Cir. 2002).*

48 *Id.* (internal quotations omitted).

49 *United States v. Correa-Ventura, 6 F.3d 1070, 1076 (5th Cir. 1993).*

50 *United States v. Simkanin, 420 F.3d 397, 410 (5th Cir. 2005).*

Defendants did not argue at trial that the court should instruct the jury on a separate element of willfulness, but they proposed two alternatives to the court's instructions on the definition of "corruptly." The alternative instructions would have required that an act done "corruptly" be done "willfully" and "knowingly" *and* with "specific intent" to either "violate the law" (in [**27] this case, by knowing that the FCPA prohibited Defendants' actions) or to "achieve an unlawful result by influencing a foreign public official's action in one's own favor."

The FCPA does not define "willfully," and we therefore look to the common law interpretation of this term [51] to determine the sufficiency of the jury instructions pertaining to the *mens rea* element. The definition of "willful" in the criminal context remains unclear despite numerous opinions addressing this issue. Three levels of interpretation have arisen that help to clear the haze. Under all three, a defendant must have acted intentionally - not by accident or mistake. The first and most basic interpretation of criminal willfulness is that committing an act, and having knowledge of that act, is criminal willfulness - provided that the actions fell within the category of actions defined as illegal under the applicable statute. In these cases, the defendant need not have known of the specific terms of the statute or even the existence of the statute. The defendant's knowledge that he committed the act is sufficient. [52]

51 *See, e.g., Bryan v. United States, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998)* (applying the Court's definition [**28] of willfulness "unless the text of the statute dictates a different result").

52 *See, e.g., Staples v. United States, 511 U.S. 600, 618-19, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994)* (defendant need only be aware that he has engaged in conduct that meets the statutory definition; he need not know of the statute or his violation of the statute).

The second and "intermediate" level of criminal willfulness requires the defendant to have known that his actions were in some way unlawful. [53] Again, he need not have known of the specific statute, but [*448] rather he must have acted with the knowledge that he was doing a "bad" act under the general rules of law. Under this intermediate level of criminal common law willfulness, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." [54]

53 *See, e.g., Bryan, 524 U.S. at 191 nn.12-13, 191-92* (discussing multiple interpretations of criminal willfulness as meaning "not merely voluntarily, but with a bad purpose," "a thing done without ground for believing it is lawful," or "[d]oing or omitting to do a thing knowingly and willfully . . . not only [with] a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it" (internal [**29] citations and quotations omitted)).

54 *Ratzlaf v. United States, 510 U.S. 135, 137, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994).*

The strictest level of interpretation of criminal willfulness requires that the defendant knew the terms of the statute and that he was violating the statute. The courts have reserved this category to limited types of statutory violations involving "complex" statutes - namely those governing federal tax law and antistructuring transactions. Although the Fifth Circuit has not addressed the FCPA under this category, the Second Circuit has determined that the FCPA does not fall within this narrow category of complex statutes, [55] and we agree.

55 *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 327 F.3d 173, 181 (2d Cir. 2003)* [hereinafter *Stichting*].

The district court's jury instructions captured both the first and second levels of criminal willfulness, but not the third and strictest interpretational level. We find the

instructions sufficient, since the strictest interpretation of criminal willfulness is reserved for complex statutes. Under the first and broadest definition of criminal willfulness, the term "knowingly" in the context [**30] of willful criminal action "merely requires proof of knowledge of the facts that constitute the offense." [56] For example, a defendant need only have known that he possessed a weapon with the characteristics that fit within the definition of "machinegun" in the relevant statute; [57] he need not have been aware of the statute or that his possession of the gun violated the statute. [58] Indeed, at least one circuit has specifically found that "[k]nowledge by a defendant that it is violating the FCPA -- that it is committing all the elements of an FCPA violation -- is not itself an element of the FCPA crime." [59] The Court in *Bryan* affirmed that the "traditional rule" for criminal willfulness is that "ignorance of the law is no excuse," [60] and that cases holding otherwise (requiring actual knowledge of violation of the law) have involved unusually complex statutes with the potential to implicate innocent individuals. [61]

56 *Bryan, 524 U.S. at 193*.

57 *Staples, 511 U.S. at 619* ("[T]he Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act").

58 *Id. at 620*. The Court did not concern itself with the question of knowledge [**31] of the law, but rather with wrongfully convicting "gun owners who were wholly ignorant of the offending *characteristics of their weapons* . . . ." *Id*. (emphasis added); *see also Rogers v. United States, 522 U.S. 252, 254-55, 118 S. Ct. 673, 139 L. Ed. 2d 686 (1998)* (plurality opinion) ("It is not . . . necessary to prove that the defendant knew that his possession was unlawful or that the firearm was unregistered.").

59 *Stichting, 327 F.3d at 181*.

60 *Bryan, 524 U.S. at 196*; *see also Cheek v. United States, 498 U.S. 192, 199-201, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991)* (discussing the particular complexity of the federal criminal tax laws and the Court's historic interpretation of these law, which led to a separate definition of willfulness for these laws).

61 *Bryan, 524 U.S. at 194-95*.

The district court, by instructing the jury that a guilty verdict required a finding that defendant acted "voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result," and by including a [*449] separate "knowing" instruction, correctly indicated that the jury must identify evidence amounting to "knowledge of facts that constitute the offense" required by the traditional criminal definition of willfulness (which we have described [**32] as the first category of willfulness). The court's instructions also substantially covered the requested instruction that Defendants acted "corruptly," meaning they acted "knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor." The instructions suggested that illegal conduct under the FCPA defined the "unlawful end or result" to which the court referred, since the jury had to have some standard by which to gauge lawfulness. Additionally, the instructions correctly indicated that to be guilty under the Act, Defendants must have knowingly (*i.e.*, voluntarily and intentionally) acted with awareness of these unlawful ends. [62]

62 We are disturbed by the jury's confusion in this case as to the criminal intent element. The jury's question to the court of whether "knowingly" meant knowing violation of the FCPA ("Can lack of knowledge of the FCPA be considered an accident or mistake?") indicates that the jury was confused as to whether Defendants had to know specifically that they were violating the FCPA when they acted. But the jury need not have found this. Under our first definition of willfulness, [**33] Defendants' knowledge that they were committing the acts of corrupt bribery of foreign officials was sufficient. Given, Defendants' proffered instruction that would have required that a finding that they "knowingly and dishonestly, with the specific intent to achieve an unlawful result *by influencing a foreign official's action in one's own favor*" would have helped the jury understand that the "unlawful ends" in the court's instructions on "unlawful end or result . . . or unlawful method or means" could refer to specific knowledge that one was committing a corrupt act as defined by the FCPA. But even if the jury understood "unlawful ends" in the more general sense - of acting with a bad or unlawful purpose - this is an acceptable definition of criminal willfulness, which we describe as the "intermediate" definition of

willfulness and discuss below.

The district court's instructions, in defining the willfulness standard as requiring knowledge that the acts committed were unlawful acts, were also adequate despite their omission of the exact term "specific intent," which was proposed by Defendants in their second instruction. We have defined specific intent crimes as those involving "willful [**34] and knowing engagement in criminal *behavior*." [63] To instruct on specific intent, a court should require the jury "to find that [defendant] intended to do something unlawful." [64] The court gave such an instruction here, despite its failure to use the phrase "specific intent." Where we have struck down jury instructions for failure to convey specific intent, we have done so on the grounds that the court mistakenly thought that the crime was a general intent crime and therefore refused to instruct that the defendant had intended to act unlawfully. [65] Additionally, as discussed in further detail below, Defendants need not have *specifically* known that they were violating the FCPA in this case; only those cases that involve unusually complex statutes require defendants to have specific knowledge that [*450] they are violating a statute. [66] Indeed, the district court's jury instructions closely track the language that the Court in *Bryan* approved as correctly defining criminal willfulness. [67]

63 *United States v. Berrios-Centeno, 250 F.3d 294, 299 (5th Cir. 2001).*

64 *United States v. Burroughs, 876 F.2d 366, 369 (5th Cir. 1989).*

65 *Id. at 368-69* (finding that the court mistakenly believed that the drug [**35] conspiracy was a general intent crime and that the "[charge] language does not address the requisite intent to break the law by her 'voluntary' actions. It thus does not compensate for the district court's incorrect definition of 'willful' or its omission of any reference to 'specific intent,' 'unlawfulness,' 'purposeful intent to violate the law,' or any like language that would have suggested the need to find specific intent").

66 *See, e.g., Cheek, 498 U.S. at 200* ("Congress has . . . softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court . . . interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws."); *Bryan, 524 U.S. at 194-95* (distinguishing the cases where "the jury must find that the defendant was aware of the *specific* provision of the tax code that he was charged with violating" (emphasis added)).

67 *Bryan, 524 U.S. at 190.* The jury instructions in *Bryan* read as follows: "A person acts willfully [**36] if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids." *Id.*

Because there are multiple definitions of criminal willfulness, however, we also look to stricter standards of willfulness to consider whether Defendants' instructions were substantively correct and whether omission of those instructions seriously impaired an effective defense. We find that the district court's jury instructions also capture our second, or intermediate, definition of criminal willfulness - a definition that we commonly follow [68] - that a defendant knew that he was doing something generally "unlawful" at the time of his action. This level of interpretation is stricter than the first because it does not only require that the defendant knew that he was committing an act (an act which, incidentally, falls within the definition of the relevant statute); the defendant must have known that the act was in some way *wrong*. The district court's jury instructions [**37] captured this level of intent well with their requirement that the jury find that Defendants acted "with a bad purpose or evil motive."

68 *See, e.g., Burroughs, 876 F.2d at 368* (describing "'willfully'" to mean that "'the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, *with bad purpose either to disobey or disregard the law*'" (quoting U.S. Fifth Circuit District Judges Association Pattern Jury Instruction (Criminal), Basic Instruction 9A, at 21 (1983) (emphasis added)); *United States v. Wilkes, 685 F.2d 135, 138 (5th Cir. 1982)* (upholding instructions that defined "willful as incorporating a 'bad purpose either to disobey or to disregard the law'").

Finally, the statute here does not fall within the narrow exception to the *Bryan* Court's rule. Under this rare exception (which covers our third and "strictest" level of criminal willfulness), a defendant must know the specific law that he is violating in order to act willfully. The "highly technical" exceptional statutes to which the Court in *Bryan* refers are federal tax laws, for which the Court has explicitly "carv[ed] out an exception to the traditional rule" that ignorance [**38] of the law is no excuse, [69] and a complicated statute addressing structuring of cash transactions, where the Court limited its holding specifically to antistructuring laws. [70] We have [*451] agreed that willfulness does *not* generally require that the defendant knew that he was violating the specific provisions of a law. [71] Although the Fifth Circuit has not directly addressed this issue in the context of the FCPA, the Second Circuit has held that "[f]ederal statutes in which the defendant's knowledge that he or she is violating the statute is an element of the violation are rare; the FCPA is plainly not such a statute." [72] Thus, the instructions need not have, as Defendants argued, indicated that the jury "must find that the defendant knew that the Foreign Corrupt Practices Act prohibited American businessmen from providing anything of value to a foreign official in order to obtain or retain business . . . ." This level of specificity was not required here.

69 *Cheek, 498 U.S. at 200* (citing *United States v. Bishop, 412 U.S. 346, 93 S. Ct. 2008, 36 L. Ed. 2d 941 (1973)*); *United States v. Pomponio, 429 U.S. 10, 12, 97 S. Ct. 22, 50 L. Ed. 2d 12 (1976)* (For cases involving tax statutes, the exception defines willfulness as the "voluntary, intentional violation [**39] of a known legal duty") (internal quotations omitted)).

70 *Ratzlaf v. United States, 510 U.S. 135, 137, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)* ("To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.").

71 *United States v. Garcia, 762 F.2d 1222, 1224 (5th Cir. 1985)* (rejecting defendant's arguments that the jury instructions were erroneous because they "did not clearly require that the Defendant have knowledge of the particular law allegedly violated.").

72 *Stichting, 327 F.3d at 181*.

The instructions' requirements that Defendants acted corruptly, with an "unlawful end or result," and committed "intentional" and "knowing" acts with a bad motive sufficiently captured the definition of criminal willfulness that we follow. They also allowed Defendants to effectively put forth adequate defenses: Defendants could have argued lack of intent and that they were not acting with knowledge of unlawful means or ends. The district court's jury instructions adequately conveyed the "willfulness" required for a conviction under the FCPA.

IV

Defendants argue that in addition to improperly instructing the jury on the element [**40] of willfulness, the district court allowed the jury to convict based on a defective indictment that omitted the element of willfulness. We review this issue *de novo* [73] and will find an indictment to be sufficient if it "alleges every element of the crime charged and in such a way as to enable the accused to prepare his defense and to allow the accused to invoke the *double jeopardy clause* in any subsequent proceeding." [74]

73 *United States v. Ratcliff, 488 F.3d 639, 643 (5th Cir. 2007)*.

74 *Id*. (internal quotations omitted).

The second superseding indictment upon which the jury convicted Defendants indeed omitted the term "willful." However, this omission was harmless error at most, as the language of the indictment described the exact type of conduct required for a finding of willfulness. As we discussed in detail in the context of jury instructions, criminal willfulness requires only that criminal defendants have knowledge that they are acting unlawfully or "knowledge of the facts that constitute the offense," depending on the definition followed, unless the statutory text provides an alternate definition of this element. [75] The FCPA does not define willfulness, so we rely upon the common [**41] law definition.

75 *Bryan, 524 U.S. at 193*.

The indictment in this case was not required to contain the exact term "willfulness." This court has specifically found that an indictment alleging that defendant "corruptly did endeavor" sufficiently "charges an intentional act," which is "interchangeable with the term willful." [76] Similarly, by alleging that Defendants in this case themselves "paid bribes and authorized the payment of bribes;" [77] "acted [*452] on his [sic] own

behalf and as an agent of American Rice, Inc.," [78] to reduce customs duties; paid bribes to underreport import quantities because Defendants "believed" [79] that they would otherwise lose sales to competitors; "directed employees" [80] to make false shipping documents; and acted "corruptly" [81] "in violation of their lawful duty," [82] the indictment sufficiently alleged the element of willfulness by using language that directly asserted Defendants' knowing commission of acts that are unlawful generally and unlawful under the FCPA. The indictment's language sufficiently placed Defendants on notice of each element of the crime charged and allowed them to prepare an effective defense.

76 *United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978)* [**42] (internal quotations omitted).
77 Second superseding indictment, Count 3.
78 *Id.*, Count 6.
79 *Id.*, Count 3.
80 *Id.*, Count 5.
81 *Id.*, Count 11.
82 *Id.*

V

In addition to arguing that the indictment failed to allege willfulness, Defendants assert that the indictment insufficiently alleged, and the Government failed to prove at trial, that Defendants made "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to foreign officials. [83] They claim that the Government only alleged in the indictment and proved at trial that Defendants used barges and similar interstate commerce for the false documents that underreported ARI's imports but failed to allege or prove that these false documents, or any other money or documents, were sent through interstate commerce "in furtherance" of the actual bribes. To the contrary, they argue, "the purpose of the bribe was to clear the way for the acceptance of the shipping documents. That is, the bribes furthered the use of instrumentalities to ship the documents [**43] and rice into Haiti, not the other way around." [84] Defendants further allege that "payments were made in person in Haiti, with cash drawn from local bank accounts." [85]

83 *15 U.S.C. §§ 78dd-1(a), -2(a).*
84 Murphy Reply Br. at 4.
85 Murphy Br. at 8.

When we review a challenge to the sufficiency of the evidence underlying Defendants' conviction and Defendants have moved for a judgment of a acquittal, as they did here in their *Rule 29* motions, [86] we ask "whether a rational juror could have found the elements of the offense proved beyond a reasonable doubt. In so doing, we view the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in support of the jury verdict." [87] A rational juror could have inferred from the evidence in this case that Defendants used interstate commerce "in furtherance of an offer, payment, promise to pay, [*453] or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official . . . ."

86 Although the Government argues that we should apply a plain error standard of review for sufficiency of the evidence, as Defendants did [**44] not object to the jury instructions on the interstate commerce issue in their *Rule 29* motions, we need not address this argument; we find that even under a more generous standard of review for Defendants (assuming they properly addressed the interstate commerce element in their *Rule 29* motion), Defendants' claim fails.
87 *United States v. Valles, 484 F.3d 745, 752 (5th Cir. 2007).*

As to the sufficiency of the indictment, the language of the indictment arguably failed to allege that Defendants sent any money for their bribes through interstate commerce, [88] thus requiring us to address Defendants' argument that a defendant can only be convicted under the bribery portion of the FCPA if the defendant used the mails or other interstate commerce "in furtherance of making the bribe itself" [89] and not for more broad use of interstate commerce for activities that support the bribe payment.

88 Even this claim in Defendants' briefs is dubious, as the indictment alleges that "[i]n furtherance of bribes . . . defendants authorized employees of American Rice, Inc. to withdraw funds from American Rice, Inc. bank accounts and to pay these funds to officials of the Haitian government . . ." Second Superseding [**45] Indictment, Count 7. This language suggests that Defendants, since their company was based in

America, sent funds through interstate commerce from America to Haiti to pay these bribes. Because the language does not specifically indicate this, however, we give Defendants' argument some credence and further address the indictment's allegations of documents, rather than money, that Defendants transported in furtherance of bribes.

89 Murphy Br. at 8.

This issue does not require us to look to the legislative history or the dictionary, as Defendants would have us do. The plain language of the statute applies to defendants that "make use of . . . any means or instrumentality of interstate commerce . . . in furtherance of an offer, payment, promise to pay, or authorization [to pay] . . . ." [90] The indictment similarly alleges that Kay directed employees to, "in furtherance of . . . bribes . . . prepare shipping documents . . . that falsely represented the weight and value of the rice being exported to Haiti." [91]

90 *15 U.S.C. § 78dd-2*.

91 Second superseding indictment, Count 5.

Defendants attempt to portray the false shipping documents as a *product of* the bribes and argue that they therefore did [**46] not send the documents through interstate commerce "in furtherance" of bribes; rather, they argue, Defendants paid the bribes using cash in Haiti, and these cash bribes allowed ARI to carry a set of false documents with its Haitian-bound cargo. But the indictment alleges, and the evidence shows, a reverse causal chain: ARI used the false documents to calculate the bribes, sending the documents through interstate commerce "in furtherance" of the bribes. Under ARI's "Plan B," Theriot described in testimony how ARI based its bribes to customs officials on the shipping documents: ARI, in its false reports, reduced the quantity of rice that it was importing by 30 percent and paid customs officials 30 percent of this 30 percent reduction to induce the customs officials to continue to accept false documents. Joel Malebranche, a sales and plant manager for ARI in Haiti whose responsibility was to "clear the [ARI] vessels for customs," described in detail how the payments were made based on the false shipping documents. Under Plan B for underreporting the amount of rice imported to Haiti and paying customs officials to accept these underreported amounts, ARI sent two sets of documents for each [**47] shipment of rice. With the ship, they sent a stowage plan and invoice indicating the correct quantity of rice on board. Then, through DHL or Federal Express, they sent a set of false documents from Houston to Haiti, reporting lower quantities. These false documents, once they arrived in Haiti, allowed ARI employees to clear the vessel in port by writing a check; Kay calculated the amount to be paid by comparing the accurate and underreported quantities of rice. [*454] As an example of this system, Government Exhibit 1A showed the correct quantity of rice on board the vessel (7718 metric tons), while Exhibit 1C, accompanied by a Federal Express slip, showed a quantity of 6218 tons. Malebranche, when asked if he had to "make any payments to customs to cause them to accept these documents," responded that ARI had to make cash payments - which he clarified to consist of "a check to cash, which was then cashed at the bank" and used to pay the bribes - and affirmed that he used the "savings" number calculated by Kay (a fraction of the taxes saved from the underreported amounts [92]) to "calculate how much had to be paid to the officials . . . . One third goes to the officials; and two thirds comes [**48] to us, to Rice Corporation." Government Exhibit 1G showed an ARI check, based on the calculation of the savings from underreported rice quantities, written to bribe Haitian officials.

92 Government Exhibit 33, a January 20, 1998 e-mail from Kay, stated, "Share this with Joel then destroy." The exhibit shows the calculations that Kay used to determine, based on the "savings" from the underreported shipping quantities (sent via Federal Express or DHL from Houston to Haiti) as compared to the properly reported quantities (sent on the ship), the payments to customs officials.

The indictment, by alleging that the false documents transported by interstate means were transported "in furtherance" of bribes, accurately tracked the interstate commerce element of the FCPA and was supported by evidence from the case. It placed Defendants on notice as to the crime charged and allowed them to present an effective defense. The indictment and the evidence were therefore sufficient with respect to the interstate commerce element of the FCPA.

VI

During the SEC's investigation, Murphy was subpoenaed to produce documents and provide

testimony. He withheld several documents referring to payments to Haitian [**49] officials, and denied during testimony knowledge of payment to customs officials or of the falsification of shipping documents.

Murphy was convicted on the obstruction charge. [93] He argues that the district court abused its discretion by refusing to give a requested good-faith jury instruction on this count. Assuming that Murphy's proffered instruction is substantively correct, we find no abuse of discretion because Murphy's instruction was substantially covered by the actual charge. The district court used the pattern jury instruction, which explains that one element of obstruction is "[t]hat the defendant's act was done 'corruptly,' that is, that the defendants acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice." Murphy's proffered jury instruction would have added that "good faith on the part of the defendant is simply inconsistent with a finding that the defendant acted with the corrupt intent required . . . . A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or [**50] wrong."

93 *18 U.S.C. § 1505*.

The charge was sufficient without Murphy's requested instruction. While counsel understandably wanted the charge to contain the verbal footing for their close, the omission of those wished-for terms was not reversible error. The instruction given required the jury to find that Murphy "knowingly and dishonestly" lied to the SEC, a finding which leaves no room for "good faith" and "honesty." Murphy's argument for inclusion relies heavily on *Arthur* [*455] *Andersen LLP v. United States*, where the Supreme Court vacated an obstruction conviction because a jury instruction, as it read it, permitted the jury to convict where the defendant innocently impeded the government's fact-finding ability. [94] In *Arthur Andersen*, the district court departed from the pattern instruction, removing the word "dishonestly," and with it much of the good-faith defense. Because the district court here followed the pattern instruction, there was no danger under the charge as given that Murphy could have been convicted of violating *18 U.S.C. § 1505* without a corrupt intent. We AFFIRM Murphy's conviction on count 14 for obstruction of justice.

94 *Arthur Andersen LLP v. United States, 544 U.S. 696, 706-07, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005)*.

VII

Defendants [**51] argue that the district court erred in refusing to admit certified tax receipts on the grounds of inadequate authentication. These documents - consisting of "bordeaus" (customs documents) and memos - would have allegedly shown that following initial underpayments at port, Defendants later engaged in reconciliations with the Haitian government where they substantially paid their taxes owed. Defendants also allege that the bordeaus, which indicate the "amount of rice recorded" in addition to taxes paid, would demonstrate that they mis-reported quantities and underpaid taxes to a lesser extent than claimed by the Government.

Defendants obtained the documents and gave them to the Government several weeks before trial but then sent them back to Haiti for certification. They provided certified copies of the documents to the Government the day before trial. The Government objected to the documents' admission on the basis that the documents were certified by the brother of a co-conspirator in the case, that the Government had not had sufficient time to test the documents, and that the documents were originally accompanied by a post stating that they were "Received from Murphy," not from the [**52] individual who later certified the documents. The Government argued that the authentication issues were of particular concern because the case dealt with false documentation. Further, Defendants were unable to locate the originals of the documents or explain why they were unavailable. The district court refused to admit the documents and, although not providing an explicit reason, apparently did so under *Rule 403 of the Federal Rules of Evidence.* We review a district court's exclusion of relevant evidence under *Rule 403* for an abuse of discretion, [95] and, if we find an abuse of discretion, we find reversible error only if the ruling affected a substantial right. [96]

95 *United States v. Jimenez, 256 F.3d 330, 341 (5th Cir. 2001)*.

96 *Guy v. Crown Equip. Corp., 394 F.3d 320, 324 (5th Cir. 2004)*; *United States v. Hicks, 389 F.3d 514, 524 (5th Cir. 2004)*.

To preserve error in an evidentiary ruling excluding evidence under *Rule 103(a)*, a defendant must make an

"offer of proof" of evidence, meaning that "the substance of the evidence" must have been "made known to the court by offer" or must have been "apparent from the context within which questions were asked." [97] The defendant need not renew [**53] his objection to the exclusion of evidence "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence . . . ." [98] If Defendants had failed to make an offer of proof in this case, as the Government claims, then we would not address the court's decision to exclude the [*456] evidence. [99] However, a formal offer of proof was not necessary here. [100] By explaining to the court the substance of the proffered evidence (receipts indicating tax payments that Defendants made after shipments were complete) and why the court should admit these documents [101] (describing how the documents had been "subscribed and sworn - and certified by the United States vice counsel"), Defendants made a sufficient "informal" offer of proof. Although Defendants did not renew their attempt to admit the evidence in trial after the court's decision to exclude, the court definitively rejected the evidence in its pre-trial ruling. [102] No further objections by Defendants were necessary.

97 *FED. R. EVID. 103(a)(2).*

98 *FED. R. EVID. 103(a).*

99 *United States v. Winkle, 587 F.2d 705, 710 (5th Cir. 1979).*

100 *United States v. Clements, 73 F.3d 1330, 1336 (5th Cir. 1996)*; *see also United States v. Ballis, 28 F.3d 1399, 1406 (5th Cir. 1994)* [**54] ("[E]xcluded evidence is sufficiently preserved for review when the trial court has been informed as to what counsel intends to show by the evidence and why it should be admitted, and this court has a record upon which we may adequately examine the propriety and harmfulness of the ruling").

101 *See Ballis, 28 F.3d at 1406* (counsel must demonstrate "what counsel intends to show by the evidence and why it should be admitted.")

102 *See, e.g., Jimenez, 256 F.3d at 342-43 (5th Cir. 2001)* (although "[o]bjecting to an *in limine* order excluding testimony or evidence does not relieve a party from making an offer of proof" at trial, an informal offer of proof may be sufficient "when the trial court makes clear that it does not wish to hear further argument on the issue").

Although Defendants properly objected to the district court's ruling, the district court did not abuse its discretion here. Defendants attempted to introduce the documents at the last minute, and the court could have reasonably concluded that they would create confusion or unfair prejudice. Additionally, the Government provided evidence that the documents were certified by a potentially biased party. Because the district court [**55] did not provide reasons (certification, relevance, or others) for the exclusion of the evidence, however, we also determine whether, if there was any error, it was reversible.

Defendants failed to show that their "substantial rights" were affected by the district court's exclusion of the evidence, and therefore the court's decision did not result in reversible error. [103] To show that the court's decision to exclude the evidence affected their substantial rights, Defendants must demonstrate that the ruling "affected the outcome of the proceedings." [104] The jury here could still have found Defendants guilty if the court had admitted the tax documents. Regardless of whether the tax documents presented evidence that Defendants paid a substantial amount of their taxes in later reconciliations with the Haitian government, as Defendants claim, this fails to diminish the weight of the Government's ample evidence demonstrating that Defendants initially based their tax payments on false reports of the quantity of rice they imported, which Defendants then used to calculate bribes to customs officials and to ensure acceptance of further false reports.

103 *FED. R. EVID. 103 (a)* ("Error may not be [**56] predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.").

104 *United States v. Cuellar, 478 F.3d 282, 295 (5th Cir. 2007)* (internal quotations omitted).

Although Defendants also argue that some of the excluded documents demonstrate that they reported more of their rice imports than the Government alleged at trial, they do not suggest that the documents show that Defendants reported the [*457] amounts honestly, or in full. Rather, they allege that the excluded evidence would have indicated that "RCH received much less, if any, actual tax benefit from the commission payments it made." [105] The district court had no such evidence that the documents actually demonstrated this - nor do we. And Defendants' claims that they received less "tax benefit" than alleged by the Government skirt the central

matter of the case: Defendants underreported quantities of rice and made bribes to continue this false reporting, which in turn allowed for underpayment of taxes and customs duties at port. Whether Defendants actually obtained substantial tax benefits is a collateral matter. The district court did not abuse its discretion in excluding the evidence [**57] and, even if it had, Defendants have failed to demonstrate that the court's exclusion of the documents affected their substantial rights by changing the outcome of the case.

105 Murphy Br. at 24.

VIII

The foreign payments in this case came to the attention of the SEC after Kay voluntarily revealed ARI's conduct to company counsel. Kay, however, refused to speak to a second set of investigating lawyers and, when later subpoenaed, he invoked the *Fifth Amendment* and refused to testify regarding the payments. At trial, Kay disclosed his intent to introduce testimony of his pre-indictment reports at trial, to suggest that his disclosures evidence his belief that his actions had been lawful. Responding to Kay's *in limine* request, the district court defined Kay's exposure to cross examination should he so testify. The district court ruled that the Government would be able ask Kay whether he had appeared before the SEC and whether Kay had been asked to appear, but no more; and that the court would then if requested by Kay instruct the jury on Kay's *Fifth Amendment* rights.

In some circumstances, Kay's response to this question and the court's jury instructions may have improperly alerted the jury [**58] to Kay's invocation of his *Fifth Amendment* rights and, despite the court's proposed instruction to the jury in its ruling, would have violated the *Fifth Amendment* protection guaranteed by *Hale*. [106] But here the court's ruling was tailored to prevent Kay from selectively using his *Fifth Amendment* rights as a "sword," while simultaneously benefitting from the shield created by these rights, and allowed the Government to reasonably respond to Kay's testimony.

106 *United States v. Hale, 422 U.S. 171, 181, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975).*

Kay correctly asserts that *Hale* erects a fortress around the *Fifth Amendment* by barring mention in criminal court of a defendant's silence following arrest. [107] Without this protection, the right against self incrimination would be diluted by the high risk that juries might draw a "strong negative inference" from this silence. [108] Although we find, contrary to the Government's assertions, that Kay properly preserved the *Fifth Amendment* issue under *Luce*, we find no *Hale* violation here.

