UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ECF CASE

UNITED STATES OF AMERICA	:	05 Cr. 518 (RCC)
- v. -	:	
VIKTOR KOZENY, FREDERIC BOURKE, JR., and DAVID PINKERTON,	: : :	
Defendants.	:	

- x

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE PRETRIAL <u>MOTIONS OF DAVID B. PINKERTON AND FREDERIC A. BOURKE JR.</u>

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GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE PRETRIAL MOTIONS OF DAVID B. PINKERTON AND FREDERIC A. BOURKE JR.

The Government respectfully submits this memorandum in opposition to David B. Pinkerton's Motion to Dismiss the Indictment and for a Bill of Particulars and Frederic A. Bourke Jr.'s Pretrial Motions. The motions (1) challenge the sufficiency of the Indictment, (2) contend that all but one of its counts is time-barred (3) and seek additional discovery and a bill of particulars. For the reasons set forth below, these motions are without merit and should be denied.

Bourke also requests a pretrial *Kastigar* hearing. As discussed below, the Government consents to a *Kastigar* hearing, but submits that it should occur after the trial.

BACKGROUND

The Indictment, which was returned on May 12, 2005 and unsealed on October 6, 2005, charges Bourke, Pinkerton and Viktor Kozeny with participating in a scheme to bribe senior government officials in Azerbaijan (the "Azeri Officials") to ensure that those officials would privatize the State Oil Company of the Azerbaijan Republic ("SOCAR") (as well as other valuable state assets) and allow the defendants and others to participate in that privatization and reap

substantial profits from it.

Azerbaijan was a Republic of the Soviet Union until it became a sovereign nation in 1991, and its major industries were owned by the state. (*See* Indictment ("Ind.") ¶ 3-4.) In the mid-1990s, the Azeri government instituted a program to privatize those industries. (*Id.* ¶ 4.) Under the privatization program, the Azeri government issued free vouchers to all Azeri citizens, which allowed them to bid for shares of industries to be privatized. Privatization vouchers were freely tradable and were bought and sold, typically with U.S. currency. Foreigners could also participate in the privatization program, but only if they purchased government-issued "options" for each voucher they held. The Azeri government sold these options at an official price. (*Id.* ¶ 5.) Certain Azeri industries, such as SOCAR, were deemed strategic enterprises and could only be privatized if the Azeri president issued a special decree. (*Id.* ¶ 4.)[1]

Beginning in the summer of 1997, Kozeny directed people working for him to purchase Azeri vouchers and options on behalf of two companies that Kozeny controlled, Oily Rock Ltd. ("Oily Rock") and Minaret Group Ltd. ("Minaret"). (*Id.* ¶¶ 6, 25.) In August 1997, one of those people was arrested by Azeri authorities while making a large purchase of vouchers and while in possession of $1 million USD and $1 million worth of vouchers. Immediately following that arrest, Kozeny had several meetings with the Azeri Officials in which he agreed to transfer to them two-thirds of Oily Rock's vouchers and options and to give to them two-thirds of any profits Kozeny and his co-investors realized from SOCAR's privatization.[2] In return for this "two-thirds transfer," the

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[1] SOCAR owns Azerbaijan's substantial oil deposits, which are both on land and offshore under the Caspian Sea. (*Id.* ¶ 3.)

[2] Kozeny also agreed to purchase vouchers from a relative of one of the Azeri Officials, resulting in profits and commissions for that official and his family. (*Id.* ¶ 29.)

Azeri Officials agreed to permit Kozeny and his fellow investors to acquire a controlling interest in SOCAR upon its privatization. (*Id.* ¶¶ 28-29.) Months later, in June 1998, Oily Rock's shareholders approved an increase in Oily Rock's authorized share capital from $150 million to $450 million. The purpose of this "two-thirds share capital increase" was to provide shares to the Azeri Officials who had been given an interest in Oily Rock pursuant to the "two-thirds transfer." (*See id.* ¶¶ 53-55.)

In addition to these corrupt promises, the Indictment charges that several additional bribes -- including substantial cash payments; jewelry and luxury items; and medical treatment, hotel accommodations, meals and shopping expenses -- were paid to ensure that Kozeny and his fellow foreign investors could reap the benefits of a privatized SOCAR. (*Id.* ¶¶ 56-62.)

A. Bourke's and Pinkerton's Roles in the Scheme

Bourke was one of the individuals who invested in Oily Rock. According to the Indictment, he made investments (on behalf of himself, family members, and friends) of approximately $7 million in March 1998 and of approximately $1 million in July 1998. (*Id.* ¶¶ 17, 67n, 67rr.) The Indictment alleges that Bourke made these investments based in part on his understanding that Kozeny had offered, paid, authorized the payment of, and would pay bribes to the Azeri Officials to ensure that those who invested with Kozeny would be allowed to participate in the privatization of SOCAR. (*Id.* ¶ 20.) Bourke is also alleged, among other things, to have assisted Kozeny in arranging for medical treatment for one of the Azeri Officials in New York City in March 1998, and for medical treatment for another Azeri Official in New York City in May and September 1998. These treatments and related travel expenses were paid for by Oily Rock and Minaret. (*Id.* ¶¶ 61-62.)

Pinkerton, a Managing Director at American International Group, Inc. ("AIG"), was responsible for initiating and supervising AIG's investment in Azeri privatization. (*Id.* ¶ 16.) AIG invested approximately $15 million in June 1998 pursuant to a "co-investment agreement" with Oily Rock and Minaret in which the parties agreed to pursue a joint strategy in acquiring and exercising at auction privatization vouchers and options to gain a controlling interest in SOCAR. (*Id.* ¶¶ 7, 46.) AIG wired these funds from accounts in New York to accounts controlled by Kozeny in Switzerland. (*Id.* ¶ 46.) Pinkerton is alleged to have caused AIG to make its investment based in part on his understanding that Kozeny had offered, paid, authorized the payment of, and would pay bribes to the Azeri Officials to ensure the investors' participation in SOCAR's privatization. (*Id.* ¶ 21.)

Specifically, the Indictment alleges that Pinkerton learned of the corrupt nature of Kozeny's deal with the Azeri Officials from Clayton Lewis, a co-conspirator who has pleaded guilty pursuant to a cooperation agreement. According to the Indictment, Lewis, a principal of the Wall Street hedge fund Omega Advisors, Inc. ("Omega"), learned in February and March 1998 that Kozeny had entered into a corrupt financial relationship with the Azeri Officials that gave those officials a personal financial incentive to permit Kozeny's successful participation in the privatization of SOCAR. (*Id.* ¶ 35.) Lewis is alleged to have imparted this information to Pinkerton shortly thereafter, in the spring of 1998. (*Id.* ¶ 44.)

B. The Charges Against Bourke and Pinkerton

Bourke and Pinkerton are charged in two conspiracy counts: (1) Count One, which charges conspiracy to violate the Foreign Corrupt Practices Act ("FCPA") and the Travel Act, from in or about May 1997 to in or about 1999; and (2) Count Twenty-One, which charges money laundering conspiracy, from in or about March 1998 to in or about September 1998. Bourke and

Pinkerton are also charged in a number of substantive counts, as indicated in the following chart summarizing the charged conduct in those counts and the time period in which the conduct occurred:

Count	Defendant(s)	Statute	Alleged Bribe/Other Conduct	Approximate Time Period
4	Bourke	FCPA	Medical and other expenses	March 1998
5	Bourke Pinkerton	FCPA	Commissions on voucher purchases	August 1997 - July 1998
10	Bourke	FCPA	Medical and other expenses	May 1998
11	Bourke	FCPA	Medical and other expenses	September 1998
12	Bourke	FCPA	Two-thirds share capital increase	June - July 1998
15	Bourke	Travel Act	Wire transfer of Bourke's $7 m. investment	March 1998
18	Pinkerton	Travel Act	Travel to Cairo, Egypt to meet with Oily Rock officer and investor re: AIG's investment	May 1998
19	Pinkerton	Travel Act	Wire transfer of AIG's $15 m. investment	June 1998
20	Bourke	Travel Act	Wire transfer of Bourke's $1 m. investment	July 1998
22	Bourke	Money laundering	Wire transfer of Bourke's $7 m. investment	March 1998
24	Pinkerton	Money laundering	Wire transfer of AIG's $15 m. investment	June 1998
25	Bourke	Money laundering	Wire transfer of Bourke's $1 m. investment	July 1998
26	Bourke	1001	False statements[3]	Apr. - May 2002
27	Pinkerton	1001	False statements	Feb. - Mar. 2002

[3] The false statements counts allege that Bourke and Pinkerton each made false statements in interviews with a Special Agent of the FBI and others.

With the exception of the false statements counts, each of the above counts also charges Bourke and Pinkerton on a theory of aiding and abetting the offense in question.

ARGUMENT

I. THE INDICTMENT PROPERLY PLEADS FCPA AND RELATED VIOLATIONS

Pinkerton first contends that all of the counts against him except the false statements count should be dismissed for failure sufficiently to allege violations of the FCPA and, by extension, the statutes predicated on those violations. Pinkerton, however, ignores certain paragraphs in the Indictment and misstates the intent required to violate the FCPA. Contrary to Pinkerton's claims, the Indictment more than adequately comports with pleading requirements generally, and more than adequately pleads FCPA violations.

A. Applicable Law

1. Sufficiency of Indictments

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "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.'" *United States* v. *Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998) (*quoting Hamling* v. *United States*, 418 U.S. 87, 117 (1974)). To determine whether a count sufficiently alleges an offense, the count should be read "in its entirety." *United States* v. *Hernandez*, 980 F. 2d 868, 871 (2d Cir. 1992). Moreover, indictments "must be read to include all facts that are necessarily implied by the specific allegations made." *Id.* (citation omitted). Thus, in

reading an indictment, "common sense and reason prevail over technicalities." *United States* v. *Sabbeth*, 262 F.3d 207, 217 (2d Cir. 2001).