107 *Id.*
108 *Id. at 180.*

The Government argues that under *Luce*, Kay failed to preserve the *Fifth Amendment* issue. Its reliance is misplaced. As the Government admits in its own brief, "this case is not [**59] exactly like *Luce*"; in fact, this case bears little resemblance to *Luce*, where the Court found that a defendant must testify in order to preserve claims under *Rule 609(a)(1) of the Federal Rules of Evidence.* [109] Here, Kay [*458] did testify. Although he did not testify regarding his prior statements about payments, Kay's proposed testimony was clear: he proposed to testify that he voluntarily told the company's lawyers about the payments as evidence that he thought the payments were lawful. The court also made clear that it would allow the Government to elicit on cross that Kay refused to respond to the SEC and that it would instruct the jury that Kay had a constitutional right to not respond to the SEC. [110] It is true that the district court's initial ruling in *Luce* was "subject to change when the case unfold[ed]," but the Court there was particularly concerned with situations where "defendant's 'actual' testimony [may] differ[] from what was contained in the defendant's proffer." [111] This was not an issue here. Before Kay testified, counsel and the court had made clear the proposed testimony on voluntary disclosure of payments, as well as the court's proposed treatment of that testimony [**60] if he chose to offer it. In *Luce*, it was "unknowable." [112]

109 *Luce v. United States, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984).*
110 The district court made it clear in this case that its determination was final, and it made this clarification immediately prior to Kay's testimony. The court confirmed attorney Urofsky's clarification that, if Kay offered evidence that he revealed ARI's activities to his attorneys (thus suggesting he was honest), the court would allow the Government to ask Kay, "Did you talk to SEC?" The court further explained "And then it opens it up for two

questions from you [the Government] with my offer of an instruction . . . *that's the end of it.* Okay? No more." (emphasis added).

111 *Luce, 469 U.S. at 41*.

112 *Id*.

Kay preserved his *Fifth Amendment* claim. We find, however, that the district court did not err in its ruling. The Supreme Court has found that when a "prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel," [113] there is no violation of the *Fifth Amendment* privilege against self-incrimination. As Justice Stevens put it, "the protective shield of the *Fifth Amendment* should [not] be converted into a sword [**61] that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." [114] Applying the *Griffin* Court's prohibition against comment on *Fifth Amendment* silence to "forbid the prosecutor from fairly responding to an argument of the defendant by adverting to that silence" [115] would have been improper here.

113 *United States v. Robinson, 485 U.S. 25, 32, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988)*.

114 *United States v. Hasting, 461 U.S. 499, 515, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983)* (Stevens, J., concurring).

115 *Robinson, 485 U.S. at 34*.

Although Appellant's prior initial statements to his attorney may have been consistent with his later invocation of the *Fifth Amendment* privilege [116] (as required [*459] if he wished to receive *Hale* protection), [117] his pre-indictment silence, when a second set of lawyers wished to inquire further as to his earlier disclosures, is not consistent with his initial disclosure of information. Kay claims that the Government sought *Fifth Amendment* impeachment "only as a naked quid pro quo, to exact a price for Kay's testimony," [118] but the record shows otherwise. The Government plausibly argued before the district court that if Kay's attorney cross-examined him on his initial disclosure of ARI's bribery, [**62] this would suggest that Kay was "the reporter . . . the complainant . . . the one who started this whole thing" - the honest individual who initiated the events leading to the investigation. Kay would have been able to use this testimony to his advantage and block any cross examination as to his subsequent refusal to talk by later invoking the *Fifth Amendment*.

116 His post-indictment silence and pre-indictment statements appear to be consistent under all three of *Grunewald*'s tests for consistency. First, although Kay did not speak about the payments after being indicted and therefore made no "repeated assertions" of innocence during proceedings, his initial revelation of the payments demonstrates his belief that he was innocent. *Hale, 422 U.S. at 178* (citing *Grunewald v. United States, 353 U.S. 391, 422, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957))*. Second, Kay asserted his right to silence in a secretive proceeding by refusing to speak when subpoenaed. As the Court in *Grunewald* found: "Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination." *353 U.S. at 422-23*. Finally, Kay reasonably believed that he was a potential [**63] defendant when the SEC subpoenaed him, and it was therefore "natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself." *Id. at 423*.

117 *Grunewald, 353 U.S. at 418-20* (prosecution may impeach defendant regarding invocation of the *Fifth Amendment* privilege if defendant's use of the privilege is "in fact inconsistent" with his testimony").

118 Kay Repl. Br. at 27.

The district court properly tailored the Government's response to Kay's proposed use of the testimony by allowing the Government - if Kay testified as to his initial statements - to ask if Kay was summoned by the SEC and whether he responded but not about his refusal to respond to lawyers engaged by the company to conduct an internal investigation.

Thus, the court made a fair and proportional response in admitting and excluding some evidence. The court recognized here that Kay had a fundamental right to silence, yet he wished to invoke the positive inference of his disclosures by testifying about his disclosures and simultaneously avoid any mention of later silence that could damage this inference. Entirely preventing Government questioning related to Kay's disclosures [**64] *and* silence would have prevented the Government from sufficiently responding to Kay's testimony. We find no *Fifth Amendment* violation.

IX

Murphy contests the district court's decision to increase his sentence by two levels for an abuse of trust under *§ 3B1.3 of the Federal Sentencing Guidelines.* Although post-*Booker*, the Sentencing Guidelines are only advisory, [119] we must still ensure that the district court properly applied the guidelines when enhancing a sentence under the guidelines range. [120] Under *§ 3B1.3*, a defendant commits an abuse of trust by "abus[ing] a position of public or private trust, or us[ing] a special skill, in a manner that significantly facilitate[s] the commission or concealment of the offense . . . ."

119 *United States v. Booker, 543 U.S. 220, 246, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).*

120 *See, e.g., United States v. Villegas, 404 F.3d 355, 362 (5th Cir. 2005)* (per curium).

We read the abuse of trust standard as a two-part test, asking "(1) whether the defendant occupies a position of trust and (2) whether the defendant abused her position in a manner that significantly facilitated the commission or concealment of the offense." [121] We further define significant facilitation by determining "whether [**65] the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of her job." [122] Although in *Sudeen* we questioned the first prong and suggested that defendant need not "legitimately" occupy [*460] a position of trust, [123] we have not overruled this test and therefore apply it here. We review the court's legal interpretation of *§ 3B1.3 de novo*, with deference to the district court. [124] We also review the question of whether Defendants occupied a position of trust *de novo*, while we review the abuse of trust for commission or concealment of an offense for clear error. [125]

121 *United States v. Jobe, 101 F.3d 1046, 1065 (5th Cir. 1996)* (quoting *United States v. Fisher, 7 F.3d 69, 70-71 (5th Cir. 1993)).*

122 *Id.*

123 *United States v. Sudeen, 434 F.3d 384, 391-92 (5th Cir. 2005).*

124 *Id. at 391.*

125 *Id.* (citing *United States v. Hussey, 254 F.3d 428, 431 (2d Cir. 2001)).*

In reviewing the court's enhancement, we first determine whether an abuse of trust or skill is part of the FCPA (the base offense) or a specific characteristic of the FCPA. If so, the guidelines would not provide for enhancement based on an abuse of trust, as use of the enhancement would [**66] lead to double counting.

The FCPA does not require an individual to possess special skills to be culpable under the Act. The *Application Notes to § 3B1.3* define "special skill" as a "skill not possessed by members of the general public and usually requiring substantial education, training, or licensing." The FCPA contains no such requirements; it applies to "any officer, director, employee, or agent" of an issuer or "any stockholder thereof acting on behalf of such issuer," [126] whose actions fall under the remaining elements of the Act. Nor does the Act require a defendant to commit an abuse of trust.

126 *15 U.S.C. § 78dd-1(a).*

Although we have not yet addressed an abuse of trust enhancement under the FCPA, we have found in fraud and embezzlement cases that the base offense does not include an abuse of trust but rather a lesser standard of breach of trust. [127] We have also upheld abuse of trust enhancements in money laundering cases, finding that the conduct that led to the conviction under the base offense did not "itself . . . include any abuse of trust." [128] Like fraud, embezzlement, and money laundering offenses, Murphy's actions that led to his FCPA conviction - falsely reporting [**67] import quantities and bribing foreign officials to accept false reports - were not themselves an abuse of trust as defined by *§ 3B1.3*. Therefore, a sentence enhancement under *§ 3B1.3* is not "double counting" in this context.

127 *See United States v. Buck, 324 F.3d 786, 792-93 (5th Cir. 2003)* (discussing cases where the Fifth Circuit has affirmed abuse of trust enhancements in fraud sentences, and determining that "*3B1.3* may apply to embezzlement convictions"). Under fraud and embezzlement, the court should distinguish "between the breach of trust necessary . . . and more egregious conduct and discretion necessary to trigger an abuse of trust enhancement." *Id. at 793*.

128 *United States v. Powers, 168 F.3d 741, 751 (5th Cir. 1999).*

Under the two-prong test for abuse of trust under *§ 3B1.3*, Murphy occupied a position of trust with respect to the Haitian government. Murphy errs in arguing that the abuse of trust enhancement only applies when a

defendant abuses "a position of trust vis-a-vis the victim of the crime." As we noted in *Buck*: "We have never held . . . nor do the guidelines explicitly require, that the determination whether a defendant occupied a position of trust must be assessed [**68] from the perspective of the victim." [129] In that case, we upheld the defendant's sentence enhancement because she violated her position of trust with respect to the government. [130]

129 *Buck, 324 F.3d at 794*.

130 *Id. at 795*.

[*461] We have also applied *§ 3B1.3* enhancements where the defendant's position of trust did not apply to the main victims of the crime, but rather to collateral victims. In *Sidhu*, we affirmed a doctor's conviction for defrauding the government and insurance companies by mis-reporting patient services and over-billing patients. The doctor had a position of trust with respect to the patients, yet the lower court based his conviction on government and insurance company fraud. [131] We have interpreted *Sidhu* to permit enhancement under *§ 3B1.3* "whenever *any* victim of a criminal scheme placed the defendant in a position of trust that significantly facilitated the crime." [132] Here, Murphy, as the president and CEO of ARI, maintained a position of trust with respect to the Haitian government as well as ARI's shareholders. Even if the shareholders are not primary victims of the crime charged, Murphy harmed shareholders by conducting illegal foreign activities on behalf of the corporation. [**69]

131 *United States v. Sidhu, 130 F.3d 644, 647, 655-56 (5th Cir. 1997)*.

132 *Buck, 324 F.3d at 795* (emphasis added).

Murphy, in occupying a position of trust, maintained a position superior to that of all other individuals with a similar ability to commit or conceal offenses. As a leader within the corporation, the record shows that Murphy authorized employees to pay "commissions" (bribes) to Haitian officials to induce these officials to accept underreported quantities of rice imports. [133] In doing so, Murphy "significantly facilitated the commission" of the FCPA offense. The district court therefore committed no error in applying the *§ 3B1.3* enhancement for abuse of a trust position to Murphy's sentence, and we AFFIRM the sentencing enhancement.

133 *See, e.g.*, Government Exhibit 82, E-mail from Douglas Murphy to ARI employees and David Kay (Dec. 29, 1998) (approving a $ 40,000 commissions payment to Haitian officials); Testimony of Lawrence Theriot (describing conversations with Kay and Murphy regarding ways to "shrink" the cargo and reduce tax payments under "Plan B").

X

We AFFIRM conviction of Defendants on all counts.

UNITED STATES OF AMERICA - against - VIKTOR KOZENY, FREDERIC BOURKE, JR. and DAVID PINKERTON, Defendants.

05 Cr. 518 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

493 F. Supp. 2d 693*; *2007 U.S. Dist. LEXIS 45590

June 21, 2007, Decided
June 21, 2007, Filed

SUBSEQUENT HISTORY: [**1]
Amended by, On reconsideration by *United States v. Kozeny, 493 F. Supp. 2d 693, 2007 U.S. Dist. LEXIS 52758 (S.D.N.Y., 2007)*

DISPOSITION: Defendants' motions to dismiss were granted.

COUNSEL: For Frederic A. Bourke, Jr.: Dan K. Webb, Esq., J. David Reich, Esq., Winston & Strawn LLP, Chicago, Illinois; Robert J. Cleary, Esq., Matthew S. Queler, Esq., Emily Stern, Esq., Proskauer Rose LLP, New York, New York.

For David B. Pinkerton: Barry H. Berke, Esq., Paul Schoeman, Esq., Jeffrey S. Trachtman, Esq., Kramer Levin Naftalis & Frankel LLP, New York, New York.

For the Government: Jonathan S. Abernethy, Assistant United States Attorney, New York, New York; Mark F. Mendelsohn, Deputy Chief, Fraud Section, Robertson Park, Assistant Chief, Fraud Section, United States Department of Justice, Washington, DC.

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

OPINION BY: Shira A. Scheindlin

OPINION
[*697]

OPINION AND ORDER

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

I. INTRODUCTION

Viktor Kozeny, Frederic A. Bourke, Jr., and David B. Pinkerton are charged with participating in a scheme to bribe senior government officials in the Republic of Azerbaijan ("Azerbaijan") in order to ensure the privatization of the State Oil Company of the Azerbaijan Republic ("SOCAR") and to ensure that each of the defendants and others would be able to participate in and profit from the privatization. The grand jury returned the Indictment containing these charges on May 12, 2005, but it remained sealed under October 6, 2005. On October 20, 2006, Pinkerton and Bourke ("defendants") moved separately pursuant to *Federal Rule of Criminal Procedure 12* to dismiss various counts of the Indictment as time-barred and for failure to adequately charge federal offenses. [1]

1 Pinkerton and Bourke also moved for a bill of particulars. That aspect of the motion has been resolved.

These motions raise various issues of law that are of

first [**2] impression in the Second Circuit. Not only is there a dearth of Second Circuit law on these issues, but there has been surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years -- especially with respect to the specific questions raised by these motions. Indeed, other than a single circuit court decision and a district court case citing thereto -- neither of which analyzed the relevant subsection of the statute and neither of which binds this Court -- no case has addressed the statute of limitations challenge raised herein. As a result, the Court was faced with the difficult task of addressing several first-impression issues of statutory interpretation. After careful consideration, for the reasons discussed below, both motions to dismiss are granted on the ground that the Indictment is time-barred as to all counts except the false statement counts that defendants do not challenge. In the interest of completeness, I also address defendants' remaining contentions in support of their motions and find them all to be without merit.

II. BACKGROUND

A. Factual Allegations [2]

> 2 Unless otherwise noted, the facts summarized in this section are taken from [**3] the Indictment.

In the 1990's, Azerbaijan undertook to privatize certain of its state-owned enterprises. [*698] The privatization process was governed principally by the State Privatization Program from 1995 to 1998. Certain industries, however, such as the oil industry, could be privatized only at the direction of the president of Azerbaijan. SOCAR, which held Azerbaijan's oil and gas reserves and facilities, was one of the state-owned companies that could be privatized only by a special decree from the president. Pursuant to the privatization program, each Azeri citizen received, at no cost, a booklet containing four voucher coupons, which were freely tradeable bearer coupons that could be used to bid for shares of privatized companies at auction. Foreigners who wished to participate in the privatization or use vouchers at auction were required to purchase an option for each voucher coupon, which were sold at an official government price by the Azerbaijan State Property Committee (the "SPC"), which principally administered the privatization process.

1. Kozeny and the Investment Consortium

Viktor Kozeny is a Czech national, Irish citizen and resident of the Bahamas. In or about July 1997, Kozeny [**4] created Oily Rock Group Ltd. ("Oily Rock") and Minaret Group Ltd. ("Minaret"), both of which are organized under the laws of the British Virgin Islands with their principal place of business in Baku, Azerbaijan. Kozeny was President and Chairman of the Board of both Oily Rock and Minaret. Kozeny exercised effective control over both companies. For the benefit of its shareholders, which consisted of individuals and entities, Oily Rock entered into co-investment agreements with institutional investors to pursue a joint investment strategy in acquiring, safeguarding, and exercising at auction Azeri privatization vouchers and options for the primary objective of acquiring a controlling interest in SOCAR. Minaret engaged in various investment banking activities, including the acquisition and safeguarding of Azeri privatization vouchers and options on behalf of the parties to the co-investment agreements, which included Minaret itself (collectively, the "investment consortium").

Two members of the investment consortium were Omega Advisors, Inc. ("Omega") and Pharos Capital Management, L.P. ("Pharos"). Omega was a hedge fund organized as a corporation under Delaware law with its principal [**5] place of business in New York, New York. Pharos was an investment fund organized as a limited partnership under Delaware law with its principal place of business in New York, New York until September 1998, then in Red Bank, New Jersey. Omega and Pharos, through their respective subsidiaries and affiliates, each entered into a co-investment agreement with Oily Rock and Minaret on or about April 30, 1998.

2. The Alleged Bribery Scheme

Beginning in August 1997, and continuing until 1999, defendants made a series of corrupt promises, payments, and offers of payments to Azeri government officials, comprised of a senior official of the Azeri government, a senior official of SOCAR, and two senior officials of the SPC (collectively, the "Azeri Officials"). The purposes of these payments included: (1) "to induce Azeri Officials to allow the investment consortium's continued participation in privatization;" (2) "to ensure the privatization of SOCAR and other valuable Azeri State assets;" and (3) "to permit the investment consortium to acquire a controlling interest in SOCAR and other valuable Azeri State assets." [3] The bribes were

made in the form of cash, shares of profits from SOCAR's privatization, [**6] vouchers and [*699] options, wire transfers, stock, personal items, medical expenses and other things of value.

3 Indictment P 19.

3. Bourke

Frederic A. Bourke, Jr. is a United States citizen. Bourke invested in Azeri privatization with Kozeny. Bourke was the principal shareholder of an investment vehicle named Blueport International, Ltd. ("Blueport"). In or about March and July 1998, Blueport invested a total of eight million dollars in Oily Rock, of which 5.3 million dollars were Bourke's personal funds. Bourke made these investments based in part on his understanding that Kozeny had paid and would pay bribes to Azeri officials to ensure SOCAR's privatization and the investment consortium's participation in the privatization.

Bourke assisted Kozeny in arranging for medical treatment for two different Azeri Officials in New York on three separate occasions. The treatments were paid for by Oily Rock and Minaret.

4. Pinkerton

Pinkerton is a United States citizen. In 1998, Pinkerton was the head of American International Group, Inc.'s Global Investment Corporation ("AIG"), a unit that managed billions of dollars of American International Group Inc.'s funds. In late March 1998, Clayton Lewis, an investment [**7] manager at Omega, contacted Pinkerton to solicit AIG's participation in a deal involving privatization in Azerbaijan, which had been brought to Omega by Kozeny a few weeks earlier. AIG invested approximately $ 15 million in June 1998 pursuant to a co-investment agreement with Oily Rock and Minaret pursuant to which the parties agreed to pursue a joint strategy to acquire and exercise vouchers and options to gain a controlling interest in SOCAR. AIG wired the funds from accounts in New York to accounts controlled by Kozeny in Switzerland. Pinkerton caused AIG to make this investment based in part on his understanding that Kozeny had paid and would pay bribes to the Azeri Officials to ensure the privatization of SOCAR and the investment consortium's participation in the privatization.

B. Official Requests for Evidence to Foreign Governments

On October 29, 2002, the Department of Justice's Office of International Affairs (the "OIA") submitted an official request to the Netherlands seeking, *inter alia*, bank account records from certain Dutch banks that "received wire transfers for the benefit of third parties and on behalf of an Azeri government official." [4] On January 13, 2003, OIA submitted [**8] a separate official request to Switzerland seeking, *inter alia*, records of bank accounts held by Oily Rock, Minaret and certain Azeri officials, and requested that a search be conducted of a law firm in Switzerland that represented Kozeny in the Azeri investment.

4 Affidavit of FBI Special Agent George P. Choudras P 22(a).

On July 21, 2003, the government applied for an order suspending the running of the statute of limitations based on these two official requests. On July 22, 2003, Judge George Daniels of the Southern District of New York granted the application, finding that "[i]t reasonably appears, and reasonably appeared at the time the official requests were made, that . . . evidence is, or was" in the Netherlands and Switzerland (the "July 22, 2003 Order"). [5] Judge Daniels further found that at the time of the July 22, 2003 Order, no final action had been taken by either the Netherlands or Switzerland on those official requests. [6] [*700] The July 22, 2003 Order specified that the period of suspension of the statute of limitations "shall begin on the dates on which the official requests were made" and end upon the earlier of final action by both the Netherlands and Switzerland, or three [**9] years. [7] The Netherlands produced responsive documents on November 8, 2005. Switzerland produced documents on several occasions in partial execution of the request, the last of which was on September 10, 2004. [8]

5 July 22, 2003 Order, Declaration of Barry H. Berke, counsel for Pinkerton ("Berke Decl.") Ex. F.

6 *See id.*

7 *Id.*

8 There is a dispute over whether the last transmittal letter sent on September 10, 2004 constitutes a "final action" by the Swiss government. For the reasons discussed below, however, the date of final action by the Swiss government is irrelevant.

C. Procedural History

The grand jury returned the Indictment on May 12, 2005, but it remained sealed under October 6, 2005. On October 20, 2006, Pinkerton moved pursuant to *Federal Rule of Criminal Procedure 12* to dismiss Counts One, Five, Eighteen, Nineteen, Twenty-One and Twenty-Four of the Indictment as time-barred and for failure to adequately charge federal offenses. At the same time, Bourke moved pursuant to *Rule 12* to dismiss Counts One, Four, Five, Ten, Eleven, Twelve, Fifteen, Twenty, Twenty-One, Twenty-Two and Twenty-Five of the Indictment on the same two grounds.

III. LEGAL STANDARD

A. Motion to Dismiss an Indictment

Indictments are governed by *Federal Rule of Criminal Procedure 7(c)*, which requires that an indictment contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." [9] "It is well settled that '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.'" [10] An indictment must charge a crime "with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." [11] "Nevertheless, an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." [12] A defendant may not challenge an indictment on the ground that it is not supported by adequate or competent evidence. [13] In evaluating a motion to dismiss [**10] an indictment under *Rule 12*, the Court must treat the allegations in the indictment as true. [14]

9 *Fed. R. Crim. P. 7(c).*

10 *United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998)* (quoting *Hamling v. United States, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)*).

11 *Id.* (quotation omitted).

12 *Id.* (quotation omitted).

13 *See Costello v. United States, 350 U.S. 359, 363, 76 S. Ct. 406, 100 L. Ed. 397, 1956-1 C.B. 639 (1956). See also Alfonso, 143 F.3d at 777* ("[T]he sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.").

14 *See Boyce Motor Lines v. United States, 342 U.S. 337, 343 n.16, 72 S. Ct. 329, 96 L. Ed. 367 (1952)*; *United States v. Velastegui, 199 F.3d 590, 592 n.2 (2d Cir. 1999).*

B. Statutory Interpretation

When interpreting a statute, the well-established rules of statutory construction instruct that "the inquiry begins with the plain language of the statute and ' [*701] where the statutory language provides a clear answer, it ends there as well.'" [15] Courts must read congressional enactments according to their plain meaning unless such reading would lead to an absurd result. [16] Where no definition is provided for a term in the statute, courts first "consider the ordinary, common-sense meaning of the words." [17] Moreover, "a statute is to be considered in all its parts [**11] when construing any one of them." [18] If, and only if, the statutory text is ambiguous should the court turn to the legislative history to ascertain Congress's intent. [19] The rule of lenity applies only where there is an ambiguity in a criminal statute and where resort to any and all other sources still results in a tie as to the proper interpretation. [20]

15 *Peralta-Taveras v. Gonzales, F.3d , No. 06-2125, 2007 U.S. App. LEXIS 11956, 2007 WL 1469423, at *2 (2d Cir. May 22, 2007)* (quoting *Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999)*). *Accord United States v. Razmilovic, 419 F.3d 134, 136 (2d Cir. 2005)* ("'Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well.'" (quoting *United States v. Gayle, 342 F.3d 89, 92 (2d Cir. 2003)*)).

16 *See United States v. Schreiber, 191 F.3d 103, 106 (2d Cir. 1999)*; *United States v. Hendrickson, 26 F.3d 321, 336 (2d Cir. 1994).*

17 *United States v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000).*

18 *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 36, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998).*

19 *See Xiao Ji Chen v. United States Dep't of Justice, 471 F.3d 315, 326 (2d Cir. 2006)* (citing *Watt v. Alaska, 451 U.S. 259, 266, 101 S. Ct.*

1673, 68 L. Ed. 2d 80 (1981) ("The circumstances [**12] of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect."); *United States v. Pabon-Cruz, 391 F.3d 86, 98 (2d Cir. 2004)* (noting "the need to consult . . . legislative history" when statutory language is ambiguous)). *See also Dauray, 215 F.3d at 264* ("When the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, [courts] [] resort to legislative history.").

20 *See Johnson v. United States, 529 U.S. 694, 713 n.13, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000)* ("Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved."); *Sash v. Zenk, 439 F.3d 61, 64 (2d Cir. 2006)* ("The rule of lenity concerns situations in which a legislature fails to give notice of the scope of punishment by leaving 'a grievous ambiguity or uncertainty in the language and structure of the [statute], such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute.'" (quoting *Chapman v. United States, 500 U.S. 453, 463, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991)*)).

C. Statute of Limitations

1. In General

Where no statute speaks to the limitations period that applies for a particular [**13] offense, "a 'catchall' statute operates" to supply a five-year statute of limitations for noncapital offenses. [21] That catchall statute, *section 3282 of title 18 of the United States Code*, provides, in pertinent part: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." [22] The parties do not dispute that *section 3282* governs all of the counts at issue on the motions to dismiss. [23]

21 *Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 157, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)* (citing *18 U.S.C. § 3282*).

22 *18 U.S.C. § 3282(a)*.

23 Neither defendant moves to dismiss the false statement counts, which are indisputably timely.

[*702] "Statutes of limitations in criminal cases normally begin to run when the crime is 'complete.'"[24] With respect to conspiracy offenses, the government must "allege and prove at least one overt act that occurred" within the statute of limitations. [25] If the indictment is not found by the last day of the statute of limitations, then the indictment will be time-barred unless the government [**14] can establish that it effectively tolled the statute of limitations. [26]

24 *United States v. Mercedes, 287 F.3d 47, 54 (2d Cir. 2002)* (quoting *Toussie v. United States, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970)*).

25 *United States v. Milstein, 401 F.3d 53, 71 (2d Cir. 2005)*. Moreover, "[f]oreseeable acts of one co-conspirator in furtherance of the conspiracy are attributable to all co-conspirators." *Id. at 72* (citing *United States v. Ben Zvi, 242 F.3d 89, 97 (2d Cir. 2001)* (statute of limitations depends on timely overt act by either the defendant or a co-conspirator)). Absent evidence that defendants ceased to be co-conspirators, which is an affirmative defense, any overt act by any of the co-conspirators in furtherance of the conspiracy within the limitations period will make the conspiracy charges timely against all defendants.

26 *See United States v. Florez, 447 F.3d 145, 149 (2d Cir. 2006)* (in the context of tolling under *section 3290*, "it is the government's burden to show that a defendant was 'fleeing from justice'" by a preponderance of the evidence).

2. *Section 3292* Tolling

Section 3292 of title 18 is titled "Suspension of limitations to permit United States to obtain foreign evidence" and provides, [**15] in pertinent part:

> (a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or

> reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.
>
> * * *
>
> (b) Except as provided in *subsection (c)* of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.
>
> (c) The total of all periods of suspension under this section with respect to an offense--
>
> > (1) shall not exceed three years; and
> >
> > (2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section. [27]

An official request is [**16] defined in the statute as "a letter rogatory, a request under a treaty or convention, or any other request for evidence" made by a court or a criminal law enforcement authority of the United States to a court or other authority of a foreign country. [28]

27 *18 U.S.C. § 3292*.
28 *Id. § 3292(d)*.

D. Conspiracy

The crime of conspiracy under *section 371* of title 18 consists of an agreement between two or more persons to commit a criminal offense, and an overt act in furtherance of that agreement. [29] *Section* [*703] *371* provides, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. [30]

"The elements of a *[section] 371* conspiracy are clearly established: (1) an agreement between two or more persons to commit a specified federal offense, (2) the defendant's knowing and willful joinder in that common agreement, and (3) some conspirator's commission of an overt act in furtherance of the agreement." [31] "Where [**17] the conspiracy involves a specific-intent crime, 'the government [must] establish beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute.'" [32]

29 *See United States v. Ceballos, 340 F.3d 115, 123 (2d Cir. 2003)* ("In order to prove a conspiracy in violation of *18 U.S.C. § 371*, the government must show that two or more persons entered into an agreement to commit an offense against the United States and that an overt act in furtherance of the conspiracy was committed.").
30 *18 U.S.C. § 371*.
31 *United States v. Snype, 441 F.3d 119, 142 (2d Cir. 2006). Accord Ceballos, 340 F.3d at 123-24* ("In order to convict a given defendant of conspiracy, the government must prove that he knew of the conspiracy and joined it with the intent to commit the offenses that were its objectives, that is, with the affirmative intent to make the conspiracy succeed" (citations omitted)).
32 *Ceballos, 340 F.3d at 124* (quoting *United States v. Samaria, 239 F.3d 228, 234 (2d Cir. 2001))*.

E. The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act of 1977, as amended (the "FCPA") [33] was enacted "to criminalize illicit payments to foreign public officials by United States [**18] businesses and individuals." [34] "The FCPA makes it illegal to bribe foreign government officials to obtain or retain business, or to direct business to another person." [35]

33 *15 U.S.C. § 78dd-1 et seq.*

34 *In re Grand Jury Subpoena dated August 9, 2000, 218 F. Supp. 2d 544, 550 (S.D.N.Y. 2002)* (citing *15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-2, 78ff (1997)*, as amended by the International Anti-Bribery and Fair Competition Act of 1998, *15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff*).

35 *Id.* (citing *15 U.S.C. § 78dd-2(a)*).