2. Elements of an FCPA Violation

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

- that they acted "corruptly";
- that they made use of the mails or any means or instrumentalities of interstate commerce;
- that this use was in furtherance of an offer, payment, promise to pay, or authorization of the payment of money or anything of value;
- that they knew that the money or thing of value would be offered or given directly or indirectly to any foreign official;
- that the payment or thing of value was intended to influence any act or decision of such foreign official in his official capacity; and
- that the payment was made to assist in obtaining or retaining business for or with, or directing business to, any person.[4]

See 15 U.S.C. § 78dd-2(a); *see also Stichting ter Bahartigiging van de Belangen* v. *Schreiber*, 327 F.3d 173, 179-180 (2d Cir. 2003) (listing all but the final element above). The final element, that the payment was made to assist in obtaining or retaining business, is sometimes referred to as the "business nexus element." *See, e.g., United States* v. *Kay*, 359 F.3d 738, 740 (5th Cir. 2004).

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[4] The penalty provisions of the FCPA make clear that for there to be a criminal violation, the defendant must willfully violate the statute. *See* 15 U.S.C. § 78dd-2(g)(2). However, as discussed below, *see infra* at 11-13, defendants who acted "corruptly" of necessity also acted "willfully."

B. Discussion

Under the relevant legal standards, there is no question that the Indictment adequately pleads FCPA conspiracy and substantive violations. In fact, the Indictment does far more, describing in great detail the bribery scheme and thus providing extensive information about the charges against which Pinkerton and the other defendants will have to defend. *See Alfonso*, 143 F.3d at 776. Moreover, the Indictment puts the defendants on notice of the elements of the FCPA and conspiracy to violate the FCPA against which they must defend. *See id.* Accordingly, Pinkerton's challenges to the sufficiency of the Indictment should be turned aside. Below, we address each of the arguments made by Pinkerton in his Memorandum of Law ("Pinkerton Mem.").

1. The Indictment Adequately Alleges Pinkerton's Intent to Join the Scheme.

Pinkerton argues first that the Indictment is insufficient because it does not allege that he had the specific intent to conspire to violate the FCPA. (Pinkerton Mem. at 7-9.) He contends that Count One "is premised on an allegation that he agreed to have AIG invest with Omega in Azeri privatization after learning that Mr. Kozeny had paid some form of bribe in the past to Azeri officials," and that there is no allegation that he "joined the conspiracy with the specific intent to make payments that could violate the FCPA." (*Id.* at 9.)

As a preliminary matter, Pinkerton is incorrect in stating that the FCPA is a specific intent crime. As the Second Circuit recently held, "specific intent to violate the FCPA is not an element of an FCPA violation" and "there is nothing . . . 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." *Stichting*, 327 F.3d at 183.[5]

More fundamentally, Pinkerton is wrong in arguing that the Indictment fails to allege that he intended to join an FCPA conspiracy. Pinkerton ignores paragraph 19 of the Indictment, which alleges that he and his co-conspirators paid and caused to be paid bribes to the Azeri Officials, and paragraph 21, which states that Pinkerton caused AIG to make its $15 million investment "based in part on [his] understanding that Kozeny had offered, paid, authorized the payment of, and would pay bribes to the Azeri Officials to ensure Oily Rock and the investment consortium's participation in the privatization of SOCAR." (Ind. ¶ 21.) The Indictment makes clear that the understanding Pinkerton is alleged to have gained was that Kozeny "had entered into a corrupt financial relationship with the Azeri Officials that gave those officials a personal financial incentive to permit Kozeny's successful participation" in SOCAR's privatization. (*Id.* ¶ 44.)

In other words, Pinkerton is charged with having AIG invest in privatization with knowledge of a corrupt arrangement and an understanding that AIG would reap the benefits of that arrangement. Further, and contrary to Pinkerton's arguments (Pinkerton Mem. at 8-9), the Indictment sufficiently pleads that this arrangement included a promise of a *future* payment to the Azeri Officials. Obviously, at the time of AIG's investment, SOCAR had not been privatized. Nor

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[5] Accordingly, the principle relied on by Pinkerton that in a conspiracy case involving a specific intent crime, the Government must prove that the defendant had "the specific intent to violate the substantive statute," *United States* v. *Samaria*, 239 F.3d 228, 234 (2d Cir. 2001), does not apply here.

In addition, *Samaria* and the two other cases Pinkerton relies on for his argument that the Government failed to plead his intent to join the conspiracy are inapposite for another reason: They address the government's burden in proving, not pleading, a conspiracy. *See Samaria*, 239 F.3d at 234 (setting forth the proof requirements for conspiracy); *United States* v. *Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996) (same); *United States* v. *Ceballos*, 340 F.3d 115 (2d Cir. 2003) (holding that the evidence was insufficient to support a bribery conspiracy); *see also United States* v. *Bodmer*, 342 F. Supp.2d 176, 192 (S.D.N.Y. 2004) (noting that *Ceballos* speaks to the government's burden of proof, not pleading requirements).

was Kozeny's -- or anyone else's -- participation in that privatization assured. (*See* Ind. ¶ 4 (privatization of SOCAR was dependent on presidential decree)). Thus, the alleged "personal financial incentive" to the Azeri Officials (*id.* ¶ 44), was a promise of a benefit in the future contingent upon them permitting Kozeny and his fellow investors to participate in privatization and gain a controlling interest in SOCAR.[6]

In short, the Indictment sufficiently alleges that Pinkerton joined the conspiracy with knowledge of its unlawful objectives and with the intent to further those objectives.

2. The Substantive FCPA Counts Plead the Requisite Mens Rea.

Pinkerton next contends that the substantive FCPA count against him, Count Five, should be dismissed because it fails to allege that he acted knowingly, intentionally or willfully. (Pinkerton Mem. at 10-11.) Bourke joins in this portion of Pinkerton's sufficiency motion, moving to dismiss the five substantive FCPA counts against him -- Counts Four, Five, Ten, Eleven and Twelve -- for the same reason. (*See* Bourke's Memorandum of Law ("Bourke Mem.") at 1, n.1.)

This relief should be denied. In making this argument, the defendants ignore that, for all of the substantive FCPA counts, the Indictment alleges that they acted "corruptly" -- the exact *mens rea* set forth in the FCPA. *See* Indictment ¶ 69 (defendants "made use of the mails and means and instrumentalities of interstate commerce *corruptly* . . . .") (emphasis added); 15 U.S.C. § 78dd-2(a) ("It shall be unlawful . . . to make use of the mails or any means or instrumentality of interstate

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[6] In a curious attempt to bolster his argument that the Indictment insufficiently pleads a future benefit to the Azeri Officials, Pinkerton quotes from comments made by former Deputy Chief of the Department of Justice's Fraud Section, Peter Clark, in 1997. (Pinkerton Mem. at 9.) Those comments, which focused on investigative hurdles in FCPA cases, are wholly irrelevant to the issue before the Court: whether the Indictment sufficiently pleads an FCPA violation. Whatever meaning Pinkerton wishes to ascribe to Mr. Clark's statements, there can be no dispute that Mr. Clark was *not* talking about pleading requirements.

commerce *corruptly* . . . .") (emphasis added).[7]

The Government recognizes that a criminal, as opposed to a civil, violation of the FCPA must also be "willful." *See* 15 U.S.C. § 78dd-2(g)(2). Although the Indictment does not include the word "willfully" in pleading the substantive FCPA counts, read as a whole, the Indictment fairly imports the element of willfulness. The allegation that the defendants acted "corruptly" means that they acted with "a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position." *See Stichting*, 327 F.3d at 183. Willful conduct requires no greater showing; rather, in the FCPA, willfulness means only that the defendant intended to commit the unlawful acts.

The legislative history reveals that the FCPA uses the term "willfully" in that sense. At the time the FCPA was enacted, several decisions had held, in the context of civil violations of the securities laws, that "willfully" meant "intentionally committing the act which constitutes the violation," with "no requirement that the actor also be aware that he is violating one of the Rules or Acts." *See, e.g., Arthur Lipper Corp.* v. *Securities and Exchange Comm'n*, 547 F.2d 171, 180 (2d Cir. 1976). The report on the House bill, which required that a violation be "knowingly and willfully," cited those decisions and stated:

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[7] The cases cited by Pinkerton holding that willfulness must be pleaded in an indictment (Pinkerton Mem. at 11) are inapposite. In two of those cases, the courts construed statutes that contained the word "willfully," but did not contain the word "corruptly." *See United States* v. *Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1975); *United States* v. *Fischetti*, 450 F.2d 34, 39 (5th Cir. 1971). In the third case, the relevant statute did not specifically identify criminal intent as an element of the crime, but the court held that it must be pleaded "to notify the defendant of the *mens rea* of the crime charged." *United States* v. *Morrison*, 536 F.2d 286, 289 (9th Cir. 1976). Here, by contrast, the Indictment notifies the defendants of the *mens rea* they are alleged to have had. *See Alfonso*, 143 F.3d at 776 (indictment's purpose is to "fairly inform[] a defendant of the charge against which he must defend") (quoting *Hamling*, 418 U.S. at 117).

> Consistent with the often reiterated holdings of the courts that have interpreted a similar standard in the few places it is included in the federal securities laws, the knowledge required is merely that a defendant be aware that he is committing the act which constitutes the violation -- not that he knows his conduct is illegal or has any specific intent to violate the law. . . . Indeed, even in the criminal context, neither knowledge of the law violated or the intention to act in violation of the law is generally necessary for conviction . . . .

H.R. Rep. No. 95-640, at 15 (1977) (citations omitted); *see also Stichting*, 327 F.3d at 173 (FCPA is not a specific intent crime). The conference committee of the House and Senate later adopted the Senate bill's version of the penalty provision, which required only that an individual act "willfully." H.R. Conf. Rep. No. 94-831, at 12-13 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4125.