Section 78dd-2(a) of the FCPA provides, in pertinent part:

> It shall be unlawful for any domestic concern, . . . or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--
>
> (1) any foreign official for purposes of--
>
> (A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign [**19] official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
>
> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or [*704] with, or directing business to, any person . . . . [36]

The statute provides the following criminal penalties for violations of the FCPA:

> Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates *subsection (a)* or *(i)* of this section shall be fined not more than $ 100,000 or imprisoned not more than 5 years, or both. [37]

36 *15 U.S.C. § 78dd-2(a).*

37 *Id. § 78dd-2(g)(2)(A).*

1. Mens Rea

a. Corruptly

The term "corruptly" is not defined in the FCPA. However, the Second Circuit has defined that term as it is used in the FCPA as follows: "The word 'corruptly' in the FCPA signifies, in addition to the element of 'general intent' present in most criminal statutes, a bad or wrongful purpose and [**20] an intent to influence a foreign official to misuse his official position." [38] The court added, however, that "there is nothing in that word or any thing else in the FCPA that indicates that the government must establish that the defendant in fact knew that his or her conduct violated the FCPA to be guilty of such a violation." [39]

38 *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber, 327 F.3d 173, 183 (2d Cir. 2003).*

39 *Id.*

b. Willfully

The term "willfully" appears in the provision of the FCPA dealing with criminal penalties, as opposed to the section defining the prohibited conduct in which "corruptly" appears. The statute does not define willfully, nor has the Second Circuit defined the term as it is used

in the FCPA. [40] The Second Circuit, however, has defined the term in the analogous securities context, where in order to establish a criminal violation, as opposed to civil violation, of the securities laws, the government "must show that the defendant acted willfully." [41] In that context, the court "defined willfulness as a realization on the defendant's part that he was doing a wrongful act under the securities laws in a situation where the knowingly wrongful act involved a significant risk of effecting the violation that has occurred." [42] Moreover, the Supreme Court has stated with regard to other criminal statutes, that "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" [43]

40 The Supreme Court has noted in other contexts that "the word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States, 524 U.S. 184, 191, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998)* (citation omitted).

41 *United States v. Cassese, 428 F.3d 92, 98 (2d Cir. 2005)* (citing *15 U.S.C. § 78ff(a)* ("Any person who willfully violates any provision of this chapter . . . shall upon conviction be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both . . . .")).

42 *Id.* (quotations and citations omitted).

43 *Bryan, 524 U.S. at 191-92* (quoting *Ratzlaf v. United States, 510 U.S. 135, 137, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)*). The Court also held that to establish "willful" violation of a statute did not require that the defendant know *which* statute he was violating, but rather only that the conduct was unlawful. In so holding, the Court distinguished the statute at issue, which dealt with the sale of firearms without a license, from the Court's interpretation of "willfully" in two other contexts: cases involving willful violations of the tax laws and willful violations in the context of structuring cash transactions to avoid a reporting requirement, where the Court required the jury to find that the "defendant was aware of the specific provision . . . that he was charged with violating." *Id. at 194*. Both contexts, the Court explained, involve "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." No such concern exists here, and thus, like the sale of firearms without a license, there is no need to read into the FCPA an "exception to the traditional rule that ignorance of the law is no excuse."

[*705]

2. Business Nexus Element

The phrase "in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person" found in the FCPA is commonly referred to as the "business nexus element." There is no definition of obtaining or retaining business in the FCPA. Nor has the Second Circuit had occasion to define the contours of the business nexus element. The Fifth Circuit, however, [**21] recently addressed this element. In *United States v. Kay*, the Fifth Circuit, after what the court itself described as an "ad nauseum" review of the legislative history of the FCPA upon its finding the terms "obtaining or retaining business" ambiguous, held that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person." [44] The court noted that Congress's concern in enacting the FCPA was the prohibition of rampant foreign bribery by domestic business entities, which included "both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country." [45] The court then held that Congress intended to prohibit "illicit payments made to officials to obtain favorable but unlawful tax treatment." [46]

44 *359 F.3d 738, 755 (5th Cir. 2004)*.

45 *Id. at 755-56*.

46 *Id. at 756*. *But see id.* ("It still must be shown that the bribery was intended to produce an effect -- here, through tax savings -- that would assist in obtaining or retaining business." (quotation omitted)).

The [**22] Fifth Circuit found that a broad reading of the business nexus element was supported by narrow statutory exceptions to the FCPA: "by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country." [47] The court's broad reading was also supported by "Congress's intention to

implement the [Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions], a treaty that indisputably prohibits any bribes that give an advantage to which a business entity is not fully entitled." [48]

47 *Id.*
48 *Id.*

I also find that the FCPA's business nexus element was intended to be construed broadly. I will address defendants' arguments as to the sufficiency of the Indictment below accordingly.

F. The Travel Act

The Travel Act applies to any person or business who travels or uses the mail or any facility in interstate or foreign commerce with the intent to: (1) distribute the proceeds of any unlawful activity; [**23] or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity. [49] A violation of the Travel Act [*706] occurs where that person or business thereafter performs or attempts to perform an unlawful activity, which includes violating the FCPA. [50] "To prove a violation of the Travel Act, the government [is] required to establish that [defendant]: (1) used a facility of interstate or foreign commerce; (2) with intent to commit any unlawful activity . . . ; and (3) thereafter performed an additional act to further the unlawful activity." [51]

49 *See 18 U.S.C. § 1952*.
50 *See id. § 1952(b)(i)* (defining "unlawful activity" as including "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States" or any act which is indictable under *section 1956* or *1957*).
51 *United States v. Salameh, 152 F.3d 88, 152 (2d Cir. 1998)* (citing *United States v. Jenkins, 943 F.2d 167, 172 (2d Cir. 1991)*).

G. Money Laundering

The crime of money laundering under *section 1956* of title 18 prohibits the "transport[ation], transmi[ssion], [**24] or transfer[], or attempt[] to transport, transmit, or transfer [of] a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . . with the intent to promote the carrying on of a specified unlawful activity." [52] The elements of a money laundering offense do not include, or even implicate, the capacity to commit the underlying unlawful activity. [53] Conspiracy to commit money laundering is also criminalized under *section 1956*. [54]

52 *18 U.S.C. § 1956(a)(2)(A).*
53 *See United States v. Cruz, 993 F.2d 164, 167 (8th Cir. 1993)* ("For the government to prove a violation of *section 1956(a)(1)(A)(i),* the evidence must establish (1) that the defendant conducted a financial transaction which involved the proceeds of unlawful activity; (2) that he knew that the property involved in the transaction was proceeds of some form of specified unlawful activity; and (3) that he intended to promote the . . . unlawful activity." (quotation marks and alterations omitted)).
54 *Section 1956(h)* provides:

> Any person who conspires to commit any offense defined in this section or [**25] *section 1957* shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

IV. DISCUSSION

A. Statute of Limitations

The majority of the conduct charged in the Indictment occurred between March and July 1998. Accordingly, the five-year statute of limitations for those offenses would have run sometime between March and July 2003. Because the Indictment was not returned until May 12, 2005, all of those offenses are time-barred unless the government can demonstrate that the statute of limitations was tolled. Here, the government attempts to utilize *section 3292* to toll the statute of limitations based on the government's official requests for foreign evidence from the Netherlands and Switzerland.

1. Suspension Period Start Date: Official Request

Defendants argue that in order to suspend the statute of limitations under *section 3292*, the government must make the necessary application to the Court before the five-year limitations period expires. Defendants acknowledge that the *section 3292* tolling period begins on the date of the official request to a foreign government -- here October 29, 2002 -- the date of the request for [**26] evidence to the Netherlands. [55] Defendants argue, however, that [*707] because the limitations period may not be tolled absent a court order, only the court's order can *suspend the running* of the statute of limitations. Accordingly, defendants argue the statute must still be running at the time of the application to the court for there to be a suspension of the limitations period. Defendants rely on legal and lay dictionary definitions of "suspend" to reach the result that one cannot "suspend the running" [56] of the statute after the statute has already expired. In opposition, the government argues that because the statute provides that the "*period of suspension*" begins on the date of the official request to the foreign government, rather than on the date that the court grants the tolling application, the government may invoke *section 3292* so long as the official request is made before the statute of limitations period expires.

55 The government's request to Switzerland was dated January 13, 2003, but this date is irrelevant for purposes of beginning the tolling period.

56 *18 U.S.C. § 3292(a)(1)*.

At the outset, I am strongly inclined to agree with defendants that the plain meaning of the statute's [**27] provision that "the district court . . . shall suspend the *running* of the statute of limitations" is unambiguous and requires that the application to the court be made and the court's order be issued before the statute of limitations has run, which would end the matter. However, there is other language that is in tension with those terms and arguably renders the statute ambiguous. *Section 3292* states in pertinent part: "Upon application of the United States, *filed before return of an indictment*, . . . the district court ... shall *suspend the running of the statute of limitations* for the offense . . . ." [57] The two clauses that are in tension are "before return of an indictment" and "suspend the running of the statute of limitations." The former implies that the only time restraint placed on the government's application to the court is that it must be made before the grand jury returns the indictment. The latter implies that in order for there to be a suspension the statute of limitations must *still be running* at the time that both the application is made and the court grants the application. In light of this tension, and in an abundance of caution, I find that *section 3292* is ambiguous, [**28] and turn to its legislative history for guidance on its proper interpretation.

57 *Id.* (emphasis added).

The legislative history of *section 3292* is sparse. The legislative record states that the Bill of which *section 3292* was a part "permits a federal court, upon application of the prosecutor, to suspend the running of the statute of limitations for such time as is necessary (up to 3 years) to obtain evidence from a foreign country" and also that *section 3292* "authorizes a federal court, upon application of a federal prosecutor that is made before the return of an indictment and that indicates that evidence of an offense is located in a foreign country, to suspend the running of the applicable statute of limitation." [58] The fact that the legislative history twice refers to the authority of the court to order the suspension reinforces the principle that only court action will toll the statute of limitations.

58 H.R. Rep. No. 98-907 (1984), reprinted in 1984 U.S.C.C.A.N. 3578.

A separate subsection of *section 3292* provides further insight. *Section 3292(b)* provides that the tolling period "shall begin on the date on which the official request is made." [59] Congress addressed the *calculation* of [**29] the tolling period in subsection *3292(b)* -- a different subsection than the one at issue here, which sets forth how the government can *obtain* the toll. Reading the statute as a whole, as I must, I find that the structure of *section 3292* strongly supports the interpretation [*708] that the court order itself -- not the official request to the foreign government -- tolls the statute of limitations and that the toll must be ordered before the statute of limitations expires.

59 *Id. § 3292(b)*.

As a result, the words of the statute itself, another subsection of the statute and the legislative history of the statute all confirm that *section 3292* only permits a court to suspend the running of the statute of limitations when the government applies for and obtains a suspension order prior to the expiration of the limitations period. The

Court's reading is further supported by the policy of statutes of limitations and another canon of statutory construction, the doctrine of constitutional avoidance.

First, the Court's understanding of *section 3292* is in line with the general policy underlying statutes of limitations for criminal offenses. "Although, in some instances, criminal statutes of limitations operate [**30] to preclude the prosecution of criminal acts, they 'have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.'" [60] Moreover, criminal statutes of limitations ensure the defendant's right to a fair trial, as they are implemented by the legislature to ensure 'the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defense.'" [61] "Additionally, they create a means of predictability by specifying the point at which 'a defendant's right to a fair trial would be prejudiced.'" [62] These policies weigh in favor of reading *section 3292* to require that the government's application and the court's order be made not only before the return of the indictment, but also before the statute of limitations has run.

60 *United States v. Torres, 318 F.3d 1058, 1062-65 (11th Cir. 2003)* (quoting *Toussie v. United States, 397 U.S. 112, 114-15, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970)*).

61 *Id.* (quoting *United States v. Meador, 138 F.3d 986, 994 (5th Cir. 1998))*.

62 *Id.* (quoting *Meador, 138 F.3d at 994*).

Second, the Court's reading is supported by the doctrine of constitutional avoidance in statutory construction. To read *section 3292* [**31] as the government suggests would permit *section 3292* to be used as a tool to revive time-barred offenses and would treat the legislatively-mandated court procedure as a post-hoc judicial rubber-stamp for prosecutorial actions. Not only does such a result not comport with this Court's understanding of the statute and its purpose, but such a reading would raise several serious constitutional questions of Due Process and retroactivity under the Ex Post Facto Clause. Under the doctrine of constitutional avoidance, however, I need not reach those issues. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." [63] The Court's reading is in line with this principle and saves *section 3292* from a potentially meritorious attack on constitutional grounds.

63 *Jones v. United States, 529 U.S. 848, 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000)*.

The Court is aware that two courts -- the Ninth Circuit and the District of Columbia following the Ninth Circuit -- have addressed this issue and reached the opposite conclusion than this Court reaches here. [64] However, a careful review [**32] of both decisions reveals that those courts did not engage in any meaningful analysis of the statute, nor did they engage in any review of the legislative history. Their analyses [*709] began and ended with a recitation of *section 3292(b)*'s decree that the period of suspension "shall begin on the date on which the official request is made." [65] As discussed above, however, that is not the subsection at issue here. This Court is well aware that the statute provides for the tolling period to begin on the date of the request to the foreign government. But this is quite different from a finding that the official request itself *suspends* the statute of limitations. These decisions either conflated *sections 3292(a)(1)* and *3292(b)* or ignored *section 3292(a)(1)* altogether in order to reach their result. Either approach violates the well-established principle of statutory construction that a statute must be "considered in all its parts when construing any one of them." [66] Moreover, that reading would permit a legislative enactment to be used to revive time-barred offenses, which raises significant Ex Post Facto concerns. [67] Thus, after careful consideration, I disagree with the result reached by the [**33] Ninth Circuit and the District of Columbia. [68]

64 *See United States v. Bischel, 61 F.3d 1429 (9th Cir. 1995)*; *United States v. Neill, 940 F. Supp. 332 (D.D.C.), vacated in part on other grounds, 952 F. Supp. 831 (D.D.C. 1996)*.

65 *18 U.S.C. § 3292(b)*.

66 *Lexecon, 523 U.S. at 36*.

67 *See, e.g., Stogner v. California, 539 U.S. 607, 616, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003)* ("[I]t [is] well settled that the Ex Post Facto Clause forbids resurrection of a time-barred prosecution.").

68 Interestingly, there has been no reported decision on this question since 1996.

Because the government did not move to "suspend the running" of the statute of limitations until after it had

expired, the government is not entitled to any tolling under *section 3292*. As a result, all of the counts except the false statement counts are time-barred and must be dismissed. It should be noted that in practice, this problem can easily be avoided -- and easily could have been avoided in this case. The government waited almost nine full months after making the official request to the Netherlands before applying for a *section 3292* suspension. Had the government applied to the court anytime before March 2003, the Indictment would have been timely, as discussed below. [**34] But the mere fact that the government could have easily avoided this dismissal does not change the result here. Statutes of limitations must be enforced, even where it deprives society of its ability to prosecute otherwise viable criminal offenses; "that is the price we pay for repose." [69]

69 *Meador, 138 F.3d at 994*.

2. Suspension Period End Date: Final Action

Even though the government cannot use *section 3292* tolling, for purposes of completeness, I continue the *section 3292* analysis as if the government's application were timely. The statute provides that the tolling period would have begun on the date of the government's request for evidence, which here would be October 29, 2002, when the request was sent to the Netherlands. [70] The next question to address, then, is when the tolling period would end, *i.e.*, when final action took place.

70 The government's request to Switzerland was dated January 13, 2003, but the date of the earlier request governs the beginning of the tolling period.

Section 3292 does not define "final action." Nor has the Second Circuit yet spoken as to the contours of the term. Other Circuits have addressed what constitutes final action for the purposes of ending the [**35] suspension period under *section 3292*, holding that final action occurs when the foreign government makes a "dispositive response" to the request. [71] A "dispositive response" is made when the foreign [*710] government has acted on every item in the official request, including issuing a certificate of authenticity if such was requested. [72] Moreover, where the United States government has made official requests to more than one foreign government, final action occurs for purposes of ending the suspension period when *all* of the foreign governments have made a dispositive response to the respective requests. [73]

71 *United States v. Hagege, 437 F.3d 943, 956 (9th Cir. 2006)* ("'[F]inal action' for purposes of *[section] 3292* means a dispositive response by the foreign sovereign to both the request for records and for a certificate of authenticity of those records, [when] both [a]re identified in the 'official request.'" (quoting *United States v. Bischel, 61 F.3d 1429, 1433 (9th Cir. 1995)*)), *cert. denied, 127 S. Ct. 85, 166 L. Ed. 2d 31 (2006)*; *United States v. Torres, 318 F.3d 1058, 1062 (11th Cir. 2003)* ("'[F]inal action' for the purposes of *[section] 3292(b)* occurs when a foreign court or authority provides a dispositive [**36] response to each of the items listed in the government's official request for information."). *See also United States v. Meador, 138 F.3d 986, 993 (5th Cir. 1998)* (final action occurred on the date of the letter from foreign government advising that it had completed action on the United States government's request).

72 *Hagege, 437 F.3d at 956*; *Torres, 318 F.3d at 1062*.

73 *See, e.g., 18 U.S.C. § 3292* (stating that the suspension period is limited to six months where "*all* foreign authorities take final action before [the statute of limitations] would expire without regard to this section" (emphasis added)).

The parties dispute when final action took place on the official requests. The government argues that final action did not occur until November 8, 2005, the date of a letter from the Netherlands transmitting documents to the United States in response to the official request (the "November 8 letter"). [74] Defendants dispute the November 8, 2005 date based on the government's omission of the enclosures to the November 8 letter, which defendants argue reveals that it is "likely that the missing attachments are letters showing that the Dutch authorities previously completed their work on the [**37] government's request." On May 25, 2007, the Court ordered the government to produce the enclosures to the November 8 letter. The government produced those documents on May 30, 2007. After reviewing that submission, I find that final action was taken by the Netherlands on or after November 8, 2005. [75] Because that date is more than three years after the official request was made, however, the suspension period would be capped at three years and would have expired on October 29, 2005. [76] Because the Indictment was re [*711] turned on May 12, 2005, before the statute of limitations

would have run, the Indictment would have been timely if the government were entitled to invoke *section 3292*. [77]

74 *See* November 8, 2005 Letter, Berke Decl. Ex. J (letter from the Netherlands government to the OIA, stating: "With reference to your letter of October 29, 2002, I send you enclosed Copies of documents attesting to the execution of the request for assistance concerning Victor [sic] Kozeny.").

75 Although the majority of documents are in Dutch, it is clear from the contents that the documents produced are responsive to the official request dated October 29, 2002 based on the frequency that the names of individuals listed in the official request appear in the documents produced. Moreover, this finding is buttressed by the sworn testimony of Judith Friedman that confirms documents were sent by the Netherlands on November 8, 2005 and received at OIA on November 15, 2005, and that "[p]rior to that time, the United States government had not received any responsive [**38] documents from the Netherlands," despite inquiries by OIA regarding the status of the official request. Declaration of Judith H. Friedman, OIA employee, P 6, attached as Ex. A to the Declaration of Jonathan S. Abernethy, Assistant United States Attorney, in opposition to defendants' motions to dismiss the Indictment.

76 *See 18 U.S.C. § 3292(c)(1)*. There is some dispute as to whether, and if so, when, the Swiss took final action on the Swiss requests. However, the date of Swiss final action is irrelevant in this case because even if the Swiss final action preceded the Dutch final action, the date of the Dutch final action would govern the end date for the toll, which applied to both official requests. Even if the Swiss final action followed the Dutch final action, the three year cap would apply.

77 Defendants also argue that the sealing of the Indictment for almost five months lacked a proper purpose and that as a result, the Indictment should be "found" for statute of limitations purposes on the date of unsealing, namely October 6, 2005. I need not address this argument, however, because even if the Indictment were found on October 6, 2005, with the benefit of *section 3292* the Indictment would still be timely because the statute of limitations would have been tolled through October 29, 2005. In any event, the government asserts that the Indictment was sealed in order to facilitate the arrest of Kozeny, who was at large in the Bahamas and posed a flight risk. This is a proper purpose for sealing, and keeping sealed, an indictment. *See United States v. Leaver, 358 F. Supp. 2d 255, 266 (S.D.N.Y. 2004)* (stating that "[f]acilitation of arrest, where the accused's whereabouts are unknown, is a proper purpose for sealing, as is the fear that an accused will become a fugitive if he learns of the charges" and finding that "the Government certainly had a good faith belief that [defendant] might conceal himself if he learned of the indictment" (citing *United States v. Srulowitz, 819 F.2d 37, 40 (2d Cir. 1987)*; *United States v. Slochowsky, 575 F. Supp. 1562, 1569 (E.D.N.Y. 1983))*).

B. Failure to Adequately Charge a Federal Offense

1. Conspiracy to Violate the FCPA

Pinkerton moves to dismiss Count One of the Indictment, which charges him with conspiracy to violate the FCPA and the Travel Act on the grounds that the Indictment fails to allege that he possessed the specific intent to violate the FCPA. [78] Pinkerton also argues that the Indictment fails to allege Pinkerton's intent that a future bribe be paid. This argument has no merit. The Indictment alleges that the defendants, including Pinkerton, "agreed . . . to commit offenses against the United States; to wit, violations of (a) the FCPA . . . ." [79] Moreover, the Indictment alleges that Pinkerton joined the conspiracy with the knowledge that bribes had been paid and would continue to be paid to Azeri officials in exchange for ensuring defendants' participation in the privatization of SOCAR. [80] Pinkerton's intent to [**39] join the conspiracy and an overt act by any co-conspirator is sufficient to allege a conspiracy. Taken as a whole, the allegations in the Indictment are plainly sufficient to withstand a motion to dismiss. Whether the evidence ultimately will be sufficient to support a conviction is a separate issue not before the Court.

78 *See* Memorandum of Law in Support of David B. Pinkerton's Motion to Dismiss the Indictment and for a Bill of Particulars ("Pinkerton Mem.") at 7. Bourke does not join Pinkerton's motion to dismiss on this issue and accordingly, Count One is adequately charged as

to Bourke. *See* Memorandum of Law in Support of Defendant Frederic A. Bourke, Jr.'s Pretrial Motions ("Bourke Mem.") at 1 n.1.

79 Indictment P 63.

80 *See id.* PP 19, 21.

2. Substantive Violation of FCPA

Defendants move to dismiss all of the substantive FCPA count against them on the ground that the Indictment fails to allege the mens rea element of a FCPA offense or conduct that can be criminalized under the business nexus element. [81] These arguments are also without merit.

81 Pinkerton moves to dismiss Count Five, which is the only substantive FCPA count against him. *See* Pinkerton Mem. at 10. Bourke moves to dismiss [**40] Counts Four, Five, Ten, Eleven and Twelve, which are all of the substantive FCPA counts against him. *See* Bourke Mem. at 1 n.1.

[*712]

a. Mens Rea

There is no dispute that the Indictment adequately alleges that defendants acted corruptly in violation of the FCPA. However, defendants argue that the failure of the government to include an express allegation in the substantive FCPA counts that defendants acted willfully, which is necessary in order to impose criminal penalties under the FCPA, is fatal to the Indictment. The government concedes willfulness must be proven and that there is no express allegation of willfulness in the substantive counts of the Indictment, but the government argues that such omission does not merit dismissal of the substantive FCPA counts.

I find that the omission of the word willfully from the substantive FCPA is a technical defect that does not prejudice defendants and is not fatal to those counts. For purposes of assessing the sufficiency of the Indictment -- as opposed to the sufficiency of proof -- I find that the term "willfully" need not be specifically included in the substantive counts in order to adequately charge the criminal violation of the FCPA. "Convictions [**41] are no longer reversed because of minor and technical deficiencies which did not prejudice the accused." [82] Defendants cannot seriously contend that their defense will be prejudiced or that they are not sufficiently informed of the charges against them for purposes of asserting a double jeopardy defense merely because the Indictment did not use the magic word "willfully" in certain paragraphs. "[I]mperfections of form [in an indictment] that are not prejudicial are disregarded, and common sense and reason prevail over technicalities." [83]

82 *United States v. Goodwin, 141 F.3d 394, 400-01 (2d Cir. 1997)* (citing *United States v. Wydermyer, 51 F.3d 319, 324 (2d Cir. 1995)*).

83 *Id. at 401*.

One of the cases cited by defendants provides instruction on this issue. In *United States v. Hernandez*, the Second Circuit recognized that "citation to a statutory section alone is not sufficient to cure a defective indictment that fails to allege all the elements of an offense" and "each count of an indictment must be treated as if it were a separate indictment, and that the validity of a count cannot depend upon the allegations contained in any other count not expressly incorporated." [84] Nevertheless, the [**42] court found that the failure to include the words "with intent to distribute" in the count was not a ground for dismissal. Rather, the court found that "[r]eading the indictment in its entirety . . . the combination of the precise language used in the caption; [the] Count['s] citation to . . . the statute allegedly violated; and the large quantity of heroin alleged in [that] Count, from which, even among four individuals, one may infer an intent to distribute, provided [defendant] with adequate notice of the nature of the crimes charged against him under [that] Count." [85]

84 *980 F.2d 868, 871 (2d Cir. 1992)*.

85 *Hernandez, 980 F.2d at 871-72*. *See also id. at 871 n.3* (noting that although the "quantity of narcotics alleged in an indictment is not an element of the offense, . . . it puts the defendant on notice of the penalty provisions he may face, and the quantity may indicate the conduct or transaction that is the basis of the charge").

As discussed above, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." [86] Here, the counts tracked the statutory language for the violation as contained [**43] in the "prohibition" section of the FCPA. [87] In addition, the substantive FCPA count expressly cited *15 U.S.C. § 78dd-2* as supplying the offense [*713] with which defendants are charged. Moreover, the very fact that

defendants were indicted made clear to them that the criminal penalty provision would be applied, which requires proof of a willful violation. [88] As a result, defendants here, like in *Hernandez*, were on notice that they were being charged with a criminal violation of *15 U.S.C. § 78dd-2*. In addition, although not expressly incorporated in the substantive FCPA counts, the "Statutory Allegations" section of the Indictment contain allegations that defendants "unlawfully, *willfully*, and knowingly combined, conspired, confederated, and agreed together and with each other *to commit offenses against the United States*; to wit, violations of (a) the FCPA, Title *15, United States Code, Section 78dd-2*; and *(b)* the Travel Act, Title *18, United States Code, Section 1952(a)(3)(A)*" [89] and that defendants "unlawfully, *willfully*, and knowingly, would and did travel in interstate and foreign commerce and use the mail and facilities in interstate and foreign commerce, *with intent to otherwise promote,* [**44] *manage, establish, carry on . . . an unlawful activity, namely, violations of the anti-bribery provisions of the FCPA, 15 U.S.C. § 78dd-2* . . . ." [90]

86 *Alfonso, 143 F.3d at 776* (citation omitted).
87 *15 U.S.C. § 78dd-2(a)*.
88 *See id. § 78dd-2(g)(2)(A)*.
89 Indictment P 63 (emphasis added).
90 *Id. P 65* (emphasis added).

At trial, the jury will be instructed on the issue of willfulness and defendants will not be convicted of a criminal violation of the FCPA without a finding of willfulness. The absence of that word from the charging portion of the Indictment does not merit dismissal of those offenses.

b. Obtain or Retain Business

Defendants argue that the Indictment does not adequately allege the business nexus element insofar as the alleged bribes were not made for the purpose of obtaining or retaining business as required by the FCPA. The Indictment alleges that the bribes were paid to the Azeri Officials in order to ensure not only the privatization, but defendants' participation in the privatization, which would permit defendants to obtain a large stake in a significant asset, SOCAR. These are not the type of "grease" payments that Congress intended to exclude from coverage by the FCPA. [91] In [**45] light of the broad construction that Congress intended courts to apply to the business nexus element, I find that these alleged payments, made for the purpose of inducing foreign officials to make available a lucrative investment opportunity, fall within the ambit of the conduct Congress intended to prohibit under the FCPA. Accordingly, the Indictment adequately charges an FCPA offense.

91 "Grease" or "facilitating" payments are defined in the FCPA as "any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to service the performance of a routine governmental action by a foreign official." *15 U.S.C. § 78dd-1(b)*. "[R]outine governmental action" is defined as actions that are ordinarily and commonly performed by a foreign official, such as obtaining permits or licenses, visas, police protection, mail services or inspections. *15 U.S.C. § 78dd-1(f)(3)(A)*. *See generally Kay, 359 F.3d at 747-50* (discussing the statutory grease exception).

3. Travel Act

Defendants' only claimed deficiency regarding the Travel Act counts are based on the asserted insufficiency of the Indictment as to the FCPA counts. Because I have found that the Indictment adequately [**46] charges violations of the FCPA, the Travel Act counts are also sufficient. [92]

92 *Cf. Dooley v. United Techs. Corp., 803 F. Supp. 428, 439-40 (D.D.C. 1992)* ("[B]ecause the [] defendants could not have violated the FCPA, they could not have violated the Travel Act.").

[*714]

4. Money Laundering

Pinkerton purports to move to dismiss the money laundering counts against him (Counts Twenty-One and Twenty-Four) for failure to adequately charge a federal crime. [93] However, the only reference to the money-laundering offenses in the memorandum of law is contained in a footnote, arguing that the "failure to allege intent to violate the FCPA is, in turn, fatal to those counts involving violations of other statutes for which a violation of the FCPA is a necessary predicate." [94] This is an incorrect statement of the law, but I need not address this issue because I have found that the Indictment sufficiently alleges the FCPA offenses. Thus, there is no

remaining challenge to the money laundering counts.

93 Bourke does not join Pinkerton's motion to dismiss for failure to adequately charge an offense as to the money laundering counts. *See* Bourke Mem. at 1 n.l.

94 Pinkerton Mem. at 9 n.6.

V. CONCLUSION

For the reasons set forth above, all of the counts in the Indictment except the false statement counts are time-barred, and Pinkerton's and Bourke's motions to dismiss are granted. The Clerk of the Court is directed to close these motions [Nos. 72 and 75 on the Docket Sheet]. A conference is scheduled for July 17, 2007, at 4:30 p.m.

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

June 21, 2007

UNITED STATES OF AMERICA - against - VIKTOR KOZENY, FREDERIC BOURKE, JR. and DAVID PINKERTON, Defendants.

05 Cr. 518 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

493 F. Supp. 2d 693*; *2007 U.S. Dist. LEXIS 52758

July 16, 2007, Decided
July 16, 2007, Filed

SUBSEQUENT HISTORY: Decision reached on appeal by *United States v. Kozeny, 541 F.3d 166, 2008 U.S. App. LEXIS 18534 (2d Cir. N.Y., 2008)*

PRIOR HISTORY: *United States v. Kozeny, 493 F. Supp. 2d 693, 2007 U.S. Dist. LEXIS 45590 (S.D.N.Y., 2007)*

DISPOSITION: The government's motion for reconsideration was granted, and counts one, 11, and 21 were reinstated.

COUNSEL: [**1] For Frederic A. Bourke, Jr.: Dan K. Webb, Esq., J. David Reich, Esq., Winston & Strawn LLP, Chicago, Illinois; Robert J. Cleary, Esq., Matthew S. Queler, Esq., Emily Stern, Esq., Proskauer Rose LLP, New York, New York.

For David B. Pinkerton: Barry H. Berke, Esq., Paul Schoeman, Esq., Jeffrey S. Trachtman, Esq., Kramer Levin Naftalis & Frankel LLP, New York, New York.

For the Government: Jonathan S. Abernethy, Assistant United States Attorney, New York, New York; Mark F. Mendelsohn, Deputy Chief, Fraud Section, Robertson Park, Assistant Chief, Fraud Section, United States Department of Justice, Washington, DC.

JUDGES: Shira A. Scheindlin, U.S.D.J.

OPINION BY: Shira A. Scheindlin

OPINION
[*714]

MEMORANDUM OPINION AND ORDER

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*, [**2] 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 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.

1 *See United States v. Kozeny, No. 05 Cr. 518, 493 F. Supp. 2d 693, 2007 U.S. Dist. LEXIS 45590, 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.

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 [**3] 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 [*715] 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 [**4] are issues for the jury and cannot be decided at this stage. [3] Accordingly, Count One is timely. Likewise, Count Eleven is also timely 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.

2 Indictment P 19.

3 *See, e.g., United States v. Sanchez, No. 01 Cr. 277, 2003 U.S. Dist. LEXIS 6340, 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)* [**5] ("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. 391, 397, 399,77 S. Ct. 963, 1 L. Ed. 2d 931 (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.").

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 [**6] 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. July 16, 2007

Dated: New York, New York

UNITED STATES OF AMERICA -against- VIKTOR KOZENY, FREDERIC BOURKE, JR., and DAVID PINKERTON, Defendants.

05 Cr. 518(SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

582 F. Supp. 2d 535*; *2008 U.S. Dist. LEXIS 85443

October 21, 2008, Decided
October 21, 2008, Filed

SUBSEQUENT HISTORY: Reconsideration denied by *United States v. Kozeny, 2008 U.S. Dist. LEXIS 101803 (S.D.N.Y., Dec. 12, 2008)*

PRIOR HISTORY: *United States v. Kozeny, 541 F.3d 166, 2008 U.S. App. LEXIS 18534 (2d Cir. N.Y., 2008)*

COUNSEL: [**1] For the Government: Harry Chernoff, Assistant United States Attorney, New York, NY.

For Defendant Bourke: Dan K. Webb, Esq., James David Reich, Jr., Esq., Winston & Strawn LLP, Chicago, IL.

JUDGES: Shira A. Scheindlin, United States District Judge.

OPINION BY: Shira A. Scheindlin

OPINION

[*536] **OPINION AND ORDER**

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

I. INTRODUCTION

This prosecution relates to alleged violations of the Foreign Corrupt Practices Act ("FCPA") by defendant David Bourke and others in connection with the privatization of the State Oil Company of the Azerbaijan Republic ("SOCAR"). Bourke has requested that the Court make determinations as to the content of applicable law in Azerbaijan and instruct the jury on certain defenses that might be available under the law of Azerbaijan. The Government and Bourke were unable to agree on the contents or applicability of that law. To resolve this disagreement, the Court held a hearing on September 11, 2008. This Opinion and Order contains the Court's determinations.

II. BACKGROUND

A. Facts

The Government's allegations in this case are complex, and it is unnecessary to recite them here. The relevant facts are as follows: SOCAR is the state oil company of the Republic of Azerbaijan. [1] In [**2] the mid-1990s, Azerbaijan began a program of privatization. [2] The program gave the [*537] President of Azerbaijan, Heydar Aliyev, discretionary authority as to whether and when to privatize SOCAR. [3] Bourke and others allegedly violated the FCPA by making payments to Azeri officials to encourage the privatization of SOCAR and to permit them to participate in that privatization. [4] Bourke argues that the alleged payments were legal under Azeri law and thus under the FCPA (which provides an affirmative

defense for payments that are legal under relevant foreign law) because they were the product of extortion. [5] He also argues that pursuant to Azeri law, any criminality associated with the payments was excused when he reported them to the President of Azerbaijan. [6]

1 *See generally Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic, 479 F. Supp. 2d 376, 378 (S.D.N.Y. 2007)*.

2 *See* Indictment of Vicktor Kozeny, Frederic Bourke, Jr., and David Pinkerton ("Ind.") P 4.

3 *See id*.

4 Ind. P 18.

5 *See* Supplemental Memorandum of Law in Support of Defendant Frederic A. Bourke's Motion Regarding Azeri Law Issues ("Def. Supp. Br.") at 4; *see also Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp. 2d 736 (S.D.N.Y. 2004)* [**3] (addressing claims by private investors in SOCAR privatization. alleging extortion and various corrupt practices).

6 *See* Def. Supp. Br. at 4.

The Government and Bourke have submitted expert reports. The Government's expert is William E. Butler, John Edward Fowler Distinguished Professor of Law at the Dickinson School of Law, Pennsylvania State University, and Emeritus Professor of Comparative Law at the University of London. [7] Bourke's expert, Paul B. Stephan, is the Lewis F. Powell, Jr. Professor of Law at the University of Virginia. [8] On September 11, 2008, the Court held a hearing in which the experts testified as to their interpretations of the relevant law. [9]

7 *See* 8/21/08 Declaration of the Government's Expert Professor William E. Butler ("Butler Decl.") P 1.

8 *See* 4/7/08 Declaration of Defendant's Expert Professor Paul B. Stephan ("Stephan Decl.") P 1.

9 *See* 9/11/08 Transcript ("Tr.").

B. The Legal System of Azerbaijan

Azerbaijan, a sovereign nation in the Caspian Sea region that borders Russia, was formerly integrated as a Republic of the Soviet Union. [10] Azerbaijan declared independence in 1991. [11] The current criminal code of Azerbaijan took effect in 2000. [12] In Azerbaijan, decisions [**4] of most courts are not considered binding authority; however, the highest court in Azerbaijan has the authority to give official interpretations of the Azeri Constitution and laws. [13]

10 *See* Ind. 113.

11 *See* The Constitutional Act on Restoration of the State Independence of the Republic of Azerbaijan (Oct. 18, 1991).

12 *See* Stephan Decl. P 5.

13 *See id*.

III. LEGAL STANDARD

A. The FCPA

The FCPA prohibits giving something of value for the purpose of "(i) influencing any act or decision of [a] foreign official in his official capacity, (ii) inducing such foreign official to do or omit any act in violation of the lawful duty of such official, or (iii) securing any improper advantage . . . to obtain[] or retain[] business for or with . . . any person." [14] The law provides an affirmative defense for payments that are "lawful under the written laws and regulations" of the country. [15]

14 *15 U.S.C. § 78dd-2(a)(1)(A)*.

15 *Id. § 78dd-2(c)*.

[*538] **B. Foreign Law**

"Though foreign law once was treated as an issue of fact, it now is viewed as a question of law and may be determined through the use of any relevant source, including expert testimony." [16] *Rule 26.1 of the Federal Rules of Criminal Procedure* provides that "[a] [**5] party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source -- including testimony -- without regard to the Federal Rules of Evidence."

16 *United States v. Vilar, No. 05 Cr. 621, 2007 U.S. Dist. LEXIS 26993, 2007 WL 1075041, at *55 n.35 (S.D.N.Y. Apr. 4, 2007)*.

IV. DISCUSSION

During the relevant period, Article 170 of the Azerbaijan Criminal Code ("ACC") provided that "Wile receiving by an official . . . of a bribe in any form whatsoever for the fulfillment or the failure to fulfill any action in the interest of the person giving the bribe which the official should have or might perform with the use of

his employment position . . . shall be punished by deprivation of freedom . . ." [17] Professor Stephan asserts that during the same period, Article 171 of the ACC provided that "[g]iving a bribe shall be punished by deprivation of freedom for a term of from three to eight years. . . . A person who has given a bribe shall be *free* from criminal responsibility if with respect to him there was extortion of the bribe or if that person after [**6] giving the bribe voluntarily made a report of the occurrence." [18] Professor Butler believes that a more accurate translation of the last clause is "[a] person who has given a bribe shall be *relieved* from criminal responsibility if extortion of the bribe occurred with respect to him or if this person after giving the bribe voluntarily stated what happened." [19]

17 Butler Decl. P 10.

18 Stephan Decl. P 3 (emphasis added).

19 Butler Decl. P 10 (emphasis added). The word appears to be [SEE NAME IN ORIGINAL], or "osvobozhdenie," which is generally translated as "liberation," but can also mean "relieved." *See* Tr. at 174. *See also [SEE NAME IN ORIGINAL]* (Deutsche Film-Aktiengesellschaft / Mosfilm 1969), a Soviet film that depicts the "liberation" of Berlin during World War II.

The Supreme Court of the U.S.S.R. interpreted Article 171 in a Resolution published in 1990. [20] The parties agree that the Resolution is relevant to the Azeri courts' interpretation of the Article. [21] It defines extortion as "a demand by an official for a bribe under the threat of carrying out actions that could do damage to the legal interests of the briber . . ." [22] The Resolution further explains that "a voluntary declaration [**7] of having committed the crime absolves from criminal responsibility not only the bribe giver but his accomplices." [23] Finally, the Resolution provides that "[t]he absolution of a bribe-giver from criminal responsibility because of extortion of the bribe or the voluntary declaration of the giving of the bribe . . . does not signify an absence in the actions of such persons [*539] of the elements of an offense. For that reason, they cannot be considered victims and are not entitled to claim restitution of the items of value given as bribes." [24]

20 *See Resolution of the Plenum of the Supreme Court of the U.S.S.R. of March 30, 1990, No. 3*, "*On Court Practice in Bribery Cases*," ("Res.") Ex. C to Stephan Decl.

21 *See* Stephan Decl. P 7; Butler Decl. P 16.

22 Res. pt. 11.

23 *Id*. pt. 19.

24 *Id*. pt. 20.

As a threshold matter, I must determine the meaning of "relieved (or free) from criminal responsibility." Bourke contends that if an individual is relieved of criminal responsibility, his action was "lawful" and he may thus avail himself of the FCPA's affirmative defense. I disagree.

For purposes of the FCPA's affirmative defense, the focus is on the *payment*, not the payer. [25] A person cannot be guilty of violating [**8] the FCPA if the payment was *lawful* under foreign law. But there is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality (e.g., time-barred) or because a provision in the foreign law "relieves" a person of criminal responsibility. An individual may be prosecuted under the FCPA for a payment that violates foreign law even if the individual is relieved of criminal responsibility for his actions by a provision of the foreign law.

25 The FCPA focuses on payments, not payers, throughout its structure. For example, it provides that there is no liability for "any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official . . . ." *15 U.S.C. § 78dd-2(b)*. The purpose of this subsection was to "acknowledge[]. . . that some payments that would be unethical or even illegal within the United States might not be perceived similarly in foreign countries, and those payments should not be criminalized." *United States v. Castle, 925 F.2d 831, 834 (5th Cir. 1991)*.

A. The Reporting Exception

As Professor Butler [**9] observes, the structure of the reporting exception to liability in Article 171 illustrates that the initial payment of a bribe was certainly not lawful. [26] The ACC relieves the payer of a bribe from criminal liability if the bribe is properly reported not because such an action retroactively erases the stain of criminality, but because the state has a strong interest in prosecuting the government official who received the

bribe. By waiving liability for reporting payers, the state increases the likelihood that it will learn of the bribery.

26 *See* Butler Decl. P 46.

But at the moment that an individual pays a bribe, the individual has violated Article 171. At that time, the payment was clearly not "lawful under the written laws" of Azerbaijan. [27] If the individual later reports the bribe, she can no longer be prosecuted for that payment. But it is inaccurate to suggest that the payment itself suddenly became "lawful" -- on the contrary, the *payment* was unlawful, though the *payer* is relieved of responsibility for it. [28] This is why the Resolution provides that the payer cannot receive restitution. Further, if the *payment* were retroactively lawful, the official who received the payment could [**10] not be prosecuted for receiving it. This cannot be correct because the purpose of the reporting exception is to enable the government to pursue the official. Thus, the relief from [*540] liability in Article 171 operates to excuse the payer, not the payment.

27 In this sense, the relief from liability operates in a fashion similar to that of a statute of limitations in the United States. If an individual commits a crime but that individual is not prosecuted within the statute of limitations, the individual's actions do not become "lawful" -- rather, the criminal cannot be prosecuted.

28 *Cf.* Tr. at 37 (testimony of Stephan) ("It's my understanding that the term relief from criminal responsibility means that the criminal code no longer applies to this person . . . .").

B. The Extortion Exception

The exception for extortion contained in the same sentence must operate in the same manner. [29] A payment to an Azeri official that is made under threat to the payer's legal interests is still an illegal payment, though the payer cannot be prosecuted for the payment. [30]

29 While in the American system, it is generally accepted that a payment that was extorted was not a "bribe," the language of Article 171 clearly [**11] indicates that Azeri law considers extorted payments to be bribes. Otherwise, the phrase "[a] person who has given a bribe shall be free from criminal responsibility if with respect to him there was extortion of the bribe" would make no sense.

30 *See* Tr. at 215-216 (testimony of Butler) ("Let's assume for a moment the worst forms of extortion. . . . So that I as the bribe giver, I will pay no matter what. . . . I am still guilty of giving the bribe because the code says I am. So now the question is whether having done so under these circumstances the court will convict me of bribery, and I think the answer is no, but it's going to have to be at the court level that that's determined, not before.").

This conclusion does not preclude Bourke from arguing that he cannot be guilty of violating the FCPA by making a payment to an official who extorted the payment because he lacked the requisite corrupt intent to make a bribe. [31] The legislative history of the FCPA makes clear that "true extortion situations would not be covered by this provision." [32] Thus, while the FCPA would apply to a situation in which a "payment [is] demanded on the part of a government official as a price for gaining entry [**12] into a market or to obtain a contract," it would not apply to one in which payment is made to an official "to keep an oil rig from being dynamited," an example of "true extortion." [33] The reason is that in the former situation, the bribe payer cannot argue that he lacked the intent to bribe the official because he made the "conscious decision" to pay the official. [34] In other words, in the first example, the payer could have turned his back and walked away -- in the latter example, he could not.

31 By the same token, an individual who is forced to make payment on threat of injury or death would not be liable under the FCPA. Federal criminal law provides that actions taken under duress do not ordinarily constitute crimes. *See generally United States v. Gonzalez, 407 F.3d 118, 122 (2d Cir. 2005)* ("Three discrete elements must be met to establish coercion or duress. These are: (1) a threat of force directed at the time of the defendant's conduct; (2) a threat sufficient to induce a well-founded fear of impending death or serious bodily injury; and (3) a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity.") (citing *United States v. Podlog, 35 F.3d 699, 704 (2d Cir. 1994))*. [**13] If a payment was obtained under duress, no liability attaches under the FCPA.

32 *See* S.Rep. No. 95-114, at 10-11 (1977),

reprinted in 1977 U.S.C.C.A.N. 4098, 4108.

33 *Id*.

34 *Id*. at 10.

If Bourke provides an evidentiary foundation for the claim that he was the victim of "true extortion," I will instruct the jury on what constitutes a situation of "true extortion" such that Bourke would not be found to have possessed the "corrupt" intent required for a violation under the FCPA. In any event, the jury will be instructed regarding the "corrupt" intent that the Government must prove he possessed beyond a reasonable doubt he possessed. [35] Such instruction will define [*541] "corrupt" intent as "having an improper motive or purpose" and will explain that the payment must have been intended to "induce the recipient to misuse his official position" in discharging an official act. [36] The charge will also emphasize that the proper focus is on Bourke's intent and that the Government is not required to show that "the official accepted the bribe," that the "official [] had the power or authority to perform the act [] sought" or that the "defendant intended to influence an official act which was lawful." [37]

35 *See* [**14] *United States v. Alfisi, 308 F.3d 144, 150 n.1 (2d Cir. 2002)* (citing *United States v. Kahn, 472 F.2d 272, 279 (2d Cir. 1973)* (finding that the issue of extortion or "economic coercion" is addressed by instructing the jury on the requisite intent of bribery).

36 S.Rep. No. 95-114, at 10 (defining the word "corruptly" for purposes of the FCPA).

37 1 L. Sand, et. al., *Modern Federal Jury Instructions - Criminal P 16.01*, instr. 16-6 (2008).

V. CONCLUSION

For the reasons stated above, the Court will not instruct the jury on the exceptions to criminal liability in Article 171. However, if Bourke provides an evidentiary foundation for "true extortion," the Court will instruct the jury on what constitutes a "true extortion" situation such that Bourke would not be found to possess the "corrupt" intent required for a violation under the FCPA. [38] The Court will, in any case, instruct the jury on the requisite elements of the crime of bribery under the FCPA, including the element of "corrupt" intent.

38 If Bourke demonstrates an evidentiary foundation for an affirmative defense of duress, the Court will also instruct the jury on its elements. *See Gonzalez, 407 F.3d at 122* ("A defendant is entitled to [**15] an instruction on an affirmative defense only if the defense has 'a foundation in the evidence') (quoting *Podlog, 35 F.3d at 704*).

SO ORDERED:

/s/ Shira A. Scheindlin

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

October 21, 2008

UNITED STATES OF AMERICA -against- VIKTOR KOZENY and FREDERIC BOURKE, JR., Defendants.

05 Cr. 518 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 101803

December 12, 2008, Decided
December 15, 2008, Filed

SUBSEQUENT HISTORY: Motion denied by *United States v. Kozeny, 2009 U.S. Dist. LEXIS 45613 (S.D.N.Y., May 29, 2009)*

PRIOR HISTORY: *United States v. Kozeny, 582 F. Supp. 2d 535, 2008 U.S. Dist. LEXIS 85443 (S.D.N.Y., 2008)*

COUNSEL: [*1] For USA, Plaintiff: Harry A. Chernoff, Jonathan Sloan Abernethy, LEAD ATTORNEYS, Rosemary Nidiry, U.S. Attorney's Office, SDNY (St Andw's), New York, NY.

For Frederic Bourke, Jr., Defendant: Dan K. Webb, LEAD ATTORNEY, Winston & Strawn LLP (IL), Chicago, IL; Emily Stern, Matthew S. Queler, LEAD ATTORNEYS, Proskauer Rose LLP (New York), New York, NY; James David Reich, Jr, LEAD ATTORNEY, Christopher J. Paolella, Winston & Strawn LLP (NY), New York, NY; Stanley A. Twardy, LEAD ATTORNEY, Day Berry & Howard LLP, Stamford, CT; John D. Cline, K. C. Maxwell, Jones Day (CA), San Francisco, CA.

JUDGES: Shira A. Scheindlin, United States District Judge.

OPINION BY: Shira A. Scheindlin

OPINION

MEMORANDUM OPINION AND ORDER

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

I. INTRODUCTION

On October 21, 2008, this Court held that it would not instruct the jury on the reporting and extortion exceptions to criminal liability in Article 171 of the Azerbaijan Criminal Code ("ACC"). [1] The Court further ruled that if Bourke provided an "evidentiary foundation for 'true extortion'" -- as defined under the Foreign Corrupt Practices Act ("FCPA") -- the Court would instruct the jury regarding the requisite "corrupt" intent required for a violation of the FCPA. [*2] [2] Bourke now seeks reconsideration of this decision, arguing that the Court failed to opine with regards to two other issues of Azeri law: 1) "that a mere offer to give a bribe, without any specific acts directed toward transferring the subject of the bribe to its recipient, is not a crime;" and 2) that "the offense of bribery requires 'direct intent.'" [3]

1 *See United States v. Kozeny, 582 F. Supp. 2d 535, 2008 U.S. Dist. LEXIS 85443, 2008 WL 4658807 (S.D.N.Y. Oct. 21, 2008)*.

2 *2008 U.S. Dist. LEXIS 85443, [WL] at *4.*

3 *See* Memorandum of Law in Support of Defendant's Motion for Reconsideration of the Court's Ruling on Azeri Law Issues ("Def. Mem."), at 1.

II. LEGAL STANDARD

A motion for reconsideration is governed by *Local Rule 6.3* and is appropriate where "'the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" [4] "A motion for reconsideration may also be granted to 'correct a clear error or prevent manifest injustice.'" [5]

4 *In re BDC 56 LLC, 330 F.3d 111, 123 (2d Cir. 2003)* (quotation omitted).

5 *In re Terrorist Attacks on September 11, 2001, No. 03 MDL 1570, 2006 U.S. Dist. LEXIS 11741, 2006 WL 708149, at *1 (S.D.N.Y. Mar. 20, 2006)* (quoting [*3] *Doe v. New York City Dep't of Soc. Servs., 709 F.2d 782, 789 (2d Cir. 1983))*.

The purpose of *Local Rule 6.3* is to "'ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters.'" [6] *Local Rule 6.3* must be "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court." [7] Courts have repeatedly been forced to warn counsel that such motions should not be made reflexively, to reargue "'those issues already considered when a party does not like the way the original motion was resolved.'" [8]

6 *Naiman v. New York Univ. Hosps. Ctr., No. 95 Civ. 6469, 2005 U.S. Dist. LEXIS 6817, 2005 WL 926904, at *1 (S.D.N.Y. Apr. 20, 2005)* (quoting *Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988)). Accord Commerce Funding Corp. v. Comprehensive Habilitation Servs., Inc., 233 F.R.D. 355, 361 (S.D.N.Y. 2005)* ("[A] movant may not raise on a motion for reconsideration any matter that it did not raise previously to the court on the underlying motion sought to be reconsidered.").

7 *DGM Invs., Inc. v. New York Futures Exch., Inc., 288 F. Supp. 2d 519, 523 (S.D.N.Y. 2003)* [*4] (quotation omitted). *Accord Shrader v. CSX Transp. Inc., 70 F.3d 255, 257 (2d Cir. 1995)* (holding that a court will deny the motion when the movant "seeks solely to relitigate an issue already decided.").

8 *Joseph v. Manhattan & Bronx Surface Transit Operating Auth., No. 96 Civ. 9015, 2006 U.S. Dist. LEXIS 11924, 2006 WL 721862, at *2 (S.D.N.Y. Mar. 22, 2006)* (quoting *In re Houbigant, Inc., 914 F. Supp. 997, 1001 (S.D.N.Y. 1996))*.

III. DISCUSSION

A. A Mere Offer to Give a Bribe

Bourke argues that the Court failed to consider his proposed instruction that "[a] mere offer to give a bribe on the part of the bribe giver, without the bribe giver performing any specific actions directed toward transferring the subject of the bribe to the government official, is not a crime under Azeri law." [9] However, this proposed instruction was not raised in Bourke's briefing on the motion. [10] Instead, the focus of Bourke's motion was an instruction with regards to Article 171 of the ACC. [11] This Court will not permit Bourke to reargue his lost motion by raising a new issue that was not briefed.

9 Def. Mem. at 2.

10 Although the proposed instruction was appended to the declaration of Bourke's expert, it was not discussed in Bourke's briefing.

11 *See* [*5] Memorandum of Law in Support of Defendant Frederic A. Bourke, Jr.'s Motion to Dismiss the Charges Against Him and for Other Relief at 1; Supplemental Memorandum of Law in Support of Defendant Frederic A. Bourke's Motion Regarding Azeri Law Issues at 1.

This Court also declines to rule on this instruction because Bourke has not been charged with making a "mere offer." The "two-thirds share capital increase" is alleged to have been transferred to Azeri officials. [12] Bourke has also been charged with having transferred cash and other gifts to various state officials. [13] Given these allegations, it is unclear how such an instruction could be given. Nevertheless, if Bourke produces evidence at trial from which the jury can find that a "mere offer" was made, the Court will then decide how to instruct the jury.

12 *See* Indictment PP 66, 67, 69.

13 *See id*.

B. Requirement of "Direct Intent"

Bourke also argues that the Court failed to opine as to whether Azeri law requires that the payer possess "direct intent" in order to be criminally liable for bribery. [14] Bourke contends that under the FCPA, bribes are committed when a payer has a "'conscious disregard' of the possibility of bribery," which is broader [*6] than the "direct intent" that is required under Azeri law. [15]

14 Def. Mem. at 3.

15 *See id*. at 5-6.

This Court has already discussed the intent necessary for Bourke to be found liable under the FCPA. [16] The Court held that if a special instruction on the intent element should be given to the jury, that instruction would define what would constitute a situation in which a payer's will is so overcome that he cannot be said to have acted with intent. [17] Because the Court has already fully considered how the jury will be instructed with regards to the intent element, it cannot and will not reconsider its decision.

16 *See Kozeny, 2008 U.S. Dist. LEXIS 85443, 2008 WL 4658807, at *3*.

17 *See id*. A jury could find that a person who pays an official for a business opportunity possesses both a conscious disregard for the possibility of bribery and direct intent to make the payment. Thus, it is not clear whether this alleged theoretical distinction between the intent elements for bribery under the FCPA or Azeri law would make a practical significance to the outcome of Bourke's trial. The Court also notes that this distinction between "conscious disregard" under the FCPA and "direct intent" [*7] under Azeri law was not briefed by Bourke.

V. CONCLUSION

For the reasons stated above, the Court denies Bourke's motion for reconsideration. The Clerk of the Court is directed to close this motion (document no. 139).

SO ORDERED:

/s/ Shira A. Scheindlin

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

December 12, 2008

UNITED STATES OF AMERICA - against - VIKTOR KOZENY and FREDERIC BOURKE, JR., Defendants.

05 Cr. 518 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

643 F. Supp. 2d 415*; *2009 U.S. Dist. LEXIS 45613

May 29, 2009, Decided
May 29, 2009, Filed

SUBSEQUENT HISTORY: Motion denied by *United States v. Kozeny, 638 F. Supp. 2d 348, 2009 U.S. Dist. LEXIS 59209 (S.D.N.Y., July 6, 2009)*

PRIOR HISTORY: *United States v. Kozeny, 2008 U.S. Dist. LEXIS 101803 (S.D.N.Y., Dec. 12, 2008)*

COUNSEL: [**1] For Landlocked Shipping Company, Dr. Jitka Chvatik, Petitioners: James E. Nesland, LEAD ATTORNEY, Cooley Godward Kronish, LLP (CO), Broomfield, CO.

For Frederic Bourke, Jr., Defendant: Emily Stern, Matthew S. Queler, LEAD ATTORNEYS, Proskauer Rose LLP (New York), New York, NY; James David Reich, Jr, LEAD ATTORNEY, Christopher J. Paolella, Winston & Strawn LLP (NY), New York, NY; Saskia A. Jordan, LEAD ATTORNEY, Haddon, Morgan, Mueller, Jordan, Mackey & Foreman, P.C., Denver, CO; Stanley A. Twardy, LEAD ATTORNEY, Day Berry & Howard LLP, Stamford, CT; John D. Cline, K. C. Maxwell, Jones Day (CA), San Francisco, CA.

For USA, Plaintiff: Harry A. Chernoff, Jonathan Sloan Abernethy, LEAD ATTORNEYS, Rosemary Nidiry, U.S. Attorney's Office, SDNY (St Andw's), New York, NY; Iris Lan, United States Attorney SDNY 1 Saint Andrew, New York, NY.

JUDGES: Shira A. Scheindlin, United States District Judge.

OPINION BY: Shira A. Scheindlin

OPINION

[*417] **OPINION AND ORDER**

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

I. INTRODUCTION

This prosecution relates to alleged violations of the Foreign Corrupt Practices Act ("FCPA") by defendant Frederic Bourke, Jr. and others in connection with the privatization of the State Oil Company of the Azerbaijan Republic ("SOCAR"). [**2] Bourke has submitted a motion in limine to preclude the Government from offering background evidence relating to corruption in Azerbaijan. For the reasons stated below, his motion is denied.

II. BACKGROUND

The Government's allegations in this case are complex, and it is unnecessary to recite them here. The relevant facts are as follows: SOCAR is the state-owned oil company of the Republic of Azerbaijan

("Azerbaijan"). [1] In the mid-1990s, Azerbaijan began a program of privatization. [2] The program gave the President of Azerbaijan, Heydar Aliyev, discretionary authority as to whether and when to privatize SOCAR. [3] Bourke and others allegedly violated the FCPA by making payments to Azeri officials to encourage the privatization of SOCAR and to permit them to participate in that privatization. [4]

1 *See* Indictment of Frederic Bourke, Jr. P 3.
2 *See id*. P 4.
3 *See id*.
4 *Id*. P 18.

III. LEGAL STANDARD

A. Motion in Limine

The Federal Rules of Evidence favor the admission of all relevant evidence. [5] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [6] [**3] A district court will "exclude evidence on a motion in limine only when the evidence is clearly inadmissible on all potential grounds." [7] "Indeed, courts considering a motion in limine may reserve judgment until trial, so that the motion is placed in the appropriate factual context." [8] Moreover, a court's ruling regarding a motion in limine "is subject to change when the case unfolds. . . even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling." [9]

5 *See Fed. R. Evid. 402*.
6 *Fed. R. Evid. 401*.
7 *United States v. Ozsusamlar, 428 F. Supp. 2d 161, 164 (S.D.N.Y. 2006)*.
8 *United States v. Chan, 184 F. Supp. 2d 337, 340 (S.D.N.Y. 2002)*.
9 *Luce v. United States, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)*.

B. Conscious Avoidance

"The modern conscious avoidance doctrine. . . is that '[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.'" [10] Thus, an instruction on conscious avoidance is proper "only '(i) when a defendant [*418] asserts the lack of some specific [**4] aspect of knowledge required for conviction and (ii) the appropriate factual predicate for the charge exists.'" [11] A factual predicate exists when "the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." [12] However, "a conscious avoidance instruction is not appropriate where the *only* evidence alerting a defendant to the high probability of criminal activity is direct evidence of the illegality itself." [13]

10 *United States v. Nektalov, 461 F.3d 309, 314 (2d Cir. 2006)* (2d Cir. 2007) (quoting *Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969))*.
11 *United States v. Kaplan, 490 F.3d 110, 125 (2d Cir. 2007)* (quoting *United States v. Quattrone, 441 F.3d 153, 181 (2d Cir. 2006))*.
12 *Id*.
13 *Nektalov, 461 F.3d at 315* (quotation marks omitted) (emphasis added). *Accord United States v. Ferrarini, 219 F.3d 145, 157 (2d Cir. 2000)* ("The evidence shows that [defendant] actually knew of the frauds; it is not sufficient to permit a finding that he consciously avoided confirming them."). And yet, "where the evidence could support both a finding of actual knowledge [**5] and a finding of conscious avoidance, the government may present conscious avoidance as an argument in the alternative." *Nektalov, 461 F.3d at 316*.