The Supreme Court has observed that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1513 (2006) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)). Here, by explicitly incorporating a particular judicial interpretation of "willfully" as used elsewhere in the securities laws, the legislative history leaves little doubt that Congress intended that "willfully," as used in the FCPA, merely requires proof that a defendant intended to commit the acts that were unlawful. Reading the Indictment as a whole, that intent is adequately pled.

In addition, the Indictment describes quintessentially willful and dishonest conduct -- that the defendants participated in or alongside of Kozeny's investment in privatization with the understanding that the process was rigged by a corrupt arrangement. (*See* Ind. ¶ 20-21.) The allegation that the defendants engaged in such inherently dishonest conduct "corruptly" (*id.* ¶¶ 64, 69) puts them on notice that their conduct is also alleged to be willful. Moreover, the very fact that

this case has been brought as a criminal prosecution rather than a civil violation also puts the defendants on notice that their conduct is alleged to be willful. *See* 15 U.S.C. § 78dd-2(g)(2).

For these reasons, the Indictment properly pleads the intent element for the substantive FCPA counts, and the defendants' motions to dismiss them should be denied.

3. The Indictment Sufficiently Pleads the Business Nexus Element of the FCPA.

Pinkerton's final sufficiency argument is that the Indictment fails to allege the business nexus element with respect to him. (Pinkerton Mem. at 11-18.) He claims that the bribes alleged in the Indictment have no "direct nexus to obtaining or retaining business" because "[h]aving an incentive to go forward with an open privatization auction, and to permit Mr. Kozeny to participate, is not the same thing as providing assistance in 'obtaining business.'" (*Id.* at 12-13.)

Once again, Pinkerton has selectively read out key paragraphs of the Indictment, which allege that the corrupt promises and payments to the Azeri Officials were made precisely so that the investors could gain a stake in a substantial asset, SOCAR. Among these paragraphs are the following:

- paragraphs 19, 21-22, and 29, which allege that the corrupt promises and bribes were made so that Kozeny and his fellow investors could participate in privatization;
- paragraphs 29 and 66b, which allege that the Azeri Officials agreed, in exchange for the two-thirds transfer, to permit Kozeny and his fellow foreign investors to acquire a controlling interest in SOCAR upon its privatization, and that this agreement gave Kozeny and others the ability to profit from privatization; and
- paragraphs 35 and 44, which allege (1) that Lewis learned that Kozeny's corrupt relationship with the Azeri Officials gave them a "personal financial incentive to permit Kozeny's *successful participation* in the privatization of SOCAR;" and (2) that Lewis imparted this information to Pinkerton

(emphasis added).[8]

The Indictment, therefore, not only adequately pleads the business nexus element, it also makes eminently clear that the whole reason behind the bribery scheme was to obtain an extremely lucrative business opportunity.

Pinkerton suggests that the FCPA should be limited to criminalizing "payments made to obtain direct and immediate preferential treatment in actually being awarded or retaining a government contract or other concrete business." (Pinkerton Mem. at 12.) This defies logic. The notion that Congress intended, when it used the word "business," to prohibit bribery to obtain a contract let by an agency of a foreign government, but did not intend to punish bribery whose object is obtaining ownership of the agency itself (and thus control of *all* of its contracts) is nonsensical. In addition, none of the cases Pinkerton cites in support of his narrow reading of the FCPA (*Id.* at 12-13 and 13 n.7) even discussed the "obtaining or retaining business" language, much less attempted to construe it. The leading, and only, case that addresses the scope of the business nexus element is *United States* v. *Kay*, 359 F.3d 738 (5th Cir. 2004), and *Kay* confirms that the element is to be broadly construed.

In *Kay*, the defendants were charged with FCPA violations based on illicit payments they made to officials in Haiti to reduce their tax burdens. *Id.* at 741. The district court dismissed the indictment, holding that bribes paid to obtain favorable tax treatment do not fall within the

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[8] In view of these allegations, as well as the fact that privatization of SOCAR was not guaranteed (*see* Ind. ¶ 4), Pinkerton's contentions (1) that the Indictment fails to plead that a fix was in to enable Kozeny to succeed in privatization, and (2) that Kozeny's bid for SOCAR would receive special treatment (Pinkerton Mem. at 12) are wholly unpersuasive. To the contrary, the Indictment's allegations make clear that participation in SOCAR's privatization was a tremendous benefit not available to the marketplace in general.

statute's "obtain or retain" language. *Id.* at 741-42. The Fifth Circuit reversed, holding 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 purpose . . . ." *Id.* at 755. The court reached that holding after an exhaustive discussion of the legislative history behind the FCPA, which the court found indicated a Congressional desire 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." *Id.* at 749. In other words, the Fifth Circuit rejected, and Congress's clear intent precludes, the very argument that Pinkerton is advancing here.