When the charge is appropriate, the Second Circuit has "stressed that it is 'essential to the concept of conscious avoidance[ ] that the defendant must be shown to have decided not to learn the key fact, *not merely to have failed to learn it through negligence*.'" [14] The Second Circuit has repeatedly quoted a scholarly treatise on this point to say:

> "'A court can properly find wilful blindness [i.e., conscious avoidance] only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This,

and this alone, is wilful blindness.'" [15]

14 *Nektalov, 461 F.3d at 315* (emphasis added).
15 *Id*. (quoting *United States v. Reyes, 302 F.3d 48, 54 (2d Cir. 2002)* (quoting Glanville Williams, *Criminal Law: The General Part* § 57, at 159 (2d ed. 1961))).

IV. DISCUSSION

Bourke moves to preclude the Government from presenting background evidence of corruption in Azerbaijan, which he believes will be [**6] central to the Government's proof that Bourke acted with the requisite knowledge required by the FCPA. [16] The FCPA states that "[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is *aware of a high probability of the existence of such circumstance*, unless the person actually believes that such circumstance does not exist." [17] Bourke therefore notes that the Government will likely proceed on a "conscious avoidance" theory in an attempt to impute to Bourke knowledge of the alleged bribes. [18]

16 *See* Memorandum of Law in Support of Bourke's Motion in Limine to Exclude Evidence Relating to Corruption in Azerbaijan ("Bourke Mem.") at 2.
17 *15 U.S.C. § 78dd-2(h)(3)(B)* (emphasis added).
18 *See* Bourke Mem. at 1-2. A superseding indictment has been filed in this case, and the substantive FCPA charge against Bourke has been removed. However, Bourke is still charged with conspiracy to violate the FCPA. *See* Second Superseding Indictment. Thus, the Government must still demonstrate Bourke's knowledge of the conspiracy's "unlawful purpose" -- the bribing of Azeri officials in order to encourage the privatization of SOCAR. [**7] *See* 1 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, *Modern Federal Jury Instructions* P 19.01, instr. 19-6 (2008) (As part of the charge, suggesting "Did [the defendant] participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective. . . ."); *United States v. Barlin, 686 F.2d 81, 90 (2d Cir. 1982)* (ruling that a conspiracy instruction that the jury must find that the defendant "participate[d] in some way in carrying out the illegal purpose with at least some knowledge of that illegal purpose and the intention to further it" was appropriate and sufficiently clear). Whether the Government may prove Bourke's knowledge based on a "conscious avoidance" theory and the means by which it may do so still require resolution.

[*419] Bourke makes two arguments in support of his contention that the Government should be precluded from presenting evidence of the prevalence of corrupt business practices in Azerbaijan. *First*, he argues that the conscious avoidance standard "is not a reasonable person standard; the Government cannot rely on evidence that [] Bourke should have known about the bribes to establish conscious avoidance [**8] . . . ." [19] *Second*, he asserts that the Government should be permitted to introduce evidence regarding the knowledge of individuals other than the defendant "only if there is some other evidence in the record -- concerning, for example, the nature of the fraud or the relationship of the parties -- from which to conclude that the defendant would have the same knowledge.'" [20]

19 Bourke Mem. at 3.
20 *Id*. at 5 (quoting *Kaplan, 490 F.3d at 120*).

A. Evidence Showing Bourke's Awareness of Corruption in Azerbaijan

Bourke notes correctly that the Government cannot present background evidence of corruption in Azerbaijan for the purpose of demonstrating that Bourke "should have known" that Azeri officials would require bribes in order to facilitate the privatization of SOCAR. [21] In response, the Government argues that such evidence will be used not to show that Bourke "should have known," but to show that Bourke was aware of the high probability that Azeri officials were being bribed. [22]

21 *See Nektalov, 461 F.3d at 315* (holding that it is "essential to the concept of conscious avoidance[ ] that the defendant must be shown to have decided not to learn the key fact, not merely to have failed to learn [**9] it through negligence."). *See also United States v. Abreu, 342 F.3d 183, 188 (2d Cir. 2003)* (rejecting argument "premised on the common misconception that the conscious avoidance theory allows the prosecution to establish

knowledge by proving only that the defendant should have known of a certain fact, even if he did not actually know it"); *Ferrarini, 219 F.3d at 157* ("[W]e have held that conscious avoidance cannot be established when the factual context *should have apprised* [the defendant] of the unlawful nature of his conduct -- [] and have instead required that the defendant have been shown to have *decided* not to learn the key fact") (internal quotations omitted) (emphasis in original).

22 *See* Government's Opposition to the Defendant's Motion in Limine to Exclude Evidence Relating to Corruption in Azerbaijan ("Gov't Mem.") at 2-3.

The Government informs the Court that it intends to present several items of evidence that -- together -- are relevant to such proof, including (1) that "Azerbaijan in the late 90s was one of the most corrupt nations in the world;" (2) it was "well-known that post-Communist privatization of state-owned assets was particularly plagued by corruption, not only [**10] in Azerbaijan, but in many other former Soviet states;" (3) "SOCAR was Azerbaijan's most important economic and strategic asset: it was highly unlikely that the president of Azerbaijan would permit it to be privatized and acquired at an outrageously [*420] low price by a group of foreign investors, absent some corrupt arrangement with the Azeri leadership;" and (4) "Bourke invested because of his great faith in co-defendant Kozeny, whose notoriety as the 'Pirate of Prague' arose from his prior corrupt dealings in privatization in the Czech Republic. . . ." [23]

23 *Id*. at 3. The Government intends to call an expert to testify about most of these topics. *See* Bourke's Motion in Limine With Respect to the Expert Testimony of Rajan Menon. While the expert is permitted to testify regarding corruption in Azerbaijan at the time of Bourke's investment in SOCAR, he will not be allowed to testify that knowledge of such corruption was well-known or notorious.

That Azerbaijan was known to be a corrupt nation, that the post-Communist privatization processes in other countries have been tainted by corrupt practices, that SOCAR was a strategic asset of Azerbaijan, and that Kozeny was notorious as the "Pirate [**11] of Prague" makes it probable that Bourke was aware that Azeri officials were being bribed in order to ensure the privatization of SOCAR. I therefore find this evidence to be relevant and admissible.

Nevertheless, Bourke points to certain language that the Government uses that might confuse a jury into believing that the correct standard is a negligence standard -- in other words, that if Bourke had made an investigation, he would have discovered the alleged bribery. [24] For instance, the Government asserts that

> [i]t is easily established that Bourke *could have learned* of Azerbaijan's corruption problem: by speaking with an academic or other expert, reviewing magazines and newspapers, contacting the State or Commerce Departments, or, of course, by speaking with his own lawyers, as he did. It is not unreasonable to expect, or for the Government to argue, that someone with Bourke's background as a highly successful investor with significant access to professional services *could have easily obtained* information which, the Government's expert will testify, is widely available. [25]

Although it is true that the Government was not as careful as it should have been in choosing its words, Bourke [**12] appears to misapprehend the Government's argument. The Government is not contending that Bourke was negligent in failing to investigate whether Kozeny and others were resorting to the use of bribery to encourage the privatization process. The Government is arguing instead that it will prove beyond a reasonable doubt that a person of Bourke's means, who was considering making a large investment in a venture in Azerbaijan, would have at least been aware of the high probability that bribes were being paid. [26]

24 *See* Reply Memorandum of Law in Further Support of Bourke's Motion in Limine to Exclude Evidence Relating to Corruption in Azerbaijan ("Bourke Rep. Mem.") at 1-2.

25 Gov't Mem. at 6-7 (emphasis added).

26 *See id*. at 7 ("[T]he evidence of corruption in Azerbaijan is not offered to show that Bourke knew that bribes were in fact being paid. The Government is only contending that because the

problem of corruption in Azerbaijan was well known, Bourke likely knew of the problem of corruption.").

Moreover, no prejudice will result from admitting such evidence because the Government has demonstrated that it will be able to establish a factual predicate for a conscious avoidance charge. The Government [**13] notes that it has accumulated substantial evidence regarding Bourke's awareness of corruption in Azerbaijan generally. [27] For instance, the Government seeks to present evidence of conversations in which Bourke was warned by his counsel that Azerbaijan was the "Wild West" [*421] and that doing business in Azerbaijan was like the movie "Chinatown," where there are "no rules." [28]

27 *See id*. at 4.

28 *Id*. The Government has informed the Court that it obtained this evidence when Bourke appeared for a proffer session and waived the attorney-client privilege after he learned that he was a subject of the Government's investigation. *See id*. at 3. When Bourke's proffer agreement was discussed at the oral argument on the motions, counsel for Bourke did not deny that the privilege had been waived and the evidence was admissible. *See* Transcript of May 21, 2009 Conference at 39:22-42:2.

In addition, the Government will introduce a tape recording that it obtained from one of Bourke's counsel, which records a conversation among Bourke, another investor, and their respective attorneys. In this recording, Bourke expresses his concern that Kozeny and his employees are paying bribes and violating the FCPA: "I mean, [**14] they're talking about doing a deal in Iran. . . . Maybe they. . . bribed them, . . . with ten million bucks. I, I mean, I'm not saying that's what they're going to do, but suppose they do that." [29] Later in the conversation, Bourke says:

> I don't know how you conduct business in Kazakhstan or Georgia or Iran, or Azerbaijan, and if they're bribing officials and that comes out . . . Let's say. . . one of the guys at Minaret says to you, Dick, you know, we know we're going to get this deal. We've taken care of this minister of finance, or this minister of this or that. What are you going to do with that information? [30]

Still later in the conversation, Bourke again ponders:

> What happens if they break a law in, uh, in uh, you know, Kazakhstan, or they bribe somebody in Kazakhstan and we're at dinner and. . . one of the guys [says] 'Well, you know, we paid some guy ten million bucks to get this now.' I don't know, you know, if somebody says that to you, I'm not part of it, I didn't endorse it. But let's say, they tell you that. You got knowledge of it. What do you do with that? . . . I'm just saying to you in general . . . *do you think business is done at arm's length in this part of the world*." [**15] [31]

While these comments do not demonstrate conclusively that Bourke knew that bribes were being paid in Azerbaijan to further the privatization of SOCAR, they certainly suggest that he suspected that might be the case. Furthermore, statements such as "What are you going to do with that information?" and "You got knowledge of it. What do you do with that?" intimate that he was concerned about what he might discover. Thus, if Bourke did not actually know, this evidence is at least sufficient for a jury to conclude beyond a reasonable doubt that he knew of the high probability that bribes were being paid. In addition, his lack of actual knowledge would suggest that he decided not to learn more. [32] Because this evidence is both relevant and probative to whether Bourke acted with conscious avoidance, Bourke's motion to preclude such evidence is denied.

29 *Id*. at 4.

30 *Id*.

31 *Id*. (emphasis added).

32 The defense also argues that the Government "cannot justify the admissibility of its 'conscious avoidance' evidence by pointing to purported evidence of Bourke's actual knowledge. . . ." Bourke Rep. Mem. at 3 (citing *Ferrarini, 219 F.3d at 157*). However, evidence that Bourke's counsel had warned him [**16] of doing business in Azerbaijan, likening the country to the "Wild West" and to the movie "Chinatown," as well as a tape recording in which Bourke communicates his concerns about running afoul of the FCPA to his attorney and another investor demonstrates not

that Bourke actually knew of the bribes, but that he was aware of the high probability that bribes were being paid to secure the success of his investment.

[*422] **B. The Knowledge of Third Parties**

The defense next contends that the Government should not be permitted to introduce evidence of third parties' knowledge of the bribes unless the Government also presents evidence 'from which to conclude that [Bourke] would have the same knowledge.'" [33] In *United States v. Kaplan*, the Government sought to demonstrate the defendant's knowledge that he was participating in insurance fraud by presenting evidence that third parties knew of such fraud. In ruling that the district court had erred in admitting the evidence, the Second Circuit noted that the Government had failed to proffer "evidence supporting the conclusion that such knowledge was communicated to Kaplan, or that Kaplan had been exposed to the same sources from which these others derived [**17] their knowledge of fraud." [34] Without such evidence, the court held that such evidence had "little relevance in the circumstances of Kaplan's case." [35]

33 Bourke Mem. at 2 (quoting *Kaplan, 490 F.3d at 120*).
34 *Kaplan, 490 F.3d at 121*.
35 *Id.*

The Second Circuit also held that such evidence was of "minimal probative value," not only because the Government failed to offer evidence that would connect the third parties' knowledge of the fraud to Kaplan, but also because the testimony concerning knowledge of the fraud was "speculative or flawed in other respects." [36] For instance, the court noted that the Government had failed to lay a proper foundation for a witness' statement that it was "[his] understanding that [the insurance] industry was a very big sham." [37] The court found that the witness was not qualified to have special knowledge of that "industry." [38] The court also noted that the witness' testimony with respect to the knowledge of another party was hearsay upon hearsay. [39] Because the testimony would have required the jury to "draw a series of inferences, unsupported by other evidence, to connect this witness' testimony about his guilty knowledge (and that of others) to Kaplan's own [**18] knowledge," the court held that the slight probative value of such testimony was outweighed by the risks that the jury would draw improper inferences from the testimony. [40]

36 *Id.*
37 *Id.*
38 *See id.*
39 *See id. at 122*.
40 *Id.*

In this case, the Government has responded that there is "ample" evidence that the knowledge of others was likely communicated to Bourke and that Bourke was exposed to the same sources from which others had derived their knowledge of the fraud. [41] For instance, Bourke traveled by private jet through the former Soviet Union with Viktor Kozeny, the alleged mastermind behind the SOCAR investment. [42] The Government intends to show that Kozeny knew about the corruption in Azerbaijan and thereafter undertook to establish a relationship with a high-ranking Azeri official. [43]

41 *See* Gov't Mem. at 6.
42 *See id.*
43 *See id.*

Moreover, the Government will present evidence that Bourke became friendly with others in Kozeny's "inner circle," including Clayton Lewis, a former employee of Omega Advisors, which was a co-investor in the venture, and Thomas Farrell, who was employed by Kozeny to facilitate the scheme. [*423] The Government has informed the Court that Farrell will testify about the significant [**19] amount of time he spent in Azerbaijan and elsewhere in the Soviet Union and his awareness of the corruption in that part of the world. [44] This evidence, the Government argues, will make clear that Bourke likely possessed the same knowledge. [45]

44 *See id.*
45 *Id.*

I am satisfied that there will be sufficient testimony from Government witnesses regarding the close business relationships between Bourke, Kozeny, and Lewis, and the participation of others like Farrell. Based on these relationships the jury has a fair basis to infer that the knowledge of these individuals can be imputed to Bourke.

Bourke argues additionally that -- like the evidence in *Kaplan* -- evidence of Kozeny's knowledge or the knowledge of others will be more prejudicial than probative. [46] The first of the concerns in *Kaplan* is addressed above -- namely linking Bourke to the

witnesses with knowledge of the bribery scheme. Regarding the concern that such evidence should not be "speculative" or "flawed," I note that the Government intends to call Farrell as a witness, [47] and he is likely to testify regarding his personal knowledge of the bribery. The same should be the case for other witnesses who were closely involved in the [**20] venture, such as Lewis. [48]

46 *See* Bourke Rep. Mem. at 3.

47 The Government has also submitted a motion in limine with respect to the defense's cross-examination of Thomas Farrell.

48 Although Kozeny will not be a witness at trial, statements made by Kozeny during the course of and in furtherance of the conspiracy are admissible under *Federal Rule of Evidence 801(d)(2)(E)* and are therefore not hearsay.

I further conclude that the prejudice caused by such proof does not outweigh its probative value. Unlike the facts of *Kaplan* in which the Government sought to prove Kaplan's knowledge solely through the knowledge of others, evidence of Kozeny's knowledge or the knowledge of others is only one part of the proof the Government will introduce. The Government has also stated its intention to present direct evidence that will support its conscious avoidance theory. This evidence includes the conversations that Bourke had with his counsel which have been discussed and addressed above.

V. CONCLUSION

For the reasons set forth above, Bourke's motion in limine seeking to bar the Government from offering evidence of corruption in Azerbaijan is denied. The Clerk of the Court is directed to close this motion [**21] (document no. 182).

SO ORDERED:

/s/ Shira A. Scheindlin

Shira A. Scheindlin

U.S.D.J

Dated: New York, New York

May 29, 2009

UNITED STATES OF AMERICA -against- VIKTOR KOZENY and FREDERIC BOURKE, JR., Defendants.

05 Cr. 518 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

638 F. Supp. 2d 348*; *2009 U.S. Dist. LEXIS 59209

July 6, 2009, Decided
July 6, 2009, Filed

SUBSEQUENT HISTORY: Motion denied by, Motion for new trial denied by *United States v. Kozeny, 2009 U.S. Dist. LEXIS 95233 (S.D.N.Y., Oct. 13, 2009)*

PRIOR HISTORY: *United States v. Kozeny, 643 F. Supp. 2d 415, 2009 U.S. Dist. LEXIS 45613 (S.D.N.Y., May 29, 2009)*

COUNSEL: [**1] For the Government: Harry Chernoff, Iris Lan, Assistant United States Attorneys, New York, NY.

For Defendant Bourke: Harold A. Haddon, Esq., Saskia A. Jordan, Esq., Haddon Morgan Mueller Jordan Mackey & Foreman P.C., Denver, CO; John D. Cline, Esq., K.C. Maxwell, Esq., Jones Day LLP, San Francisco, CA; James David Reich, Jr., Esq., Christopher Paolella, Esq., Winston & Strawn LLP, New York, NY.

JUDGES: Shira A. Scheindlin, United States District Judge.

OPINION BY: Shira A. Scheindlin

OPINION

[*349] **OPINION AND ORDER**

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

I. INTRODUCTION

Defendant Frederic Bourke moves pursuant to *Federal Rule of Criminal Procedure 29* for an entry of a judgment of acquittal. For the reasons that follow, his motion is denied.

II. BACKGROUND

The Government's allegations in this case are complex, and it is unnecessary to recite them here. The relevant facts are as follows: SOCAR is the state-owned oil company of the Republic of Azerbaijan ("Azerbaijan"). [1] In the mid-1990s, Azerbaijan began a program of privatization. [2] The program gave the President of Azerbaijan, Heydar Aliyev, discretionary authority as to whether and when to privatize SOCAR. [3] Bourke and others allegedly conspired to violate the FCPA by agreeing to [**2] make payments to Azeri officials to encourage the privatization of SOCAR and to permit them to participate in that privatization. [4]

1 *See* Indictment of Frederic Bourke, Jr. P 3.
2 *See id*. P 4.
3 *See id*.
4 *See id*. P 18.

III. LEGAL STANDARD

To prevail on a *Rule 29* motion, a defendant must show that "the evidence is insufficient to sustain a conviction." [5] "[A] defendant [*350] making an insufficiency claim bears a very heavy burden." [6] "The ultimate question is not whether [the court] believe[s] the evidence adduced at trial established the defendant's guilt beyond a reasonable doubt, but whether any rational trier of fact could so find." [7] "In other words, the court may enter a judgment of acquittal only if the evidence that the defendant committed the crime is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." [8]

5 *Fed. R. Crim. P. 29(a)*.

6 *United States v. Desena, 287 F.3d 170, 177 (2d Cir. 2002)*. *Accord United States v. Best, 219 F.3d 192, 200 (2d Cir. 2000)*.

7 *United States v. Espaillet, 380 F.3d 713, 718 (2d Cir. 2004)*. *Accord Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*.

8 *United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999)* (quotation marks and citation [**3] omitted). *Accord United States v. Macpherson, 424 F.3d 183, 187 (2d Cir. 2005)*.

A court must grant a motion under *Rule 29* "if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." [9] "But at the end of the day, 'if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.'" [10]

9 *United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984)*.

10 *United States v. Cassese, 428 F.3d 92, 99 (2d Cir. 2005)* (quoting *United States v. Glenn, 312 F.3d 58, 70 (2d Cir. 2002))* (ruling on a *Rule 29* motion).

In considering the sufficiency of the evidence, the court must "view all of the evidence in the light most favorable to the government." [11] A court must analyze the pieces of evidence not separately, in isolation, but together, in conjunction with one another. [12] Accordingly, a court must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from the others." [13]

11 *United States v. Aleskerova, 300 F.3d 286, 292 (2d Cir. 2002)*; [**4] *United States v. Reyes, 302 F.3d 48, 52 (2d Cir. 2002)*.

12 *See United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000)*.

13 *Guadagna, 183 F.3d at 130*. *Accord Reyes, 302 F.3d at 53* ("[W]e consider the evidence as a whole.").

"[T]he credibility of witnesses is the province of the jury, and [a court] simply cannot replace the jury's credibility determinations with [its] own." [14] "[T]he task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court." [15] Furthermore, "the jury's verdict may be based on entirely circumstantial evidence." [16] Because the jury is entitled to choose which inferences to draw, the Government, in presenting a case based on circumstantial evidence, "need not 'exclude every reasonable hypothesis other than that of guilt.'" [17] But [*351] "a conviction based on speculation and surmise alone cannot stand." [18] Moreover, a "jury is entitled to a vast range of reasonable inferences, but may not base a verdict on mere speculation." [19]

14 *United States v. James, 239 F.3d 120, 124 (2d Cir. 2000)*. *Accord Autuori, 212 F.3d at 114* (a court "may not substitute [its] own determinations of credibility or relative weight of the evidence for that of [**5] the jury"). Moreover, a court must "credit[] every inference that the jury might have drawn in favor of the [G]overnment." *United States v. Morrison, 153 F.3d 34, 49 (2d Cir. 1998)*.

15 *United States v. McDermott, 245 F.3d 133, 137 (2d Cir. 2001)*.

16 *United States v. Dae Whan Kim, 435 F.3d 182, 184 (2d Cir. 2006)*.

17 *Guadagna, 183 F.3d at 130* (quoting *Holland v. United States, 348 U.S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954))*; *Reyes, 302 F.3d at 56* (by "discount[ing] evidence of guilty knowledge entirely because there were possible . . . innocent explanations for [defendant's] conduct," the district court "failed to view the evidence in the light most favorable to the [G]overnment"); *Autuori, 212 F.3d at 114* ("[T]he [G]overnment need not negate every theory of innocence.").

18 *United States v. D'Amato, 39 F.3d 1249, 1256*

(2d Cir. 1994).

19 *United States v. Wilson, 160 F.3d 732, 737, 333 U.S. App. D.C. 103 (D.C. Cir. 1998)* (quotation marks and citation omitted)).

IV. DISCUSSION

A. Count Two -- Money Laundering Conspiracy

Bourke argues that the Government has presented no evidence (1) "showing that [he] entered into any agreement with the specific intent of transporting money overseas for the purpose of promoting a violation of the FCPA;" and (2) [**6] "demonstrating that the scope of any such conspiracy extended into the statute of limitations period." [20] I will address each of these arguments in turn.

20 Preliminary Memorandum of Law in Support of Defendant Frederic Bourke, Jr.'s Motion for Entry of a Judgment of Acquittal Pursuant to *Fed R. Crim. P. 29* ("Bourke Mem.") at 1.

1. Lack of Intent

Bourke contends that the Government has failed to prove that Bourke's intent in agreeing to transfer money overseas was to violate the FCPA rather than to purchase vouchers and options, which he notes is lawful. [21]

21 *See id*. at 5.

As an initial matter, there is no dispute that Bourke invested in Oily Rock in March and July 1998. [22] In order to sustain the money laundering conspiracy charge against Bourke, the Government must present evidence that Bourke had the "knowledge or awareness of the illegal nature of the charged activity and [that he intended] to advance the illegal objective." [23] After a review of the evidence admitted at trial, I conclude that a reasonable jury could draw the inference that Bourke agreed with others that the intended use of his investment would be, in part, for the purpose of bribing Azeri officials.

22 *See* Trial Transcript [**7] ("Tr.") at 2555:6-9 (Christopher Paolella, defense counsel, acknowledging at oral argument that the dates of Bourke's investment were March and July 1998). *See also id*. at 1063:11-22 (Bodmer explaining that Bourke had invested in Oily Rock in March and July 1998). Oily Rock was the organization that was established to purchase vouchers on behalf of Bourke and his co-investors in Azerbaijan. *See id*. at 400:25-401:3.

23 *United States v. Svoboda, 347 F.3d 471, 479 (2d Cir. 2003)*.

Hans Bodmer, attorney to co-defendant Viktor Kozeny during the period of the privatization scheme, testified that he had a conversation with Bourke in early February 1998 regarding the bribery of Azeri officials. [24] Bodmer testified that during one trip to Azerbaijan, Bourke asked him, "what is the arrangement, what are the Azeri interests." [25] After obtaining Kozeny's approval to speak to Bourke about the specifics of the "arrangement," Bodmer then met with Bourke the following day. [26] He testified that he then told Bourke that two-thirds of the vouchers had been issued to the Azeri officials under credit facility agreements at no risk to them. [27] He also identified the Azeri officials [*352] who received these vouchers [**8] as Barat Nuriyev and his family and Nadir Nasibov and his family. [28] It would certainly be reasonable for the jury to conclude that Bourke was aware of the bribery arrangements as early as February 1998.

24 *See* Tr. at 1065:7-1070:23.

25 *Id*. at 1065:15-16.

26 *See id*. at 1067:3-21.

27 *See id*. at 1068:23-1069:10

28 *See id*. at 1069:22-1070:3. Nasibov was the Chairman of the State Committee for Property in Azerbaijan. *See id*. at 321:10-15; 444:18-19. Nuriyev was his deputy. *See id*. at 427:17-18.

In addition to Hans Bodmer, the Government also called Thomas Farrell, one of Kozeny's employees, as a witness. Farrell testified that some time after Bourke had invested in Oily Rock, Bourke requested that Farrell leave his office with him so that they might have a conversation. [29] During that conversation, Bourke asked about the status of the privatization venture and whether President Aliyev or Barat Nuriyev had given any indications to Farrell about possible approval. [30] Farrell testified that at one point in the conversation, Bourke had asked: "Has Viktor given them enough money?" [31]

29 *See id*. at 518:23-519:8.

30 *See id*. at 519:15-519:22.

31 *Id*. at 520:1.

Farrell testified that Bourke raised the subject with

[**9] him a second time during a trip to celebrate the opening of the Minaret offices in Baku, Azerbaijan in April 1998. [32] Farrell testified that Bourke asked him about privatization and whether Farrell had heard anything from the officials in charge, such as Nuriyev. [33] After Farrell gave Bourke a short status report, Bourke asked: "Well are -- is Viktor giving enough to them?" [34]

> 32 *See id*. at 535:23-536:16. Minaret was an investment bank that Kozeny had established in Azerbaijan. *See id*. at 400:8-16.
> 33 *See id*. at 536:18-23.
> 34 *Id*. at 536:24-26.

The testimony of Bodmer and Farrell, when considered in the light most favorable to the Government, is sufficient to prove beyond a reasonable doubt that Bourke agreed and intended that his investment not only be used for the purpose of purchasing vouchers and options, but also to ensure that the privatization of SOCAR occurred, by bribing the officials involved in the decision-making process. At oral argument, Bourke argued that proof that he knew that the investment money was being used partly to bribe officials is not enough; intent is required to sustain a conviction for conspiracy. [35] However, even if *Bodmer's testimony* shows only *knowledge* of [**10] the bribery arrangements, a reasonable jury could infer from *Farrell's testimony* of Bourke's statements that Bourke *intended* that part of his July 1998 investment money be used to bribe officials. [36]

> 35 *See id*. at 2555:22-2556:10.
> 36 Neither *United States v. Brown, 186 F.3d 661 (5th Cir. 1999)*, nor *United States v. Miles, 360 F.3d 472, 477 (5th Cir. 2004)*, are of any help to Bourke. In *Brown*, the Fifth Circuit held that "[i]n examining the question of intent necessary for a money laundering promotion conviction, [] the Government must present either direct proof of an intent to promote such illegal activity or proof that a given type of transaction, on its face, indicates an intent to promote such illegal activity." *Brown, 186 F.3d at 670-71*. The court ruled that in the absence of direct proof, the defendant could not be convicted for using funds procured by fraud to pay the operating expenses of an "otherwise legitimate business enterprise." *See id. at 671*. The court reiterated these holdings in *Miles. See Miles, 360 F.3d at 477*. Here, by contrast, there is direct proof of Bourke's intent. Moreover, Bourke is charged only with a conspiracy to launder money, not with the substantive offense [**11] of money laundering.

[*353] **2. Expiration of the Statute of Limitations**

Bourke next argues that even if he participated in a money laundering conspiracy, that conspiracy ended with his last investment in Oily Rock. [37] He contends that because his last transfer of funds occurred before July 22, 1998, "the money launder[ing] charge is barred by the statute of limitations." [38]

> 37 *See* Bourke Mem. at 8.
> 38 *Id*.

In the Court's June 21, 2007 Opinion and Order and subsequent Memorandum Opinion and Order on Bourke's motion to dismiss, I held that the Government had alleged -- with respect to the money laundering conspiracy count -- conduct occurring within the limitations period, which is after July 22, 1998. [39] However, I also noted that "[w]hether the government ultimately will be able to prove that the [alleged money laundering] conspiracy continued past July 1998 is an issue for trial." [40]

> 39 *See United States v. Kozeny, 493 F. Supp. 2d 693, 714 (S.D.N.Y. 2007)*.
> 40 *Id. at 715*.

As noted above, the Government has offered sufficient evidence for a reasonable jury to conclude that a money laundering conspiracy existed and Bourke willfully joined and participated in that conspiracy. The key question therefore [**12] is whether the conspiracy continued after July 22, 1998.

The Second Circuit has held that

> where a conspiracy statute does not require proof of an overt act and where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has been terminated[,] and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn. [41]

The Supreme Court has ruled that a conviction for conspiracy to engage in money laundering in violation of *Section 1956(h) of Title 18 of the United States Code* does not require proof of an overt act. [42] In addition, the conspiracy here, whose purpose is to violate the FCPA, contemplates a continuity of purpose and continued performance of acts. As such, to prove that the claim is time-barred, Bourke must show either that the conspiracy was terminated, or that Bourke withdrew. [43]

41 *United States v. Spero, 331 F.3d 57, 60 (2d Cir. 2003)*.

42 *See Whitfield v. United States, 543 U.S. 209, 219, 125 S. Ct. 687, 160 L. Ed. 2d 611 (2005)*.

43 Although the burden of proof is on the Government to prove that the conspiracy continued past July 22, 1998, in order for Bourke to [**13] prevail on his *Rule 29* motion with respect to this Count, he must make an affirmative showing that the conspiracy was either terminated or he withdrew from the conspiracy by that date.

Bourke does not contend that he withdrew from the conspiracy by July 22, 1998. [44] Instead, he argues that the conspiracy must have terminated by July 22, 1998 because "the object of the conspiracy here was to transport funds for the intent of violating the Foreign Corrupt Practices Act." [45] He further contends that viewing the object of the conspiracy as simply the violation of the FCPA would "conflate" the money laundering conspiracy with the conspiracy to violate the FCPA. [46]

44 In fact, Bourke confirmed to the Court at the June 30, 2009 charge conference that withdrawal from either of the conspiracies is not one of his defenses. *See* Tr. at 2946:16-25.

45 *Id*. at 2980:15-17.

46 *Id*. at 2980:18-23.

[*354] I disagree. In *United States v. Mennuti*, the Second Circuit examined whether the statute of limitations had expired on a count for conspiracy to commit mail fraud. [47] The court found that the "crucial question" for statute of limitations purposes is "the scope of the conspiratorial agreement," which must be informed [**14] by the purpose of the conspiracy. [48] It also held that where the object of the conspiracy is economic, the conspiracy "continues until the conspirators receive their anticipated economic benefits." [49] The court therefore rejected Mennuti's argument that the conspiracy ended when the insurance check was acquired. [50] Instead, it reasoned that Mennuti's "sole reason for becoming involved in the scheme was to purchase [a real estate] property at a low cost and then resell it at a profit." [51] As such, the conspiracy did not end when he acquired the check; it ended when he purchased the property. [52]

47 *679 F.2d 1032, 1035 (2d Cir. 1982)*.

48 *Id*.

49 *Id*. The Second Circuit reiterated these holdings in a subsequent money laundering case pursuant to *section 1956(h)*. *See United States v. La Spina, 299 F.3d 165, 173-76 (2d Cir. 2002)*.

50 *See Mennuti, 679 F.2d at 1035*.

51 *Id*.

52 *See id*.

Applying the reasoning of *Mennuti* to the instant case makes clear that the conspiracy here was economic. According to the Indictment, the purpose or intent of transporting the funds was to violate the FCPA. However, a person does not violate the FCPA without expecting to receive something in return. In this case, the Government [**15] contends that the conspirators bribed the officials in order to encourage the privatization of SOCAR and reap substantial returns on their voucher investments. Contrary to Bourke's argument, a reasonable jury could infer that the conspiracy had not terminated by July 22, 1998, because the privatization had not occurred at that time and no returns had been made on the investments.

In fact, Bourke himself made his final investment in July 1998 in further anticipation of the success of the privatization venture. There is also evidence that investments in Oily Rock were still being made in August 1998, [53] and that bribes were being paid in August and September 1998. [54] This evidence provides a reasonable basis for a jury to infer that the conspiracy continued past July 22, 1998.

53 *See* GX 186 (Transfer statement notifying Oily Rock that a payment was made by Richard Friedman to Oily Rock's account at Hyposwiss for one million dollars on August 8, 1998).

54 *See id*. at 574:18-575:13 (Farrell's testimony that cfforts were expended in 1998 to obtain a doctor's appointment and a visa for Nuriyev to travel to the United States to see that doctor); *id*. at 583:1-17 (Farrell's testimony regarding an [**16] entry in his calendar that reflects Bourke's help in obtaining a doctor's appointment and

visa); GX 822 (8/14/98 Letter from Farrell to Bourke regarding Nuriyev's medical treatment in the United States). *See also id*. at 1121:4-1123:19 (Bodmer's testimony that from May 1, 1998 to September 29, 1998, a number of payments were made from Oily Rock accounts to Azeri officials); *id*. at 1122:2-16 (Bodmer's testimony that the latest payment was for one million dollars and was transferred from Oily Rock funds to an account of Cassopolis Enterprises, which was associated with the daughter of President Aliyev); GX 261-N (showing the date of the transfer as September 29, 1998 and the amount of the transfer to be $ 1,000,000).

Bourke relies principally on *United States v. Roshko* [55] for his argument that the object of the conspiracy here was "narrowly [*355] and specifically framed" -- to transport money for the purpose of violating the FCPA. [56] However, *Roshko* involved a conspiracy to obtain a green card, and the Second Circuit distinguished its facts from the facts of an economic conspiracy case, specifically discussing with approval its reasoning in *Mennuti*. [57]

55 *969 F.2d 1 (2d Cir. 1992)*.

56 *See* Supplemental [**17] Memorandum of Law in Further Support of Defendant Frederic Bourke, Jr.'s Motion for Entry of a Judgment of Acquittal Pursuant to *Fed. R. Crim. P. 29* ("Bourke Supp. Mem.") at 7.

57 *See Roshko, 969 F.2d at 8-9*.

Finally, Bourke contends that tying the money laundering conspiracy to the underlying substantive violation "would render the statute of limitations essentially indeterminate." [58] That is not the case here. It would be reasonable to conclude that the conspiracy ended when Kozeny and his co-conspirators abandoned their attempts at encouraging the privatization of SOCAR or when they ceased paying bribes to Azeri officials. Accordingly, Bourke's motion is denied with respect to Count Two.

58 *See* Bourke Supp. Mem. at 4-5.

B. Count One -- Conspiracy to Violate the FCPA and Travel Act

Bourke next argues that he should be acquitted of Count One because "[n]o rational juror could find beyond a reasonable doubt that the post-July 22, 1998 payments (and other alleged overt acts) furthered the FCPA conspiracy, as opposed to the options fraud conspiracy." [59] Bourke argues that by July 1998, the privatization venture was a "pipe dream," but that the options fraud conspiracy continued at "full [**18] speed." [60] Bourke further notes that it would be "nothing but 'speculation and conjecture' to conclude that any such payments furthered the FCPA conspiracy -- and that cannot be the basis for finding guilt beyond a reasonable doubt." [61]

59 Bourke Mem. at 11.

60 *Id*. at 14.

61 *Id*. at 16.

However, there is ample evidence to suggest that the purpose of many of the payments was to obtain assistance from the Azeri officials in the privatization venture. Farrell testified that bribes had been paid to the officials for the purpose of "help[ing] us purchase and obtain vouchers and options to [use in the] privatization auction." [62] There is also testimony connecting specific bribes to the privatization venture. [63] For instance, Farrell testified that at the meeting in which Kozeny agreed to give the officials a two-thirds share of the vouchers, he had also agreed to pay an "entry fee" of eight to twelve million dollars to President Aliyev in order to participate in the privatization of SOCAR, which was subsequently transferred in cash and by wire. [64] A reasonable jury could properly conclude that any bribes made after July 22, 1998 were also made for the purpose of encouraging privatization rather [**19] than facilitating Kozeny's options fraud scheme.

62 Tr. at 353:14-16.

63 And even if there is no testimony connecting some of the bribes to the privatization venture, all bribes and payments made prior to April 1998 would have necessarily been for the purpose of encouraging the privatization venture rather than facilitating the options fraud scheme. This is because a reasonable jury could infer that the options fraud scheme began only when Omega Advisors made its first investment. *See* Tr. at 549:16-551:7 (Farrell testifying that Kozeny violated the co-investment agreement with Omega Advisors by selling Oily Rock's own options to Omega); GX152 (co-investment agreement with Omega dated April 1998).

64 *See id*. at 436:8-437:25.

[*356] Bourke's argument is also unpersuasive for another reason. As noted, there is sufficient evidence from which a reasonable jury could infer that Bourke knew of payments being made to Azeri officials by February 1998 and that he intended for similar payments to be made as of April 1998. In addition, there is evidence that he was involved in referring Nuriyev to a doctor in the United States and obtaining a visa for him to travel to the United States in August 1998. [65] But [**20] there is also evidence that Bourke had no knowledge of the options fraud scheme until later -- sometime around October 1998. [66] It would therefore be plausible for a jury to infer that the purpose of the bribes -- including some that were made after July 22, 1998 -- was to encourage the privatization of SOCAR, in which Bourke participated, rather than to facilitate the options fraud scheme, of which Bourke had no knowledge. Because this inference is supported by the evidence, it would not be the result of "speculation or conjecture." Bourke's motion with respect to Count One must therefore also be denied.

65 *See id*. at 574:18-575:7 (Farrell's testimony regarding Bourke's efforts at securing doctor appointment and visa); GX822 (8/14/98 Letter).

66 *See* Tr. at 1177:2-1178:6 (Bodmer testifying that he met with Bourke in October 1998, and that Bourke had informed him that he had discovered Kozeny's options fraud scheme); *id*. at 738:13-740:22 (Farrell testifying that Bourke had met with Aliyev in October 1998 to report that Farrell and Kozeny were "crooks" and then had met with Farrell and Kozeny and had accused them of cheating investors).

C. Count Three -- False Statements Charge

Finally, Bourke [**21] challenges the sufficiency of the evidence with respect to the false statements charge. He argues that the statements he made to federal authorities during his proffer sessions are "ambiguous" and that when viewed "in context and as a whole, no rational juror could find beyond a reasonable doubt that [] Bourke knowingly and willfully made a materially false statement." [67]

67 Bourke Mem. at 17.

However, when the evidence is viewed as a whole, a reasonable jury could find that a number of statements made by Bourke are flatly contradicted by the testimony of Farrell and Bodmer. For instance, Agent George Choundas, the FBI special agent who interviewed Bourke in April and May 2002, [68] testified that Bourke was asked whether he had any conversations with Bodmer or Kozeny regarding a scheme to influence Azeri officials. [69] Bourke had answered: "No, because I didn't think there were any." [70] However, as noted, Bodmer testified that Bourke had approached him in February 1998 about an "arrangement" with the Azeri officials, and that Bodmer had then explained to Bourke how the Azeri officials were to receive a two-thirds share of the vouchers for essentially no consideration. [71]

68 *See* Tr. at 2449:5-10 [**22] (Choundas testifying that he was a special agent with the FBI from 1999-2004); *id*. at 2453:20-21 (testifying that the interviews of Bourke took place in April and May 2002).

69 *See id*. at 2465:25-2466:2.

70 *Id*. at 2466:5-6.

71 *See id*. at 1065:7-1070:13.

Agent Choundas also testified that Bourke was specifically asked whether -- by April 1998 and the opening of the Minaret offices in Baku, Azerbaijan -- he had reason to suspect that Kozeny was paying bribes to Azeri officials. [72] Bourke had answered no. [73] Bourke was subsequently [*357] asked whether by April 1998 he had been given any indication that "anything untoward relating to the investment was going on." [74] Again, he responded no. [75] However, such statement is belied by the testimony of Farrell and Bodmer that they both had conversations with Bourke by April 1998 about payments to the Azeri officials. [76]

72 *See id*. at 2458:11-16.

73 *See id*. at 2458:17-18.

74 *Id*. at 2458:19-22.

75 *See id*. at 2458:23-24.

76 *See id*. at 1065:7-1070:13 (Bodmer's testimony); *see id*. at 519:13-520:7; 536:14-537:1 (Farrell's testimony).

Bourke's argument that he had not made a false statement because he "expressly stated his belief that Kozeny was 'paying off Azeri officials [**23] (including Nuriyev) as part of the options fraud scheme" is of no moment. [77] As noted, a reasonable jury could find, based on the evidence offered at trial, that Bourke had no knowledge of the options fraud scheme until approximately October 1998. Therefore, Bourke's

statement that Kozeny was bribing officials in furtherance of Kozeny's options fraud scheme would not explain Bourke's denial of knowledge of the bribery that had already occurred by April 1998. Bourke's motion with respect to Count Three is denied.

77 *See* Reply Memorandum of Law in Further Support of Defendant Frederic Bourke, Jr.'s Motion for Entry of a Judgment of Acquittal Pursuant to Fed R. Crim. 29 at 4.

V. CONCLUSION

For the reasons set forth above, Bourke's *Rule 29* motion is denied in its entirety. The Clerk of the Court is directed to close this motion (document no. 221).

SO ORDERED:

/s/ Shira A. Scheindlin

Shira A. Scheindlin

U.S.D.J

Dated: New York, New York

July 6, 2009

UNITED STATES OF AMERICA - against - VIKTOR KOZENY and FREDERIC BOURKE, JR., Defendants.

05 Cr. 518 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

664 F. Supp. 2d 369*; *2009 U.S. Dist. LEXIS 95233

October 13, 2009, Decided
October 13, 2009, Filed

PRIOR HISTORY: *United States v. Kozeny, 638 F. Supp. 2d 348, 2009 U.S. Dist. LEXIS 59209 (S.D.N.Y., 2009)*

COUNSEL: [**1] For Government: Harry Chernoff, Iris Lan, Assistant United States Attorneys, New York, NY.

For Bourke, Defendant: Harold A. Haddon, Esq., Saskia A. Jordan, Esq., Haddon Morgan Mueller Jordan Mackey & Foreman P.C., Denver, CO; John D. Cline, Esq., K.C. Maxwell, Esq., Jones Day LLP, San Francisco, CA; James David Reich, Jr., Esq., Christopher Paolella, Esq., Winston & Strawn LLP, New York, NY.

JUDGES: Shira A. Scheindlin, United States District Judge.

OPINION BY: Shira A. Scheindlin

OPINION

[*371] **OPINION AND ORDER**

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

I. INTRODUCTION

After a five-week trial, defendant Frederic Bourke was convicted of conspiring to violate the Foreign Corrupt Practices Act ("FCPA") under *18 U.S.C. § 371* and making false statements in violation of *18 U.S.C. § 1001*. [1] He now moves pursuant to *Federal Rule of Criminal Procedure 29* for entry of a judgment of acquittal on both counts, or alternatively, pursuant to [*372] *Rule 33* for a new trial. For the reasons that follow, his motions are denied.

1 *See* 7/10/09 Verdict Sheet; 5/26/09 Superseding Indictment PP 44-48; 54-55.

II. BACKGROUND

A. Facts

[2]

2 The facts in this case are complex, and it is unnecessary to recite them here. Instead of summarizing the voluminous testimony at trial, [**2] any facts pertinent to Bourke's motions will be addressed in the discussion section of this Opinion.

SOCAR is the state-owned oil company of the Republic of Azerbaijan ("Azerbaijan"). [3] In the mid-1990s, Azerbaijan began a program of privatization. [4] The program gave the President of Azerbaijan, Heydar

Aliyev, discretionary authority as to whether and when to privatize SOCAR. [5] Bourke, co-defendant Viktor Kozeny, and others conspired to violate the FCPA by agreeing to make payments to Azeri officials to encourage the privatization of SOCAR and to permit them to participate in that privatization. [6] The payments included, among other things, cash bribes, the gift of a two-thirds interest in the privatization venture, and assistance with obtaining a medical appointment, visas, and college admission in the United States. [7]

3 *See* Trial Transcript ("Tr.") at 169:16-17.
4 *See id*. at 181:23-182:10.
5 *See id*. at 203:2-5.
6 *See id*. at 432:1-5.
7 *See id*. at 450:8-22; 432:6-434:25; 574:15-575:21.

B. Procedural History

On May 12, 2005, in a sealed indictment, the Government charged Bourke with various offenses related to the payment of bribes to Azeri officials. In an Opinion and Order dated June 21, 2007, [**3] this Court granted Bourke's motion to dismiss certain of the counts against him on the ground that they were time-barred. [8] In a Memorandum Opinion and Order dated July 16, 2007, the Court reinstated the conspiracy to violate the FCPA count, the substantive FCPA count, and the money laundering conspiracy count. [9] The false statements count against Bourke was not dismissed in the June Opinion and Order and therefore also remained. [10] On May 5, 2009, a grand jury returned a superseding indictment that omitted the charges that the Court had dismissed. [11] On the eve of trial, after the Government decided not to proceed with the substantive FCPA count, a grand jury returned a second superseding indictment that omitted the substantive FCPA charge. [12]

8 *See United States v. Kozeny, 493 F. Supp. 2d 693, 714 (S.D.N.Y. 2007)*.
9 *See id. at 714-15*.
10 *See id. at 714*.
11 *See* 5/5/09 Superseding Indictment.
12 *See* 5/26/09 Superseding Indictment.

Trial on the three remaining counts -- conspiracy to violate the FCPA, conspiracy to engage in money laundering, and the making of false statements -- commenced on June 1, 2009 and lasted approximately five weeks. In a July 6, 2009 Opinion and Order, this Court denied [**4] Bourke's *Rule 29* motion for judgment of acquittal, finding that the Government had presented sufficient evidence to enable a reasonable juror to conclude beyond a reasonable doubt that Bourke was guilty of all counts. [13]

13 *See United States v. Kozeny, 638 F. Supp. 2d 348, 2009 U.S. Dist. LEXIS 59209, 2009 WL 1940897, at *6 (S.D.N.Y. July 6, 2009)*.

On July 10, 2009, the jury convicted Bourke of the conspiracy to violate the FCPA count and the false statements charge. [14] Bourke was acquitted, however, of the money laundering conspiracy [*373] count. [15] Bourke now moves the Court to enter a judgment of acquittal with respect to the counts upon which he was convicted or, in the alternative, to grant him a new trial.

14 *See* 7/10/09 Verdict Sheet.
15 *See id*

III. LEGAL STANDARD

A. *Rule 29*

To prevail on a *Rule 29* motion, a defendant must show that "the evidence is insufficient to sustain a conviction." [16] "[A] defendant making an insufficiency claim bears a very heavy burden." [17] "The ultimate question is not whether [the court] believe[s] the evidence adduced at trial established [the defendant's guilt beyond a reasonable doubt], but whether *any rational trier of fact could so find*." [18] "In other words, the court may enter a judgment [**5] of acquittal only if the evidence that the defendant committed the crime is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." [19]

16 *Fed. R. Crim. P. 29(a)*.
17 *United States v. Desena, 287 F.3d 170, 177 (2d Cir. 2002)*. *Accord United States v. Best, 219 F.3d 192, 200 (2d Cir. 2000)*.
18 *United States v. Eppolito, 543 F.3d 25, 45-46 (2d Cir. 2008)* (emphasis in original). *Accord Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*.
19 *United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999)* (quotation marks and citation omitted). *Accord United States v. Wexler, 522 F.3d 194, 209 (2d Cir. 2008)*.

A court must grant a motion under *Rule 29* if there is "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." [20] "[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." [21]

20 *United States v. Irving, 452 F.3d 110, 117 (2d Cir. 2006)* (quotation omitted).

21 *United States v. Hawkins, 547 F.3d 66, 71 (2d Cir. 2008)*.

In considering the sufficiency [**6] of the evidence, the court must "view all of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor." [22] A court must analyze the pieces of evidence not separately, in isolation, but together, in conjunction with one another. [23] Accordingly, a court must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from the others." [24]

22 *United States v. Ware, 577 F.3d 442, 447 (2d Cir. 2009)*.

23 *See United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000)*.

24 *Guadagna, 183 F.3d at 130*. *Accord United States v. Reyes, 302 F.3d 48, 53 (2d Cir. 2002)* ("[W]e consider the evidence as a whole.").

"The assessment of witness credibility lies solely within the province of the jury, and the jury is free to believe part and disbelieve part of any witness's testimony . . . ." [25] "'[T]he task of choosing among competing, permissible inferences is for the fact-finder, not for the reviewing court.'" [26] Furthermore, "'the jury's verdict may be based on entirely circumstantial evidence.'" [27] Because the jury is entitled [*374] to choose which inferences to draw, the [**7] Government, in presenting a case based on circumstantial evidence, "need not 'exclude every reasonable hypothesis other than that of guilt.'" [28] But "'a conviction based on speculation and surmise alone cannot stand.'" [29]

25 *Ware, 577 F.3d at 447*.

26 *United States v. Khedr, 343 F.3d 96, 104 (2d Cir. 2003)* (quoting *United States v. McDermott, 245 F.3d 133, 137 (2d Cir. 2001))*.

27 *United States v. Santos, 541 F.3d 63, 70 (2d Cir. 2008)* (quoting *United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995))*.

28 *Guadagna, 183 F.3d at 130* (quoting *Holland v. United States, 348 U.S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954))*; *Reyes, 302 F.3d at 56* (by "discount[ing] evidence of guilty knowledge entirely because there were possible . . . innocent explanations for [defendant's] conduct," the district court "failed to view the evidence in the light most favorable to the [G]overnment"); *Autuori, 212 F.3d at 114* ("[T]he [G]overnment need not negate every theory of innocence.").

29 *Santos, 541 F.3d at 70* (quoting *United States v. D'Amato, 39 F.3d 1249, 1256 (2d Cir. 1994))*.

B. *Rule 33*

Rule 33(a) provides that "[u]pon [**8] the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." [30] "This rule 'confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice.'" [31] "[B]efore ordering a new trial pursuant to *Rule 33*, a district court must find that there is 'a real concern that an innocent person may have been convicted.'" [32] "The test is whether "it would be a manifest injustice to let the guilty verdict stand." [33]

30 *Fed. R. Crim. P. 33(a)*.

31 *United States v. Polouizzi, 564 F.3d 142, 159 (2d Cir. 2009)* (quoting *United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992))*.

32 *United States v. McCourty, 562 F.3d 458, 475 (2d Cir. 2009)* (quoting *United States v. Ferguson, 246 F.3d 129, 134 (2d Cir. 2001))*.

33 *Sanchez, 969 F.2d at 1414* (quotations omitted).

IV. DISCUSSION

A. Insufficiency of Evidence

1. Count One -- Conspiracy to Violate the FCPA or Travel Act

Bourke argues that the Government presented insufficient evidence to establish beyond a reasonable doubt that he had actual knowledge of the bribery. [34] However, Bourke misconstrues the knowledge that a jury

must find he had [**9] in order to be convicted of the crime of conspiracy. The Government must prove that Bourke had knowledge of the *object of the conspiracy*, which was to violate the FCPA, not that bribes had, in fact, been paid. Indeed, a defendant can be convicted of conspiracy even if the object of the conspiracy -- in this case, the making of corrupt payments in return for the privatization of SOCAR -- is never fully consummated. [35]

34 *See* Memorandum of Law in Support of Defendant Frederic Bourke, Jr.'s Post-Trial Motion for Entry of a Judgment of Acquittal Pursuant to *Fed. R. Crim. P. 29* or for a New Trial Pursuant to *Fed. R. Crim. P. 33* ("Bourke Mem.") at 29.

35 *See Wexler, 522 F.3d at 214* ("[T]he law is well established that a [] conspiracy requires proof only of the parties' mutual agreement, not the consummation of any particular object.").

There was ample circumstantial evidence that Bourke had actual knowledge of the object of the conspiracy. For instance, Amir Farman-Farma, who was employed by Minaret [36] and became familiar with Bourke during the course of the privatization venture, testified that he had asked Bourke in a December 1998 conversation how Kozeny had justified the dilution of Oily [**10] Rock shares as a result of the capital share increase. [37] Bourke had replied [*375] that he had been told by Kozeny that the dilution was "a necessary cost of doing business" and that "he had issued or sold shares to new partners who would maximize the chances of the deal going through, the privatization being a success." [38] Robert Evans, another investor in the venture, also testified that Kozeny had told him and Bourke during a trip to Azerbaijan that they would not be receiving the "full value" of their investments because of a "split with local interests." [39] It can be inferred from both of these conversations that Bourke was aware that "new partners" or "local interests" were receiving shares of the venture without consideration and in exchange for assistance in encouraging the Azeri Government to privatize SOCAR.

36 Minaret was an investment bank that Kozeny had established in Azerbaijan. *See* Tr. at 400:8-16.

37 *See id*. at 1455:19-22 (Farman-Farma testifying that he was employed by Kozeny to work at Minaret); 1483:24-1484:9 (testifying about the conversation he had with Bourke regarding the dilution of shares). Oily Rock was the organization that was established to purchase vouchers on [**11] behalf of Bourke and his co-investors in Azerbaijan. *See id*. at 400:25-401:3. Bourke's co-conspirators agreed that a two-thirds interest in Oily Rock would be issued to Azeri officials in exchange for their assistance in encouraging the privatization of SOCAR. *See id*. at 431:12-434:25.

38 *Id*. at 1484:10-16.

39 *Id*. at 2623:4-14.

In addition, the Government introduced a tape recording of a May 1998 teleconference in which Bourke and Richard Friedman, another investor in Oily Rock, discussed with their attorneys how to limit any liability that may result from their participation on the boards of Kozeny's companies. [40] During this call, Bourke indicated strongly that he knew Kozeny and others were engaged in bribing state officials. [41]

40 *See* Government Exhibit ("GX") 4A-T-2.

41 *See id*. at 2 ("Bourke: I mean, they're talking about doing a deal in Iran . . . Maybe they . . . bribed them, . . . with ten million bucks . . . . I'm not saying that's what they're going to do, but suppose they do that . . . . What happens if . . . they bribe somebody in Kazakhstan and we're at dinner and . . . one of the guys [says] 'Well, you know, we paid some guy ten million bucks to get this now.' . . . I'm just [**12] saying to you in general . . . *do you think business is done at arm's length in this part of the world*?") (emphasis added).

Despite this knowledge, Bourke and Friedman proposed the formation of companies affiliated with Oily Rock and Minaret that would shield them from liability and limit their knowledge of the affairs of Kozeny's Oily Rock and Minaret. [42] Bourke joined the board of directors of Oily Rock US Advisors and Minaret US Advisors on July 1, 1998. [43] He made an additional investment in the privatization scheme after his appointments to these positions. [44]

42 *See id*. (proposing the formation of "Oily Rock Partners" after discussion of possible bribery by Kozeny). *See* Tr. at 1582:24-1583:8.

43 *See* GX 217 (7/1/98 Letter Agreement between Oily Rock Group Ltd. and Bourke setting out the terms of his appointment to the board of

Oily Rock U.S. Advisors); GX 601 (9/14/98 Minutes of an Oily Rock U.S. Advisors and Minaret U.S. Advisors meeting).

44 *See* Tr. 2056:2-11 (David Hempstead, one of Bourke's attorneys, testifying that Blueport International, a company set up by Bourke for the purpose of investing in the venture, had invested one million dollars in mid-July 1998).

There is also substantial [**13] direct evidence of Bourke's knowledge. Hans Bodmer, co-defendant and attorney to Kozeny during the period of the scheme, testified that he had a conversation with Bourke in February 1998 regarding the bribery of Azeri officials. [45] Bodmer testified that on February 5, 1998 during a trip to Azerbaijan, Bourke asked him, "what is the arrangement, what are the Azeri interests." [46] After [*376] obtaining Kozeny's approval to speak to Bourke about the specifics of the "arrangement," Bodmer then met with Bourke the following day, February 6. [47] He testified that he then told Bourke that two-thirds of the vouchers had been issued to the Azeri officials under credit facility agreements at no risk to them. [48] He also identified the Azeri officials who received these vouchers as Barat Nuriyev, Nadir Nasibov, and their families. [49]

45 *See id*. at 1065:7-1070:23.

46 *Id*. at 1065:15-16.

47 *See id*. at 1067:3-21.

48 *See id*. at 1068:23-1069:10

49 *See id*. at 1069:22-1070:3. Nasibov was the Chairman of the State Committee for Property in Azerbaijan ("SPC"). *See id*. at 321:10-15; 444:18-19. Nuriyev was his deputy. *See id*. at 427:17-18.

In addition to Hans Bodmer, the Government also called Thomas Farrell, co-defendant [**14] and one of Kozeny's employees. [50] Farrell testified that some time after Bourke had invested in Oily Rock, Bourke requested that Farrell leave his office with him so that they might have a conversation. [51] During that conversation, Bourke asked about the status of the privatization venture and whether President Aliyev or Barat Nuriyev had given any indications to Farrell about possible approval. [52] Farrell testified that at one point in the conversation, Bourke had asked: "Has Viktor given them enough money?" [53]

50 *See id*. at 354:7-15 (Farrell testifying regarding his duties on behalf of Kozeny).

51 *See id*. at 518:23-519:8.

52 *See id*. at 519:15-519:22.

53 *Id*. at 520:1.

Farrell testified that Bourke raised the subject with him a second time during a trip to celebrate the opening of the Minaret offices in Baku, Azerbaijan in April 1998. [54] Farrell testified that Bourke asked him about the prospects of privatization and whether Farrell had heard anything from the officials in charge, such as Nuriyev. [55] After Farrell gave Bourke a short status report, Bourke asked: "Well are -- is Viktor giving enough to them?" [56]

54 *See id*. at 535:23-536:16.

55 *See id*. at 536:18-23.

56 *Id*. at 536:24-26.

Bourke contends [**15] that documentary evidence and obvious internal inconsistencies call into doubt Bodmer's and Farrell's testimony and therefore that these conversations could never have happened. [57] For instance, he notes that "[g]round handling records for Kozeny's private airplane show that [] Bourke and Kozeny did not arrive at the Baku airport until after 9 a.m. (Baku time) on February 6, 1998," demonstrating that the February 5th conversation with Bodmer could not have taken place. [58] Indeed, after being confronted with such evidence, the Government stipulated that neither Bourke nor Kozeny was present in Azerbaijan on February 5th. [59]

57 *See* Bourke Mem. at 31-33.

58 *Id*. at 31 (citing Defendant Exhibit A-15-F).

59 *See* Tr. at 2501:15-25.

Bourke also notes that the conversation with Bodmer could not have occurred during Bourke's April 1998 trip to Azerbaijan to celebrate the opening of the Minaret offices because Bodmer specifically remembered the presence of Evans on the trip. [60] Because Evans did not travel to Azerbaijan in April, Bourke argues that the Bodmer conversation could not have taken place during that trip either. [61]

60 *See* Bourke Mem. at 32 (citing Tr. at 1305:7-8).