Pinkerton attempts an end run around the *Kay* decision by claiming that its holding is somehow limited to the payment of bribes "to improve the profitability of a specific, already-existing contract" which only goes to the issue of *retaining*, not *obtaining*, business. (Pinkerton Mem. at 17.) But *Kay's* express holding plainly is not limited to bribes to retain business, *see* 359 F.3d at 755, nor does the opinion require that any "specific" business be sought. Pinkerton also attempts to distinguish *Kay* by noting that the bribes there were paid to gain a competitive advantage in the marketplace. (Pinkerton Mem. at 17.) But that is exactly what the bribes in this case were designed to do as well. They were promised and paid to allow the defendants to participate in SOCAR's privatization and obtain a controlling interest in SOCAR, with the clear implication that not everyone would be eligible to participate, much less gain control of Azerbaijan's most valuable national asset.

Finally, Pinkerton tries to suggest that *Kay* should be limited because it relied on specific legislative history addressing bribes to reduce tax burdens, whereas there is no legislative history concerning bribes that "influence officials to go forward with a privatization program."

(Pinkerton Mem. at 17.) Again, Pinkerton's position finds no support in the *Kay* opinion, which reviewed *all* of the FCPA's legislative history and reached the conclusion that a broad reading of the business nexus element was appropriate. *See* 359 F.3d at 750-51 (noting Congress's use of "broad, general language in prohibiting payments to procure assistance for the payor in obtaining or retaining business," as well as the "very limited exceptions" to the FCPA's reach). Moreover, the notion that the legislative history would have spelled out every type of "business" that might be obtained or retained through bribery is implausible at best. The business sought here -- a stake in a privatized oil company -- may not have been routine or ordinary, but that does not mean it is not covered by the FCPA.[9]

In short, there is no support in the legislative history or the case law for Pinkerton's narrow reading of the business nexus element, and the Indictment more than adequately pleads that element by making clear that the bribes were paid to obtain a controlling interest in SOCAR.[10]

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[9] The *Kay* court noted that "the concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid." *See* 359 F.3d at 749. Here, the corruption was intended to secure something far more significant than a contract bid; it was intended to gain a stake in a state-owned industry.

[10] Pinkerton also argues that the rule of lenity applies here, and that the FCPA did not give him "fair notice that [he] could be prosecuted for passively investing in a venture that may have been facilitated by past bribes aimed at causing a privatization auction to happen." (Pinkerton Mem. at 18.) This argument fails in two respects. First, as discussed above, the Indictment sufficiently alleges a promise of a future benefit to the Azeri Officials. (*See supra* 9-10.) Second, the rule of lenity is not nearly as expansive as Pinkerton suggests. It is, rather, a doctrine of "last resort," *United States* v. *Venturella*, 391 F.3d 120, 133 (2d Cir. 2004), and has "always [been] reserved 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." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (internal quotation marks omitted). That certainly is not the case here, where extensive legislative history supports the broad reading of the "obtaining or retaining business" language. *See Kay*, 359 F.3d at 746-55. Moreover, "[a] statute does not become ambiguous merely because '[it] has been applied in situations not expressly anticipated by Congress.'" *United States* v. *Trapilo*, 130 F.3d 547, 552 n.8 (2d Cir. 1997) (*quoting National Organization For Women* v. *Scheidler*, 510 U.S. 249, 262 (1994)). Thus, Pinkerton's argument that no published cases as of 1998 construed the FCPA to apply to facts like

II. THE INDICTMENT WAS TIMELY BROUGHT

Pinkerton and Bourke move to dismiss all but the false statements counts on the ground that they are time-barred, even though the statute of limitations was suspended under 18 U.S.C. § 3292 ("Section 3292 ") based on the Government's official requests for foreign evidence. The defendants' arguments on this point are not supported by the relevant facts or the applicable law, and the motions to dismiss based on the statute of limitations should be denied.

A. Relevant Facts

On or about October 29, 2002, the Department of Justice's Office of International Affairs ("OIA") submitted an official request to the Netherlands (the "Netherlands Request") seeking, among other things, "bank account records from two Dutch banks that received wire transfers for the benefit of third parties and on behalf of an Azeri government official." (July 21, 2003 Affidavit of FBI Special Agent George P. Choundas ("Choundas Aff.") at 12.)[11] On or about January 13, 2003, OIA submitted an official request to Switzerland (the "Swiss Request") requesting, among other things, (1) records of bank accounts held by Oily Rock, Minaret, and various Azeri officials; and (2) that a search be conducted of the von Meiss Blum law firm, which represented Kozeny in the Azeri investment. (Choundas Aff. at 13-14; *see* Ind. ¶¶ 13-14, 39-40, 46.)[12]

On July 21, 2003, the Government applied for, and on July 22, 2003, the Honorable George B. Daniels granted, an Order suspending the running of the statute of limitations based on

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the ones in this case (Pinkerton Mem. at 18) is of no merit.

[11] The Choundas Affidavit is attached as Exhibit A to the October 20, 2006 Affidavit of Matthew S. Queler, Esq. ("Queler Aff.") and as Exhibit G to the October 20, 2006 Declaration of Barry H. Berke, Esq. ("Berke Decl.").

[12] OIA later submitted a supplemental request to Switzerland which responded to a letter from the Swiss authorities seeking additional information. (Choundas Aff. at 14.)

these official requests. (*See* Ex. H to the Queler Aff. and Ex. F to the Berke Decl.) Judge Daniels' Order stated 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, and that authorities in those countries had not taken final action on the official requests. (*Id.* at 1.) The Order stated that the suspension "shall begin on the dates on which the official requests were made" and end when the Netherlands and Switzerland took final action, such periods not to exceed three years in total. (*Id.* at 2-3.)

Dutch authorities produced documents responsive to the Netherlands Request on November 8, 2005. (*See* copy of transmittal letter from the Netherlands, which is Ex. J to the Berke Decl.; *see* also Declaration of OIA Senior Trial Attorney Judith Friedman dated January 18, 2007 ("Friedman Decl.") at ¶ 6).[13] Swiss authorities sent documents to the Government on several occasions. (*See* copies of transmittal letters from Switzerland, which is Ex. L to the Berke Decl.) The last transmittal letter was dated September 10, 2004, and it, like all of the other letters, indicated that the documents sent were in partial execution of the Swiss Request. (*Id.*)[14]

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[13] The Friedman Declaration is attached as Exhibit A to the Declaration of Jonathan S. Abernethy dated January 18, 2007 ("Abernethy Decl."). Pinkerton erroneously asserts that "[t]he Dutch Authorities appear to have taken final action no later than February 27, 2004 – the latest date of any of the certifications completed by the Dutch government." (Pinkerton Mem. at 26.) As the Friedman Declaration makes clear, OIA did not receive any documents from the Netherlands until November 2005 (Friedman Decl. at ¶ 6), and thus the Netherlands did not take final action until after the Indictment was returned.

[14] Pinkerton states that "the relevance of these letters is unclear, since they reference an MLAT request dated March 26, 2003, which is not one of the requests referenced in Agent Choundas's affidavit or in Judge Daniels' order." (Pinkerton Mem. at 27 n.15.) The reason the Swiss authorities used the March 26, 2003 date is because that is the date of the official German translation of the Swiss Request. (Friedman Decl. at ¶ 8.)

B. Applicable Law

Section 3292 provides in pertinent part that:

> (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 empaneled 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 * * *

18 U.S.C. § 3292.

Courts that have reviewed the timing requirements for Section 3292 applications have consistently either held or noted in dicta that the statute of limitations is tolled from the date of the official request for evidence. *See United States* v. *Bischel*, 61 F.3d 1429, 1434 (9th Cir. 1995) ("[T]he statute plainly contemplates that the starting point for tolling the limitations period is the official request for evidence, not the date the § 3292 motion is made or granted."); *United States* v. *Neill*, 940 F. Supp. 332, 336 (D.D.C. 1996), *vacated in part on reconsideration on other grounds*, 952 F. Supp. 831 (D.D.C. 1996) ("[T]he statutes of limitations were tolled by the official request to a foreign government, not by the government's [Section 3292] application to the Court."). *See also*

United States v. *Fraser*, 834 F.2d 911, 914 n.4 (11th Cir. 1987) (noting that in Section 3292, "Congress provided that an official request for evidence located in a foreign country tolls the statute of limitations."); *United States* v. *Miller*, 830 F.2d 1073, 1076 (9th Cir. 1987) ("The statute itself specifies the *only* relevant time the application must be made: 'before return of an indictment.'") (emphasis added); *United States* v. *Trainor*, 277 F. Supp.2d 1278, 1282 (S.D. Fla. 2003) ("Aside from requiring an application or motion to be filed prior to the return of the indictment, § 3292 places no time limits on when the application or motion must be submitted.").

As to the length of a suspension, Section 3292 indicates that it ends when a foreign country takes "final action" on an official request or in three years, whichever is sooner. 18 U.S.C. § 3292 (b), (c)(1). The phrase "final action" is not defined, but it has been construed to mean "a dispositive response [by the foreign sovereign] *to each item* set out in the official request, including a request for certification [as to the authenticity of the requested records]." *Bischel*, 61 F.3d at 1433-34 (emphasis added); *accord United States* v. *Torres*, 318 F.3d 1058, 1065 (11th Cir. 2003). Stated somewhat differently, final action only occurs when "the foreign government believes it has completed its engagement [in relation to an official request for evidence] and communicates that belief to our government . . . ." *United States* v. *Meador*, 138 F.3d 986, 991 (5th Cir. 1998).

C. Discussion

Under these standards, the statute of limitations was properly tolled for all of the relevant offenses. The Section 3292 application was timely because it was brought before the Indictment was returned, and that is the only time requirement in the statute. *Miller*, 830 F.2d at 1076; *Trainor*, 277 F. Supp.2d at 1282. In addition, the suspension was more than sufficient in length: It began on October 29, 2002, the date of the Netherlands Request, and lasted the full three

years because the Netherlands did not take "final action" until November 8, 2005, more than three years later. *See* 18 U.S.C. § 3292(c)(1); *see also Neill*, 940 F. Supp. at 337 (Section 3292 suspension remains until the last foreign authority takes final action on an official request).[15] Thus, for each of the counts in the Indictment, the five year statute of limitations effectively was an eight year statute, and all of the counts were timely brought.