61 *See id*.

[*377] Bourke also disputes [**16] that one of the two conversations with Farrell took place. [62] He notes that Farrell had testified that he had met with Bourke

after Bourke's investment in the venture or several weeks prior to his second conversation with Bourke, which he had placed in April 1998. [63] However, Bourke notes that he and Farrell had not been together since the February 1998 trip, and he had not taken a trip to Azerbaijan between February and April. [64]

62 *See id*. at 32-33.

63 *See id*. at 32; Tr. at 521:18-24 (Farrell testifying that the earlier conversation with Bourke preceded the second conversation by "several weeks, maybe a month, maybe less.").

64 *See* Bourke Mem. at 32-33 (citing GX 1100, a chart that shows that Bourke was in Azerbaijan in February and then again in April 1998).

Bourke contends that the only reasonable inference is that the talks never happened. [65] However, such a conclusion is justified only if the evidence is viewed in the light most *unfavorable* to the Government. Although Bodmer's and Farrell's testimony were impeached during trial, the jury was entitled to reject the testimony in whole, in part, or not at all. [66] The events took place more than ten years ago, and a reasonable juror may [**17] have discounted the dates, but nevertheless found the testimony of Bodmer and Farrell regarding the content of the conversations to be credible. Viewed in the light most *favorable* to the Government, the testimony shows that far from being ignorant of the corrupt arrangements, Bourke not only knew about them but supported them. Because I find that the Government presented sufficient evidence to demonstrate beyond a reasonable doubt that Bourke possessed actual knowledge of the object of the conspiracy, Bourke's *Rule 29* motion is denied. [67]

65 *See id*. at 32-33.

66 Indeed, the jury was specifically instructed that they could reject any testimony that they did not find credible. *See* Tr. at 3350:9-16 (THE COURT: "If you find that a witness has testified falsely as to any material fact, you have the right to reject the testimony of that witness in its entirety. On the other hand, even if you find that a witness has testified falsely about one matter, you may reject as false that portion of his testimony and accept as true any other portion of his testimony that commends itself to your belief or that you may find corroborated by other evidence in the case.").

67 Furthermore, as discussed below [**18] in Part IV.C.1.a, a reasonable juror could find beyond a reasonable doubt and based on the evidence presented at trial, that Bourke was aware of the high probability that bribes were being paid and that he took steps to avoid confirming that fact.

Bourke also moves pursuant to *Rule 33* for a new trial, arguing that this Court should evaluate the testimony of Bodmer and Farrell and that there is a "real concern that an innocent person may have been convicted." [68] Quoting the Second Circuit in *United States v. Sanchez*, he notes that "'[w]here testimony is patently incredible or defies physical realities, it may be rejected by the court, despite the jury's evaluation.'" [69]

68 Bourke Mem. at 33 (quotations omitted).

69 *Id*. at 30 (quoting *Sanchez, 969 F.2d at 1413*).

However, the Second Circuit also noted in *Sanchez* that "[e]ven in a case where perjury clearly has been identified, [] we have indicated our reluctance to approve the granting of a new trial unless we can say that the jury probably would have acquitted in the absence of the false testimony." [70] It ruled that "[i]t is only in the [*378] rare instance where it can be shown that the prosecution knowingly used false testimony that we would apply [**19] a less stringent test and permit the granting of new trial where the jury 'might' have acquitted absent the perjury." [71]

70 *Sanchez, 969 F.2d at 1413-14* (citing *United States v. Stofsky, 527 F.2d 237, 245-46 (2d Cir. 1975))*.

71 *Id. at 1414* (citing *Stofsky, 527 F.2d at 246*).

There is no evidence that Bodmer committed perjury on the stand. Bodmer testified in accordance with what was on his attorney time records and reasoned that the only other trip that he had taken with Bourke to Azerbaijan besides the trip for the opening of the Minaret offices was in February 1998. [72] If he testified falsely, it appears to have been unintentional. There is also no evidence that the Government was aware of such discrepancy. Even if I determined that Bodmer had committed perjury by testifying falsely about the dates, I cannot say that the other evidence in the record, including Farrell's testimony that he spoke to Bourke about the corrupt arrangements in April 1998 -- which was not impeached -- was insufficient to demonstrate beyond a reasonable doubt that Bourke possessed the requisite

knowledge of the scheme. I therefore also deny Bourke's *Rule 33* motion.

72 *See* Tr. at 1073:1-25 (Bodmer testifying that [**20] he could not remember the specific date of the conversation except that it took place in Spring 1998, and that he had been together with Bourke one time in addition to the opening of the Minaret offices).

2. Count Three -- False Statements Charge

Bourke argues again that "[t]he jury could not have found beyond a reasonable doubt that [] Bourke's statements, viewed in context and as a whole, were materially false" and therefore that he should be acquitted of the false statements charge. [73] But none of Bourke's arguments convince me that my decision denying his previous *Rule 29* motion on the false statements charge should be reconsidered. [74]

73 Bourke Mem. at 50.

74 *See Kozeny, 2009 U.S. Dist. LEXIS 59209, 2009 WL 1940897, at *6.*

As noted in my July Opinion and Order, when the evidence is viewed as a whole, a reasonable jury could find that a number of Bourke's statements are flatly contradicted by the testimony of Farrell and Bodmer. [75] For instance, Agent George Choundas, the FBI special agent who interviewed Bourke in April and May 2002, [76] testified that Bourke was asked whether he had any conversations with Bodmer or Kozeny regarding a scheme to influence Azeri officials. [77] Bourke had answered: "No, because I didn't [**21] think there were any." [78] However, as noted, Bodmer testified that Bourke had approached him in February 1998 about an "arrangement" with the Azeri officials, and that Bodmer had then explained to Bourke how the Azeri officials were to receive a two-thirds share of the vouchers for essentially no consideration. [79] While Bodmer's testimony that the conversation took place on February 5, 1998 was called into doubt, a reasonable juror could conclude that the conversation nevertheless took place some time close to that date.

75 *See id.*

76 *See* Tr. at 2449:5-10 (Choundas testifying that he was a special agent with the FBI from 1999 to 2004); *id.* at 2453:20-21 (testifying that the interviews of Bourke took place in April and May 2002).

77 *See id.* at 2465:25-2466:2.

78 *Id.* at 2466:5-6.

79 *See id.* at 1065:7-1070:13.

Agent Choundas also testified that Bourke was specifically asked whether -- by April 1998 and the opening of the Minaret [*379] offices -- he had reason to suspect that Kozeny was paying bribes to Azeri officials. [80] Bourke had answered no. [81] Bourke was subsequently asked whether by April 1998 he had been given any indication that "anything untoward relating to the investment was going on." [82] Again, [**22] he responded no. [83] However, such statement is belied by the testimony of Farrell and Bodmer that they both had conversations with Bourke by April 1998 about payments to the Azeri officials. [84]

80 *See id.* at 2458:11-16.

81 *See id.* at 2458:17-18.

82 *Id.* at 2458:19-22.

83 *See id.* at 2458:23-24.

84 *See id.* at 1065:7-1070:13 (Bodmer's testimony); *see id.* at 519:13-520:7; 536:14-537:1 (Farrell's testimony).

Finally, Bourke was asked, "Were you aware at any point or did you have any reason to suspect at any point that Viktor had given anything to Azeri officials, whether it was President Aliyev or the chairman or deputy chairman of the SPC, was there ever a point in time where you saw anything that might have caused you to suspect that anything like that was going on?" [85] Choundas testified that Bourke had answered, "I'd say no to that. I was unaware. I'm still unaware of any transfers of anything. I exclude from that if Viktor bought dinners for people, but in terms of cash or stock or anything of that sort, completely unaware of it." [86] Again, these statements are directly contradictory to the testimony of Bodmer and Farrell. The statements also conflict with Farman-Farma's testimony that Bourke [**23] was aware that his shares in Oily Rock were being diluted so that "new partners" could have an interest in the venture. [87] The statements also diverge from Evans' testimony that Kozeny had informed Bourke and Evans that the venture would be shared with "local interests." [88]

85 *Id.* at 2458:25-2459:6.

86 *Id.* at 2459:18-22.

87 *Id.* at 1483:24-1484:16.

88 *Id.* at 2623:4-14.

Bourke attempts to minimize these responses, contending that the testimony of both Bodmer and Farrell was heavily impeached and therefore that the February and April conversations did not occur. [89] He also notes that the opening of the Minaret offices occurred on April 22, 1998 and therefore the discussion he had with Bodmer -- if it took place in April instead of February -- and the second conversation with Farrell in April could have taken place *after* the opening of the Minaret offices. [90] He argues that his response that he was unaware of "anything untoward" *by* April 1998 and the opening of the Minaret offices was therefore true.

89 *See* Reply Memorandum of Law in Further Support of Defendant Frederic Bourke, Jr.'s Post-Trial Motion for Entry of a Judgment of Acquittal Pursuant to *Fed. R. Crim. P. 29* or for a New Trial Pursuant [**24] to *Fed. R. Crim. P. 33* ("Bourke Reply") at 32.

90 *See id*. at 32-33.

However, as discussed, a reasonable juror need not have rejected the testimony of Bodmer and Farrell completely. She could have concluded that the Bodmer conversation and the first Farrell conversation occurred sometime during the February 1998 trip to Azerbaijan. Placing the Bodmer and Farrell conversations after the Minaret opening also does not explain Bourke's response that -- even up until the time of his interview with Agent Choundas -- he had no reason to suspect Kozeny had given anything to the officials. And even if a reasonable juror decided that the Bodmer conversation and the first of the [*380] two Farrell conversations could not have occurred, the second of the two Farrell conversations was not impeached or otherwise discredited.

A reasonable juror could also have decided that the April 1998 conversations occurred prior to or on the day of the opening of the Minaret offices. "Whether a statement [is] literally true is generally an issue for the jury to decide." [91] And while this Court "may make this determination in limited circumstances where 'there can be *no doubt* that [the defendant's] answers were literally [**25] true under any conceivable interpretation of the questions,'" [92] I cannot say that there is no doubt in this case.

91 *United States v. Carey, 152 F. Supp. 2d 415, 423 (S.D.N.Y. 2001)* (citing *United States v. Lighte, 782 F.2d 367, 372, 374 (2d Cir. 1986)*). Indeed, the jury was specifically instructed, according to Bourke's request, that "[i]f the FBI's question was ambiguous so that it reasonably could be interpreted in several ways, then the government must prove that the defendant's answer was false under any reasonable interpretation of the question." Tr. at 3382:3-6.

92 *Carey, 152 F. Supp. 2d at 423* (quoting *Lighte, 782 F.2d at 374*) (emphasis added).

Bourke's argument that he had not made a false statement because he "expressly stated his belief that Kozeny was 'paying off Azeri officials" as part of the options fraud scheme is of no moment. [93] A reasonable jury could find, based on the evidence offered at trial, that Bourke had no knowledge of the options fraud scheme until approximately October 1998. [94] Therefore, Bourke's statement that Kozeny was bribing officials in furtherance of Kozeny's options fraud scheme rather than the privatization venture would not explain Bourke's denial [**26] of knowledge of the bribery that had already occurred by April 1998. Bourke's *Rule 29* motion for entry of a judgment of acquittal as to Count Three is therefore denied.

93 Bourke Mem. at 50-51. At some point, Nuriyev and Nasibov began imposing the requirement that foreign investors would need to purchase options in addition to vouchers. *See* Tr. at 411:21-23; 427:1-15. Kozeny masterminded a plan -- later called the "options fraud scheme" -- in which he would defraud Oily Rock's institutional investors by selling them options directly from Oily Rock at inflated prices in contravention of the co-investment agreements that governed the terms of the investments. *See id*. at 549:14-551:16.

94 *See* Tr. at 1177:2-1178:6 (Bodmer testifying that he met with Bourke in October 1998, and that Bourke had informed him that he had discovered Kozeny's options fraud scheme); *id*. at 738:13-740:22 (Farrell testifying that Bourke had met with Aliyev in October 1998 to report that Farrell and Kozeny were "crooks" and then had met with Farrell and Kozeny and had accused them of cheating investors).

B. Alleged Errors in the Court's In Limine Rulings

Bourke also challenges the Court's rulings on a number of the parties' [**27] motions *in limine*. I will discuss each of his arguments in turn.

1. Bruce Dresner's Testimony

Bourke contends that the Court improperly precluded Bruce Dresner, the Vice President for Investments at Columbia University ("Columbia"), from testifying about Columbia's investment in the privatization venture through Omega Advisors ("Omega"), one of the hedge funds that invested in Oily Rock. [95] Bourke claims that the admission of Dresner's testimony was important for two reasons. *First*, he contends that Dresner would have testified about the due diligence conducted by Columbia before it invested. [96] Thus, Bourke would have been able to show that his own limited investigation into the investment [*381] was "unexceptionable." [97] *Second*, Bourke states that "Dresner's testimony [] would have been relevant to rebut the Government's argument that [] Bourke's statements on the tape-recorded portion of the May 1998 conference call are evidence of guilty knowledge" because Dresner and members of Columbia's Finance and Steering Committees expressed the same concerns to Clayton Lewis, Bourke's co-defendant and an Omega employee who was marketing the venture to clients. [98]

95 *See* Bourke Mem. at 33.
96 *See id*. at 35.
97 *Id*.
98 *Id*. at 36.

I [**28] precluded Dresner's testimony on relevance grounds, noting that Dresner had no contact with Bourke or Kozeny and had relied entirely on the representations of Lewis and Omega, and that Columbia had invested in Omega, rather than in Oily Rock directly. [99] I also ruled that Dresner's investment memorandum could not be introduced as evidence on hearsay grounds, concluding that it did not fall under the business records exception of *Federal Rule of Evidence 803(6)*. [100] After reviewing Bourke's arguments, I see no reason to revisit my rulings.

99 *See* Tr. at 2696:10-14; 2701:2-4.
100 *See id*. at 2697:1-19; 2701:2-4.

a. Relevance to Show Bourke's Limited Due Diligence Was Unexceptionable

In the first place, Dresner's due diligence or lack thereof is simply irrelevant to whether Bourke consciously avoided learning about the bribery. Dresner had no contact with Bourke, nor did he have access to Kozeny. Dresner also never visited Azerbaijan. What Dresner and Columbia learned about the investment was entirely through Lewis and Omega.

Bourke argues that the Government introduced the testimony of Carrie Wheeler, an employee of Texas Pacific Group ("TPG") -- which was also approached by Kozeny to invest [**29] in the privatization venture -- and David Rossman, an attorney for TPG, in order to contrast the due diligence they performed to that of Bourke. [101] Bourke asserts that allowing Wheeler and Rossman to testify but precluding Dresner "unilaterally disarmed [him]." [102]

101 *See* Bourke Reply at 17; Bourke Mem. at 33.
102 Bourke Mem. at 33.

However, Wheeler's and Rossman's testimony is easily distinguishable from Dresner's. Wheeler, along with Bourke and other investors, took an introductory trip to Azerbaijan in January 1998. [103] Thus, Wheeler was exposed to the same sources as Bourke and would have been privy to the same information regarding SOCAR as Bourke. Kozeny had also invited TPG to invest directly in Oily Rock. [104] By contrast, Dresner and Columbia had been approached by Lewis to invest in Omega. Any information they received regarding the opportunity would have been through Lewis and Omega. Therefore, whatever Dresner and Columbia learned or failed to learn has no bearing on what Bourke knew. [105]

103 *See* Tr. at 1747:21-1748:23 (Wheeler testifying that she visited Azerbaijan in January 1998 with Kozeny, Bourke, and other potential investors in order to conduct due diligence on the SOCAR [**30] opportunity for TPG).
104 *See id*. at 1748:3-8 (Wheeler testifying that David Bonderman, her boss at TPG, had been approached by Kozeny to invest in SOCAR).
105 *See United States v. Kaplan, 490 F.3d 110, 121 (2d Cir. 2007)* ("Evidence of others' knowledge would have been highly relevant had it been supplemented by evidence supporting the conclusion that such knowledge was communicated to [the defendant], or that [the defendant] had been exposed to the same sources from which these others derived their knowledge of the fraud. In the absence of such evidence, the relevance of others' knowledge was at best minimal in proving [the defendant's] knowledge."). Also, to the extent that Bourke

wished to show that other investors engaged in limited due diligence, there was ample testimony at trial from other investors who admitted to not conducting the same amount of diligence as TPG. *See, e.g.*, Tr. at 1632:9-1633:23 (Senator George Mitchell testifying that his due diligence consisted of reading some "critical" newspaper articles about Kozeny and talking to Bourke). Thus, even if Dresner's testimony was relevant, testimony about his due diligence would have been cumulative.

[*382] **b. Relevance to Show May** [**31] **1998 Statements Were Not Evidence of Guilt**

For the same reasons, Dresner's questions regarding possible FCPA liability during a due diligence session has no relevance to Bourke's May 1998 discussion with Friedman and their lawyers in which Bourke expressed concern that they might discover that Kozeny and his cohorts were engaging in corrupt payments and agreed that establishing companies to limit liability would be advisable. It appears that Bourke wished to introduce Dresner's testimony for the purpose of casting doubt on the charges against him by showing that Dresner and Columbia possessed the same concerns about FCPA liability, but nevertheless escaped indictment. Indeed, he contends that "[e]vidence that Dresner and members of Columbia's Finance and Steering Committees expressed identical concerns about the same investment tends to make the fact of [] Bourke's alleged guilty knowledge less probable than it would otherwise be." [106] However, the drawing of such inferences is improper -- that Bourke was ultimately charged while Dresner was not is irrelevant. And even if there was a slight probative value to Dresner's testimony, the possibility that the jury might draw such an improper [**32] inference renders such evidence more prejudicial than probative. Bourke's motion for a new trial on this ground is therefore denied. [107]

106 Bourke Mem. at 36.

107 Bourke does not argue that my ruling with respect to Dresner's investment memorandum was in error. I find no reason to reconsider that decision either.

2. Government Exhibit 181: Schmid Memorandum

At trial, I allowed the Government to introduce a portion of a draft memorandum -- written for Bodmer by Rolf Schmid, Bodmer's associate -- that recounted Bodmer's February 1998 conversation with Bourke about the corrupt arrangements. Bodmer's testimony regarding that conversation had been called into doubt and challenged by the defense, and the Government sought to rehabilitate Bodmer by eliciting testimony from Schmid that Bodmer had told Schmid about his conversation with Bourke. Anticipating that Schmid would also be heavily impeached by the defense, the Government asked the Court to allow the admission of that portion of the memorandum for the sole purpose of allowing the Government to present a prior consistent statement of Schmid under *Rule 801(d)(1)(B)*. [108]

108 *See* Tr. at 1344:2-1345:1 (Government requesting that Schmid be allowed [**33] to testify that Bodmer had told him about the conversation with Bourke shortly after Bodmer returned from Azerbaijan as a prior consistent statement and further requesting that if Schmid is impeached, the Government be allowed to introduce the portion of Schmid's draft memorandum memorializing this conversation); 1348:2-3 (Court granting the Government's request).

Bourke did not object to the introduction of such evidence, but requested that the Court allow the introduction of other portions of the memorandum in which Schmid had noted that the credit facility extended by Kozeny to Azeri officials was [*383] an arm's length transaction and that Bodmer had no knowledge of the corrupt payments to Azeris. [109] He argued that admission of such evidence was warranted pursuant to the Rule of Completeness and as prior inconsistent statements of Bodmer. [110]

109 *See id*. at 1345:13-1346:2.

110 *See id*. at 1345:19-21 (contending that *Rule 106* -- the Rule of Completeness -- mandates that other portions be admitted for the purpose of giving context); 1346:18-19 (arguing that the contents of the memorandum are prior inconsistent statements of Bodmer).

Noting that the memorandum was written by Schmid rather than [**34] Bodmer, I denied the request, but added that if Bourke could lay a foundation that the statements in the Schmid memorandum were affirmed by Bodmer, I would reconsider my ruling. [111] Defense counsel then conducted a voir dire on the exhibit, but

Schmid responded that he had not obtained any information from Bodmer when preparing the memorandum. [112]

111 *See id*. at 1348:2-8.
112 *See id*. at 1382:15-21.

Schmid's response should have shut the door on further arguments over the redacted portions of the memorandum. Nevertheless, Bourke now moves for a new trial, arguing that "[t]he Court's decision not to admit this critical piece of evidence in its entirety robbed the jury of the context it needed to evaluate both Bodmer's testimony and the admitted portions of the memo," thereby likely affecting the outcome of the trial. [113] Bourke makes three arguments in support of his position. *First*, he asserts again that the memorandum should have been admitted in its entirety under the Rule of Completeness to give the jury context for the portion of the memorandum the Government introduced. [114] *Second*, he contends that there was substantial evidence that the redacted portions of the memorandum were "memorializations [**35] of what Bodmer told Schmid about his understanding of the Azeri investment venture" and that the alleged "prior inconsistent statements were textbook impeachment material" that should have been admitted. [115] *Finally*, he argues that admission of the excluded portions of the memorandum were necessary so that the jury could assess the credibility of the portions the Court admitted. [116] Bourke's request is denied for substantially the same reasons I denied his request at trial.

113 Bourke Mem. at 42.
114 *See id*. at 37.
115 *Id*. at 40.
116 *See id*. at 42.

a. Prior Inconsistent Statements of Bodmer

Bourke's contention that the redacted portions of the Schmid memorandum should have been admitted as prior inconsistent statements of Bodmer fails. *First*, there was no evidence that Bodmer affirmed the statements in the memorandum. In addition to responding that he had not obtained information from Bodmer in preparing the memorandum, [117] Schmid further testified that his statements about Bodmer's conversation with Bourke were based on his "own recollections" and on "the files that were available." [118] He testified that he did not recall receiving comments from Bodmer and that the memorandum did not reflect [**36] what "other people's recollection [was]." [119] *Second*, even if the statements could be [*384] attributable to Bodmer, *Federal Rule of Evidence 801(d)(1)(A)* provides that inconsistent statements are not hearsay if "the statement [] was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." None of the statements in the Schmid memorandum were made under oath. These portions are therefore inadmissible hearsay.

117 *See Tr*. at 1382:15-21.
118 *Id*. at 1387:10-23.
119 *Id*. at 1400:3-6, 18-24; 1403:12-18. Bourke argues that he need only show that the statements are attributable to Bodmer by the preponderance of the evidence, but the only evidence he puts forth is the conclusory argument that "the statements in the memo had to come from somewhere, and the logical source was Hans Bodmer." Bourke Reply at 21. Not only is such argument completely unsupported, but it is severely undercut by Schmid's repeated denials that the statements were attributable to anyone else.

b. Rule of Completeness

The Rule of Completeness provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction [**37] at the time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." [120] Bourke quotes the Second Circuit correctly when he argues that an "'omitted portion of [the] statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion.'" [121] But the Second Circuit has also held that "'the completeness doctrine does not, however, require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages.'" [122]

120 *Fed. R. Evid. 106*.
121 Bourke Mem. at 38 (quoting *United States v. Johnson, 507 F.3d 793, 796 (2d Cir. 2007)* (quotations omitted)).
122 *Johnson, 507 F.3d at 796* (quoting *United States v. Jackson, 180 F.3d 55, 73 (2d Cir. 1999))*.

Here, the redacted portions had no relevance to the admitted passages. Indeed, the memorandum contained Schmid's draft answers to a series of interrogatories on a wide range of subjects posed by attorneys in a related litigation in London. [123] The portion that was admitted was introduced [**38] only as a prior consistent statement of Schmid. There is no indication that any portion of the memorandum was based on anything but his own understanding. It therefore has no relevance to Bodmer's knowledge of the corrupt arrangements or to what Bodmer discussed with Bourke.

123 *See* Tr. at 1379:19-1380:20. The London litigation was brought by Omega and other institutional investors against Kozeny and Oily Rock alleging that they were defrauded when Kozeny sold them options at inflated prices in violation of their co-investment agreement. *See id.* at 1378:17-1379:11. Bourke was not a party to that action.

c. Impeachment of Schmid

Bourke next argues that the redacted portions were important because they would have been used by the jury to assess the credibility of Schmid with respect to the portion that was admitted. [124] He notes that the answers were given "to minimize the firm's culpability" in the London litigation and "to shift blame to others, including [] Bourke." [125]

124 *See* Bourke Mem. at 42.
125 *Id.*

Bourke not only failed to make this argument prior to my ruling at trial, but the argument makes no sense. If anything, Schmid may have had a reason to lie about whether the transactions [**39] were entered at arms length and any knowledge of the corrupt payments by Bodmer. However, there certainly would have been no reason to fabricate conversations that Bodmer had with Bourke regarding the credit facility agreements. Indeed, the rest of [*385] Schmid's answer includes a summary of Bodmer's conversation with Eric Vincent, an employee of Omega Advisors, regarding whether any of the agreements were in violation of the FCPA. [126] If Schmid had wanted to "minimize the firm's culpability," he would have excluded any such information. It was therefore proper for this Court to redact the portions of the Schmid memorandum that the defense requested. Bourke's motion for a new trial on this ground is therefore denied.

126 *See* GX 181A ("Hans Bodmer discussed with Eric Vincent the various agreements which were to be concluded with Oily Rock and Minaret . . . . During his discussion he asked Eric Vincent whether the involvement of the Azeri Interests [] was in compliance with the U.S. Foreign Corrupt Practices Act . . . .").

3. Cross-Examination of Thomas Farrell

At a May 21, 2009 conference, the Court denied Bourke's request to cross-examine Thomas Farrell about certain matters, holding that such [**40] cross-examination would be more prejudicial than probative. Bourke has given me no reason to reconsider my ruling. His motion for a new trial on this ground is therefore denied.

C. Alleged Errors in the Court's Jury Charge

Bourke argues next that the Court's jury instructions were erroneous in a number of respects. I will discuss each of his challenges in turn.

1. Conscious Avoidance

Bourke argues that the Court erroneously charged the jury that it could find him guilty of the conspiracy offense on a theory of conscious avoidance despite the fact that "(1) the Government expressly disclaimed reliance on such a theory at trial; and (2) the Government's evidence, at best, could establish only negligence, which under controlling Second Circuit precedent cannot support criminal liability." [127] He contends that because the Government's evidence of actual knowledge was thin, there was a "strong possibility" that the conscious avoidance charge misled the jury into improperly believing that it could convict him on the basis that he had '"not tried hard enough to learn the truth."' [128]

127 Bourke Mem. at 7.
128 *Id.* (quoting *United States v. Ferrarini, 219 F.3d 145, 157 (2d Cir. 2001)).*

"The conscious [**41] avoidance doctrine provides that a defendant's knowledge of a fact required to prove the defendant's guilt may be found when the jury is persuaded that the defendant consciously avoided learning that fact while aware of a high probability of its existence." [129] With respect to conspiracy, the Second Circuit has held that conscious avoidance may satisfy the

knowledge component of the intent to participate in the conspiracy, even though there must be further proof that the defendant joined the conspiracy with the intent to further its criminal purpose. [130]

> 129 *United States v. Svoboda, 347 F.3d 471, 477 (2d Cir. 2003)* (quotation omitted).
> 130 *See id. at 479*. In addition, the FCPA explicitly permits a finding of knowledge on a conscious avoidance theory. It provides that "[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." *15 U.S.C. § 78dd-2(h)(3)(B)*. Because the defendant must be found to possess the same intent as that required for the substantive offense, the conscious [**42] avoidance instruction was particularly appropriate in this case.

A conscious avoidance charge is proper "'(i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction and (ii) the appropriate [*386] factual predicate for the charge exists.'" [131] A factual predicate exists when "the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." [132]

> 131 *United States v. Kaplan, 490 F.3d 110, 127 (2d Cir. 2007)* (quoting *United States v. Quattrone, 441 F.3d 153, 181 (2d Cir. 2006))*.
> 132 *Id*.

a. A Factual Predicate Exists for a Conscious Avoidance Charge

There is no dispute with respect to the first requirement -- Bourke's key defense was that he never knew of any corrupt arrangements. [133] I also find that the appropriate factual predicate exists for such a charge. There was ample evidence that Bourke was aware of a high probability that the payments were illegal and deliberately avoided confirming this fact. *First*, there was testimony at trial from a number of witnesses that Bourke knew that corruption was rampant in [**43] Azerbaijan. For instance, Farman-Farma testified that he and Bourke were aware that "Azerbaijan . . . was rated as one of the most corrupt countries in the world." [134] One of Bourke's attorneys, Arnold Levine, also testified that he had once compared Azerbaijan to the "wild west" in a conversation with Bourke. [135]

> 133 *See* Tr. at 123:9-14 (defense counsel arguing during opening statements that "[t]here was no way Kozeny was going to let anybody tell [] Bourke about any payments he was making to the Azeris").
> 134 *Id*. at 1496:11-19.
> 135 *Id*. at 1571:21-24. Although Levine later attempts to explain that he would also call Russia the "wild west" because of the lawlessness, *see id*. at 1578:24-1580:22, a reasonable juror could have inferred -- based on the testimony as a whole -- that Levine also alerted Bourke to corruption in Azerbaijan.

Second, there was also testimony that Bourke was aware of Kozeny's exploits and misdeeds in Czechoslovakia. David Hempstead, another of Bourke's attorneys, testified that Bourke was familiar with Kozeny's past and had told Hempstead on one occasion that Kozeny was replicating in Azerbaijan the same scheme that he had staged during Czechoslovakia's privatization [**44] period, which consisted of amassing vouchers in order to later control companies. [136] Senator Mitchell also testified that he had approached Bourke to express his concerns after reading a number of negative news articles about Kozeny's Czechoslovakia ventures and that Bourke had already been "aware" of them. [137]

> 136 *See id*. at 1924:9-1925:6.
> 137 *Id*. at 1632:9-22.

Perhaps the strongest evidence that Bourke was aware of the high probability that corrupt payments were being made to Azeri officials is a May 18, 1989 tape recording of a phone conference among Bourke, Friedman, and their attorneys during which they discuss whether Bourke and Friedman will join the board of Oily Rock. [138] During this conversation, Bourke expressed his concern that Kozeny and his employees were paying bribes and violating the FCPA: "I mean, they're talking about doing a deal in Iran . . . . Maybe they . . . bribed them, . . . with . . . ten million bucks. I, I mean, I'm not saying that's what they're going to do, but suppose they do that." [139] Later in the conversation, Bourke says:

I don't know how you conduct business

> in Kazakhstan or Georgia or Iran, or [*387] Azerbaijan, and if they're bribing officials and that comes [**45] out . . . Let's say . . . one of the guys at Minaret says to you, Dick, you know, we know we're going to get this deal. We've taken care of this minister of finance, or this minister of this or that. What are you going to do with that information? [140]

Still later in the conversation, Bourke again ponders:

> What happens if they break a law in . . . Kazakhstan, or they bribe somebody in Kazakhstan and we're at dinner and . . . one of the guys says, 'Well, you know, we paid some guy ten million bucks to get this now.' I don't know, you know, if somebody says that to you, I'm not part of it . . . I didn't endorse it. But let's say [] they tell you that. You got knowledge of it. What do you do with that? ... I'm just saying to you in general . . . *do you think business is done at arm's length in this part of the world*. [141]

These comments certainly suggest that Bourke suspected bribes were being paid to encourage the privatization of SOCAR. [142] Furthermore, statements such as "What are you going to do with that information?" and "You got knowledge of it. What do you do with that?" indicate that he feared what he might discover.

> 138 *See* GX 4A-T-2.
> 139 *Id*. at 2.
> 140 *Id*. at 3.
> 141 *Id*. (emphasis added).
> 142 It [**46] may also be inferred from this evidence that Bourke actually knew about the bribes. *See Svoboda, 347 F.3d at 480* ("Of course, 'the same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct.'").

There is also a factual predicate for the conclusion that Bourke took steps to avoid learning that the bribes were illegal. At the end of the recording, Bourke and Friedman decided that instead of joining the Oily Rock board directly, they would join the boards of newly-established but separate companies that were affiliated with Minaret and Oily Rock. [143] According to their conversation, the purpose of forming these companies was to enable them to participate in the venture without having direct access to knowledge about Oily Rock's transactions and without the possibility of being held civilly or criminally accountable should any of their suspicions about Kozeny turn out to be true. [144] Thus, if Bourke did not actually know, this evidence is at least sufficient for a reasonable juror to conclude beyond a [**47] reasonable doubt that he knew of the high probability that bribes were being paid *and* that he took steps to ensure that he did not acquire knowledge of that fact. [145] A factual [*388] predicate therefore existed for this instruction.

> 143 *See* GX 4A-T-2 at 7 (Friedman: "So [] we have Oily Rocks U.S. Corp[.], a blank corporation, which we are directors . . . it has a contract with Oily Rocks Group to provide advice on strategic matters . . . .").
> 144 *See id*. at 8 (William Benjamin, Friedman's counsel: "From [] a legal point of view, I think you've successfully distanced yourself from [] the existing company . . . [you will not be at risk civilly or criminally so long as] you're not directly participating in it in some way . . . .").
> 145 This case is therefore distinguishable from *United States v. Ferrarini*. In *Ferrarini*, the Second Circuit cautioned that conscious avoidance cannot be found whenever there is evidence of actual knowledge because there would be a danger that a defendant would be convicted based only on "equivocal" evidence of actual knowledge and in the absence of evidence showing that the defendant deliberately avoided learning the truth. *Ferrarini, 219 F.3d at 157*. By contrast, there [**48] is evidence here demonstrating that Bourke feared what he might learn and made efforts to distance himself from such knowledge.

b. The Government's "Express Disclaimer" that It Was Not Relying on Conscious Avoidance Theory

Bourke makes much of the Government's rebuttal summation in which it argued that Bourke did not look the other way, but "knew everything he needed to know to become a member of the conspiracy." [146] He argues

that the charge was improper given that the Government had decided only to advance an actual knowledge theory. However, Bourke's citation only to the Government's rebuttal summation is misleading and ignores the fact that this argument was made in response to Bourke's suggestion that he was merely negligent. The Government made clear in its introductory summation that it was also contending alternatively that Bourke was deliberately avoiding knowledge of the corrupt payments:

> So the question you have to decide is whether the defendant knew of the conspiracy. Did he join it? And did he lie when he told the FBI he knew nothing about it? What facts did the defendant know? *And what additional/acts must he have known unless he was willfully avoiding learning them by* [**49] *essentially sticking his head in the sand?* [147]

Indeed, the Second Circuit has specifically approved the giving of a conscious avoidance charge where both theories are argued, ruling that a conscious avoidance charge is "'not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain.'" [148]

146 Bourke Mem. at 9 (quoting Tr. at 3279:19-21).

147 Tr. at 3034:18-23 (emphasis added).

148 *Kaplan, 490 F.3d at 128 n.7* (quoting *United States v. Hopkins, 53 F.3d 533, 542 (2d Cir. 1995))*.

c. A Conviction Based on Negligence

Bourke's second argument -- that the Government merely presented evidence of Bourke's negligence -- also fails. In attempting to make his point, Bourke quotes to a passage from Judge Richard Posner's opinion in *United States v. Giovanetti* on conscious avoidance:

> "The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow the jury to convict upon a finding of negligence for crimes that require intent . . . . The criticism can be deflected [**50] by thinking carefully about just what it is that real ostriches do . . . . They do not just fail to follow through on their suspicions of bad things. They are not merely careless birds. They bury their heads in the sand so that they will not see or hear bad things. They deliberately avoid acquiring unpleasant knowledge. *The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings*." [149]

But Judge Posner's description is wholly consistent with this case. As discussed, there is plenty of evidence that Bourke -- rather than merely failing to conduct due [*389] diligence -- had serious concerns that Kozeny was engaging in questionable practices but nevertheless took steps to avoid learning about those practices by declining to join the board of Oily Rock. His remarks on the tape evidencing his concern that he would discover Kozeny's engagement in corrupt practices and the subsequent formation of companies affiliated with Oily Rock in which he could participate without being held [**51] accountable for Kozeny's actions demonstrate that he was not merely negligent, but was deliberately attempting to shield himself from actual knowledge.

149 Bourke Mem. at 12 (quoting *United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990))* (emphasis added).

Bourke also makes much of what he calls the "Government's 'due diligence' evidence." [150] For instance, he argues that the Government improperly distinguished the due diligence conducted by Wheeler and Rossman from the due diligence, or lack thereof, that he and his attorneys performed. [151] But such distinctions were highly relevant to the jury's determination of whether Bourke consciously avoided knowing about the details of the venture. The Government was entitled to show that others -- who were exposed to the same sources as Bourke -- had high suspicions regarding the legitimacy of the venture which they were able to later confirm while Bourke willfully shielded himself from learning all the facts.

150 *Id*.
151 *See id*. at 13-14.

And there is no reason to believe that the jury improperly returned a guilty verdict on the basis of Bourke's negligence. The jury was specifically instructed that Bourke could not be convicted if it found [**52] him to be negligent. The jury was instructed -- with respect to conscious avoidance -- that Bourke's

> knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge. *On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal*. [152]

Bourke's motion for a new trial on this ground is therefore denied.

152 Tr. at 3366:20-3367:6 (emphasis added).

2. Insufficiency of Mens Rea Charge

Bourke also contends that the Court's *mens rea* instruction was insufficient because it failed to instruct the jury that it was required to find that he acted "corruptly" and "willfully," which is the intent required for a conviction under the FCPA. [153] Indeed, the Supreme Court has held that "in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal [**53] statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." [154] Bourke argues that although the Court instructed the jury on the "willfully" and "corruptly" element of a substantive FCPA offense, it specifically directed the jury that it did not have to find that the Government satisfied each of the substantive FCPA elements in order to find that Bourke had engaged in a conspiracy to violate the FCPA. [155] Bourke also asserts that the Court failed to include an explanation of "corruptly" and "willfully" [*390] when it instructed the jury with respect to the *mens rea* required for a conspiracy conviction. [156]

153 *See* Bourke Mem. at 20.
154 *United States v. Feola, 420 U.S. 671, 686, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975)*.
155 *See* Bourke Mem. at 20-21.
156 *See id*. at 21.

First, the jury was correctly instructed that the Government need not prove all of the elements of the substantive crime of violating the FCPA. The Second Circuit has held that "conspiracy is a crime, separate and distinct from the substantive offense." [157] "A conspiracy conviction under [*18 U.S.C] § 371* requires proof of three essential elements: (1) an agreement among two or more persons, the object of which [**54] is an offense against the United States; (2) the defendant's knowing and willful joinder in that conspiracy; and (3) commission of an overt act in furtherance of the conspiracy by at least one of the alleged co-conspirators." [158] And "[a]lthough the government need not prove commission of the substantive offense or even that the conspirators knew all the details of the conspiracy, [] it must prove that '*the intended future conduct they . . . agreed upon include[s] all the elements of the substantive crime*.'" [159]

157 *United States v. Pinckney, 85 F.3d 4, 8 (2d Cir. 1996)*.
158 *Svoboda, 347 F.3d at 476*.
159 *Pinckney, 85 F.3d at 8* (quoting *United States v. Rose, 590 F.2d 232, 235 (7th Cir. 1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979))*.

Second, while the portion of the conspiracy charge dealing with *mens rea* does not instruct the jury in any single sentence that it must find that Bourke intended corruptly and willfully to violate the FCPA, when read as a whole, the conspiracy charge *does* instruct the jury of that requirement. The charge explained that the jury must first find that a conspiracy existed and that "the conspiracy intended to achieve one, but not necessarily both, of the objectives alleged [**55] in the indictment." [160] It then instructed the jury that the two objects of the conspiracy were (1) to violate the FCPA; and (2) to violate the Travel Act by traveling in interstate commerce or using interstate commerce for the purpose of violating the FCPA. [161] It also instructed the jury that in order for a defendant to violate the FCPA, he must have "intended to act corruptly and willfully." [162] Finally, the charge

directed the jury that in order to convict Bourke of the conspiracy offense, it must determine that he "participated [in the conspiracy] with knowledge of at least some of the purposes or objectives of the conspiracy *and with the intention of aiding in the accomplishment of those unlawful ends*." [163] Read altogether, the charge instructed the jury that -- before it could convict Bourke -- it was required to find that Bourke participated in a conspiracy with knowledge of and the intention to further its objective of corruptly and willfully bribing foreign officials.

160 Tr. at 3361:13-14; 3362:13-15.

161 *See id*. at 3362:16-17; 3368:20-24; 3369:8-9.

162 *Id*. at 3364:7-15.

163 *Id*. at 3374:19-23 (emphasis added).

Alternatively, Bourke cannot dispute that the Court instructed the jury [**56] to find that Bourke must have knowledge of and share the intent to further the object of the conspiracy. He also cannot contest the fact that the jury was instructed that the object of the conspiracy was to violate the FCPA or the Travel Act. The Second Circuit has defined "corruptly" in the FCPA to signify not only the "'general intent' present in most criminal statutes," but also "a bad or wrongful purpose and an intent to influence a foreign official to [*391] misuse his official position." [164] Thus, the jury -- by finding that Bourke knew of and intended to violate the FCPA by bribing foreign officials -- must necessarily have found him to possess a corrupt and willful intent. [165]

164 *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B. V. v. Schreiber, 327 F.3d 173, 183 (2d Cir. 2003)*.

165 Bourke attempts to mince words by arguing that the Court failed to use the word "corruptly" or explain that the term conveys that "the offer, payment, and promise was intended to influence an official to misuse his official position" while charging the jury with respect to the second element of conspiracy relating to intent. Bourke Reply at 7 (quotation [**57] marks omitted). But he cannot dispute that the jury found him guilty of engaging in a conspiracy to violate the FCPA. The jury therefore had to find that he intended to offer or pay an official for the purpose of influencing that official and encouraging that official to misuse his position.

Bourke argues that the Court should have instructed the jury that it must find that *he corruptly and willfully intended to join the conspiracy* to bribe Azeri officials and that the Court's failure to do so was in error. [166] Even if Bourke is correct, there is no principled distinction between instructing the jury that it must find that he: (1) corruptly and willfully intended to join the conspiracy with the purpose of corruptly and willfully bribing officials and (2) intended to join the conspiracy with the purpose of corruptly and willfully bribing officials. In either case, the jury would have been required to find that he possessed a corrupt and willful intent.

166 *See* Bourke Mem. at 21.

Bourke also cites to *United States v. Harrelson*, a Fifth Circuit decision in which the court reversed a conviction for conspiracy to commit murder where the instructions omitted the requirement that the jury find [**58] that the defendant acted with "premeditation" and "malice aforethought." [167] He argues that this Court made the same error as the district court in that case because it failed to instruct the jury that the *mens rea* required for a conspiracy conviction was the same as the *mens rea* for the substantive offense. [168] But in this case, unlike *Harrelson*, the jury was instructed not only to find that the intent of the conspiracy itself was "corrupt" and "willful" [169] but also -- as discussed above -- that Bourke himself possessed that same intent. [170]

167 Bourke Reply at 7 (citing *United States v. Harrelson, 766 F.2d 186, 188 (5th Cir. 1985))*.

168 *See id*.

169 *See* Tr. at 3361:17-18 ("The government must prove that the conspiracy intended to achieve one, but not necessarily both, of the objectives alleged in the indictment").

170 In fact, the Fifth Circuit in *Harrelson* found the holding in *Feola* to be subject to two interpretations, noting that *Feola* "speaks of a degree of intent which must be present for the conspiracy to exist, rather than one which must be present in each individual conspirator before he can be a member, and hence is not precisely conclusive of the issue before us today." *See Harrelson, 766 F.2d at 188 n. 1*. [**59] In the first interpretation, it would "suffice that between at least two conspirators (or perhaps in one only) there existed the degree of intent required for

conviction of the substantive offense, the others joining 'knowingly and wilfully' in the enterprise." *Id. at 188*. The second is that "no person should be convicted of conspiracy to commit a given crime without proof that he personally possessed that degree of criminal purpose." *Id*. While the Fifth Circuit agreed with the second of these two interpretations, this issue has not been addressed by Second Circuit.

The same can be said for the other case Bourke cites in his reply papers, *United States v. Curran*. [171] There, the Third Circuit [*392] held that "[i]n order to prove a conspiracy, the government must show an agreement to commit an unlawful act combined with intent to commit the underlying offense." [172] Once again, this instruction is consistent with the charge in this case. The jury was told specifically that it had to find "a combination, an agreement, or an understanding of two or more persons to accomplish by concerted action a criminal or unlawful purpose." [173] It was also instructed that "[t]he government must prove that the [**60] conspiracy intended to achieve" either a violation of the FCPA or the Travel Act. [174] There was therefore no error in my charge. [175]

171 *See* Bourke Reply at 7 (citing *United States v. Curran, 20 F.3d 560, 571 (3d Cir. 1994)* (quotation omitted)).

172 *Curran, 20 F.3d at 571*.

173 Tr. at 3361:14-17.

174 *Id*. at 3362:13-17; 3368:20-24. Similarly, the Second Circuit's recent decision in *United States v. Shim* is inapposite. There, the Circuit reversed the district court's ruling denying the defendants' request that it charge the jury with respect to an element of the substantive offense underlying the conspiracy charge. *See United States v. Shim, 584 F.3d 394, No. 08 Cr. 1834, 2009 U.S. App. LEXIS 21536, 2009 WL 3127210, at *1 (2d Cir. Oct. 1, 2009)*. By contrast, the jury in this case was instructed that the defendant must have intended every element of the substantive offense. *See* Tr. at 3362:16-3371:18.

175 Also, because the charge was proper, I make no determination as to whether Bourke adequately preserved his objection. However, I note that Bourke's purported objection at the charge conference was less than clear. *See id*. at 2946:1-7 ("We're talking here about the intent required for the Count One conspiracy, and *it may* [**61] *well be that all of this captures what's required*, but what I think is missing and what I'd like to suggest is a clear statement that the intent required for the conspiracy includes, and must include[,] the intent required for the underlying substantive offense.") (emphasis added).

3. Failure to Include a Good Faith Charge

Bourke next asserts that the Court erroneously failed to instruct the jury on Bourke's good faith defense. [176] He argues that the Court should have adopted his requested charge, that "[i]f [] Bourke believed in good faith that he was acting properly in connection with the matters alleged in those counts, even if he was mistaken in that belief, and even if others were injured by his conduct, there would be no crime." [177]

176 *See* Bourke Mem. at 22.

177 *Id*

As noted, however, I specifically instructed the jury that "knowledge is not established [] if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal." [178] I also charged the jury -- in the intent portion of the conspiracy charge -- that "the government must prove beyond a reasonable doubt that the defendant knew that he was a member of an operation [**62] or conspiracy that committed or was going to commit a crime, and that his action of joining such an operation or conspiracy was not due to carelessness, negligence or mistake." [179]

178 Tr. at 3367:3-6.

179 *Id*. 3372:11-16.

This principle was repeated again when I instructed the jury that it "must first find that [Bourke] knowingly joined in the unlawful agreement or plan." [180] I then continued by defining the term "knowingly" as "deliberately and voluntarily," rather than the product of a "mistake or accident or mere negligence or some other innocent reason." [181] And in the portion of the charge dealing with the false statement count, I instructed the jury that it [*393] must find that Bourke acted "knowingly and willfully" and also directed the jury to the part of the charge where the term "knowingly" is defined. [182]

180 *Id*. at 3372:9-10.

181 *Id*. 3372:21-25.
182 *See id*. at 3382:7-11.

Bourke further argues that the Second Circuit has approved the use of a conscious avoidance charge where "there was a genuine issue as to the defendant's good-faith ignorance of the illegality of his conduct," but notes that "in those circumstances, [] courts have given specific instructions on *both* conscious avoidance [**63] and the good-faith defense (or an equivalent, such as advice of counsel)." [183] As noted above, the jury was in fact instructed on both conscious avoidance and the good faith defense. Furthermore, Bourke specifically objected to the Government's request for an advice of counsel instruction. [184] Although the Court considered including an advice of counsel instruction in the charge, it ultimately denied the Government's request for such instruction after the defense failed to make the argument in its closing that it was relying on such defense. [185] Bourke's motion for a new trial on this ground is therefore denied.

183 Bourke Mem. at 25.
184 *See* 7/2/09 Email from Hal Haddon, counsel for Bourke, to Jessica Chan, my law clerk.
185 *See* Tr. at 3022:6-9 (THE COURT: "I don't know if we recirculated the current version that does add a sentence about burden of proof and good faith? Maybe we didn't. But we also didn't decide whether to give it at all. So that I will decide after summations); *id*. at 3334:15 (ruling, based on the summations, that the instruction would not be given to the jury).

4. Failure to Include Charge Regarding Agreement on Overt Act

Bourke contends that the Court also erred by failing [**64] to include a charge instructing the jury that -- in order to convict him of Count One -- it must agree unanimously on the overt act. [186] Bourke asks the Court to grant him a new trial "before a properly-instructed jury to remedy this violation of [his] right to aunanimous jury verdict." [187]

186 *See* Bourke Mem. at 26.
187 *Id*. at 27.

In declining to give this instruction, I reviewed the authorities cited by Bourke and the Government. I noted that although the Second Circuit has not addressed this issue, both the Fifth and Seventh Circuits have held that unanimity on the overt act is not required for a conviction of conspiracy. [188] I also noted that the Supreme Court had considered a similar issue in *Richardson v. United States*, where it held that the jury must agree unanimously on the violations constituting the continuing criminal enterprise offense because those violations were elements of the crime. [189] Reasoning that because an overt act is not required to be a crime, [190] the indictment need not identify which overt act was committed, [191] and the overt [*394] acts proven at trial can vary from the overt acts in the indictment, [192] I found that the overt act was closer to a "possible set of [**65] underlying brute facts [that] make up a particular element" rather than an element itself. [193]

188 *See* Tr. at 3023:3-19 (citing *United States v. Griggs, 569 F.3d 341, 2009 WL 1767269 (7th Cir. 2009)* and *United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981))*.
189 *See id*. at 3023:20-3024:5 (citing *Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985(1999))*.
190 *See Braverman v. United States, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23, 1942 C.B. 319 (1942)* ("The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.").
191 *See Schad v. Arizona, 501 U.S. 624, 631, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991)* ("Our cases reflect a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed.").
192 *See Kaplan, 490 F.3d at 129* ("[W]e have routinely found that no prejudice results from a variance between overt acts charged in an indictment and those proved at trial.").
193 *See* Tr. at 3024:6-17 (quoting *Richardson, 526 U.S. at 817*).

Bourke makes no new and persuasive arguments in support of his position [**66] that the jury was required to agree unanimously on the same overt act. [194] therefore find no reason to reconsider my ruling. Bourke's motion for a new trial on this ground is therefore denied.

194 Bourke cites to the Third Circuit case of *United States v. Echeverri, 854 F.2d 638 (3d Cir.*

1988), in his reply. *See* Bourke Reply at 13. But *Echeverri* is distinguishable because the defendant was on trial for the offense of continuing criminal enterprise, in which each violation is considered an element of the crime. *See Echeverri, 854 F.2d at 642*. Thus, the jury was required to unanimously agree as to each violation that together constituted the offense. *See id. at 643*. *Echeverri* was also issued prior to the Supreme Court's decision in *Richardson* where the same issue was presented and definitively resolved.

5. Failure to Charge the Jury Regarding the Lawful Under Azeri Law Defense

The FCPA provides an affirmative defense to criminal liability if "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's country." [195] Article 171 of the Azerbaijan Criminal Code provides that "[g]iving a bribe shall be punished [**67] by deprivation of freedom for a term of from three to eight years . . . . A person who has given a bribe shall be *free* from criminal responsibility if with respect to him there was extortion of the bribe or if that person after giving the bribe voluntarily made a report of the occurrence."

195 *15 U.S.C. § 78dd-2(c)(1)*.

On September 11, 2008, this Court held a hearing to resolve disagreements between the parties with respect to whether Bourke was entitled to jury instructions on the reporting and extortion exceptions. [196] After extensive testimony from two experts, I issued an Opinion and Order on October 21, 2008, declining to instruct the jury of the reporting and extortion exceptions of Article 171. [197]

196 *See United States v. Kozeny, 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008)*.
197 *See id. at 541*.

I reasoned that although a bribe-payer is absolved from criminal responsibility if he is extorted or if he reports the bribe to a state official, his actions are not deemed lawful under Azeri law. [198] To the contrary, I noted that a Resolution published by the Supreme Court of the U.S.S.R. -- which both experts agreed was relevant to the Azeri courts' interpretation of the Article -- had noted [**68] that the absolution of criminal liability "'does not signify an absence in the actions of such persons of the elements of an offense.'" [199] Because the FCPA provides a defense for lawful *payments* under foreign law, I found it irrelevant that Azeri law absolves the *bribe-payer* from responsibility. [200] I reasoned that

> [*395] there is no immunity from prosecution under the FCPA if a person could not have been prosecuted in a foreign country due to a technicality (e.g., time-barred) or because a provision in the foreign law 'relieves' a person of criminal responsibility. An individual may be prosecuted under the FCPA for a payment that violates foreign law even if the individual is relieved of criminal responsibility for his actions by a provision of the foreign law. [201]

198 *See id. at 539*.
199 *Id. at 538-39* (quoting Resolution of the Plenum of the Supreme Court of the U.S.S.R. of March 30, 1990, No. 3, "On Court Practice in Bribery Cases," Ex. C to 4/7/08 Declaration of Professor Paul B. Stephan, Bourke's expert.).
200 *See id. at 539*.
201 *Id*.

Nevertheless, I also noted that my ruling did not preclude Bourke from arguing at trial that the payments were extorted and therefore that he lacked the requisite [**69] corrupt intent required for the offense. [202] Additionally, I ruled that the legislative history of the FCPA makes a distinction between payments "'demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract'" and payments made to an official "'to keep an oil rig from being dynamited,'" an example of "'true extortion.'" [203] I therefore held that if Bourke provided an evidentiary foundation at trial that he was a victim of true extortion, the jury would be instructed with respect to the corrupt intent the Government must prove Bourke possessed before it may convict him of the offense. [204]

202 *See id. at 540*.
203 *Id*. (quoting S.Rep. No. 95-114, at 10-11 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4108).

204 *See id*.

Bourke filed a motion for reconsideration of the Court's October 21, 2008 Opinion and Order, which the Court denied in a Memorandum Opinion and Order dated December 15, 2008. [205] Bourke now argues again that the Court's October 21, 2008 ruling "was in error and prejudiced [] Bourke's defense." [206] He contends that the Government's trial witnesses confirmed that the early bribes were the product of extortion by Azeri officials. [**70] [207] For instance, he notes that both John Pulley, Kozeny's security consultant, and Farrell testified that the first payment occurred after Azeri officials arrested an Oily Rock courier carrying millions of dollars in cash and vouchers. [208] He also notes that a number of meetings took place between Kozeny and state officials after the arrest, during which "the officials demanded that they be given an interest in two-thirds of the Oily Rock's vouchers in return for releasing the courier, permitting Oily Rock to continue purchasing privatization vouchers, and relieving the company from paying protection money to the Chechen mafia." [209]

205 *See United States v. Kozeny, No. 05 Cr. 518, 2008 U.S. Dist. LEXIS 101803, 2008 WL 5329960, at *2 (S.D.N.Y. Dec. 15, 2008)*.

206 Bourke Mem. at 44.

207 *See id*. at 49.

208 *See id*. (citing Tr. at 241:5-244:1 (Pulley testifying that after two couriers had been arrested and their vouchers seized, he, Farrell, and Kozeny had met with Nuriyev and Nasibov); 423:8-425:18 (Farrell testifying that after a courier and a Chechen security officer had been arrested by state authorities, Uncle Ali of the Chechen mafia had managed to schedule a meeting between Kozeny and Ilham Aliyev, the President's [**71] son and the Vice President of SOCAR)).

209 *See id*. (citing Tr. at 429:23-435:14 (Farrell testifying that during the ensuing meetings with Nuriyev and Nasibov, the parties came to an agreement that the officials would receive two-thirds of the vouchers for no consideration)).

However, Bourke ignores the fact that prior to the arrest of the courier, Kozeny had already instructed Farrell to make contacts with the Azeri government and had approved the payment of ten thousand [*396] dollars in exchange for a meeting with an official. [210] In addition, Bourke fails to acknowledge that Kozeny had first proposed to Nuriyev and Nasibov that he would give them one-half of the vouchers in return for their help and cooperation in the venture, even if the officials ultimately succeeded in convincing Kozeny to increase their interest in the venture to two-thirds. [211]

210 *See* Tr. at 412:5-413:9 (Farrell testifying that Kozeny had wanted Farrell to establish contacts in the Azeri government and that he had been able to arrange a meeting with a state official in return for ten thousand dollars which Kozeny readily paid).

211 *See id*. at 432:1-433:14 (Farrell testifying that Kozeny had offered to give fifty percent [**72] of the vouchers he was purchasing to the Azeri officials, but that the officials had counter-offered by asking for a two-thirds interest).

Aside from the fact that Bourke never raised this extortion argument at trial, I charged the jury on the requisite corrupt intent Bourke must have had before he could be convicted of the conspiracy offense. [212] The jury was thus instructed that if it determined that Bourke and the others in the alleged conspiracy lacked the required intent -- as would be the case if they were coerced to make payments -- it would be required to acquit Bourke. Bourke's motion for a new trial is therefore denied.

212 *See id*. at 3364:7-15.

6. Failure to Include "Mere Offer" Charge

As part of his motion for reconsideration of the Azeri law defenses, Bourke also moved for inclusion of an instruction in the jury charge that a "mere offer" of payment -- without any transfer of the payment -- is not a bribe under Azeri law and therefore is not a violation of the FCPA. [213] At the time of the motion for reconsideration, the Court declined to rule on this requested charge, noting that Bourke had not specifically made such a request in his briefing on the Azeri Law motion. [214] In [**73] any event, I also noted that "Bourke ha[d] not been charged [in the Indictment] with making a 'mere offer.'" [215] Nevertheless, I held that if Bourke was able to show at trial that he was entitled to a "mere offer" charge, I would decide at that time whether and in what manner I would give such an instruction. [216]

213 *See Kozeny, 2008 U.S. Dist. LEXIS 101803,*

*2008 WL 5329960, at *1*.

214 *See id*.

215 *Id*.

216 *See id*.

At trial, Bourke requested such a charge again. While I entertained his request, I ultimately declined to give this instruction after hearing Bourke's summation and determining that he was not relying on such a defense. [217] Bourke now asserts that "certain of the unlawful FCPA bribes alleged by the Government as predicates of the conspiracy [] were never proven to have been consummated." [218] He contends that the Court's omission of a "mere offer" charge was therefore error and argues that he is entitled to a new trial on this ground. [219]

217 *See* Tr. at 3334:16.

218 Bourke Mem. at 29.

219 *See id*. at 28.

The Second Circuit has held that refusal to give a requested defense charge is not error unless "the requested instruction is 'legally correct, *represents a theory of defense with basis in the record that would lead to* [**74] *acquittal*, and the theory is not effectively presented elsewhere in the charge.'" [220] Besides the fact that Bourke [*397] never attempted to argue the "mere offer" defense, Bourke's requested charge has no basis in fact and would have served only to confuse the jury.

220 *United States v. Kerley, 544 F.3d 172, 177 (2d Cir. 2008)* (quoting *United States v. Doyle, 130 F.3d 523, 540 (2d Cir. 1997))* (emphasis added).

The Government decided to drop the substantive FCPA offense on the eve of trial and proceed to trial only on the conspiracy offense. The Government was therefore not required to show that any of the bribes were actually consummated. In addition, Bourke sought this instruction on the premise that there was a *possibility* that the jury might convict him of participating in a conspiracy to *merely offer* bribes, but not to actually pay them -- in other words that the object of the conspiracy was only to offer bribes to officials. But such theory makes no sense. [221] Bourke's motion for a new trial on this ground is therefore also denied.

221 Although I decline to rule on the issue of whether a "mere offer" to bribe is "lawful under the written laws and regulations" of Azerbaijan and therefore [**75] that it is an affirmative defense to a violation of the FCPA, I note that such exception is neither included in Article 171 nor was it shown to be included in any other written law or regulation.

V. CONCLUSION

For the reasons set forth above, Bourke's *Rule 29* and *Rule 33* motions are denied in their entirety. The Clerk of the Court is directed to close this motion (document no. 236).

SO ORDERED:

/s/ Shira A. Scheindlin

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

October 13, 2009