In their motion papers, Pinkerton and Bourke argue, first, that Section 3292 does not permit revival of an already expired limitations period, and therefore the counts for which the statute of limitations had run by the time the Government applied for the suspension are out of time.[16] They attempt to rely on the statutory language for their contentions (1) that only a district court's order, not an official request for foreign evidence, can suspend the statute of limitations; and (2) that a

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[15] In addition, although not necessary to a finding that the suspension period was sufficient, it bears note that final action has not yet been taken on the Swiss Request, as each Swiss transmittal of documents indicated that the documents in question were sent only in partial execution of the request. (*See* Ex. L to the Berke Decl.)

[16] For Bourke, this would include all of the substantive FCPA, Travel Act and money laundering counts except for Count 11, which is alleged to have occurred in September 1998. *See supra* page 5 (chart summarizing counts). Pinkerton goes one step further, arguing not only that the substantive FCPA, Travel Act and money laundering counts against him are barred, but also that the two conspiracy counts are outside the statute of limitations as to him because he "had no involvement in the conspiracies after AIG wired its investment funds on June 8-11, 1998." (Pinkerton Mem. at 23.) Yet Pinkerton never suggests that he withdrew from the conspiracy, and his argument ignores that the conspiracy is alleged to have continued well past June 1998. Indeed, the last overt act is alleged to have occurred in February 1999. (Ind. ¶ 67 uu.) The statute of limitations is measured from no earlier than that date, *see Grunewald* v. *United States*, 353 U.S. 391, 396-97 (1957); *United States* v. *Monaco*, 194 F.3d 381, 387 n.2 (2d Cir. 1999), under the well-settled principle that a conspiracy continues as long as conspirators engage in overt acts in furtherance of their plot. *United States* v. *Toussie*, 397 U.S. 112, 122 (1970). *See also United States* v. *Menendez*, 612 F.2d 51, 54 (2d Cir. 1979) ("a conspirator is presumed to continue in the conspiracy until the last act of any of the conspirators"); *United States* v. *LaSpina*, 299 F.3d 165, 175 (2d Cir. 2002) ("Where the object of a conspiracy is economic, the conspiracy generally 'continues until the conspirators receive their anticipated economic benefits.'") (quoting *United States* v. *Mennuti*, 679 F.2d 1032, 1035 (2d Cir. 1982)). Therefore, even if Pinkerton were correct in arguing that the Government's Section 3292 application was untimely (an argument that is directly contrary to the case law), the two conspiracy counts against him plainly would still be within the statute of limitations.

district court cannot "suspend" a limitations period that has already run. (Pinkerton Mem. at 20-21; Bourke Mem.at 4-7.) The two reported cases that have squarely addressed this issue, however, have held just the opposite based on the same statutory language on which the defendants rely. *See Bischel*, 61 F.3d at 1434 (Section 3292 "plainly contemplates" that the toll starts when the official request is made, not when the 3292 order is granted); *Neill*, 940 F. Supp. at 336 (agreeing with *Bischel* and expressly rejecting defendants' argument that Section 3292 "cannot revive an expired statute of limitations").

The Government respectfully submits that *Bischel* and *Neil* were correctly decided and should be followed by this Court. First, Section 3292 is explicit that "[e]xcept 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* . . . ." 18 U.S.C. § 3292(b) (emphasis added). The statute itself, therefore, makes clear that although the application to the court need only be made before indictment, 18 U.S.C. § 3292(a)(1), tolling begins when the official request to the foreign country is made.

Moreover, *Bischel* and *Neil* are consistent with the legislative history behind Section 3292. In enacting the statute in 1984, Congress emphasized the "serious difficulties" federal prosecutors face in obtaining records from overseas, including the fact that it "generally take[s] a considerable period of time" for a foreign country to respond to an official request for records. H.R. Rep. No. 98-907, at 2 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3578, 3578. The legislative history was explicit that "the delays attendant in obtaining the records from other countries create . . . statute of limitations . . . problems." *Id.* In view of these concerns, it stands to reason that the statute's requirement that the Government make its Section 3292 application prior to indictment, and *not* prior

to the expiration of the original statute of limitations, reflects Congress's recognition that there would be cases where prosecutors would have to file their motion after the original statute had expired. The defendants' arguments to the contrary should be rejected.[17]

Faced with directly contrary case authority in *Bischel* and *Neil*, the defendants are left to cite a 2000 law review article which stated that a Section 3292 application "must be made before the expiration of the original statute of limitations." Abraham Abramovsky & Jonathan I. Edelstein, *Time for Final Action on 18 U.S.C. § 3292*, 21 Mich J. Int'l L. 941, 953-54 (2000). But the article cites as purported authority two cases that do not stand for the quoted proposition. In fact, one of those cases, *United States* v. *Davis*, 767 F.2d 1025 (2d Cir. 1985), includes just two passing and unrelated references to Section 3292, and the other case, *United States* v. *Baron*, No. 92 Cr. 898 (TPG), 1994 WL 63251 (S.D.N.Y. Feb. 18, 1994), did not address the question of when a 3292 application must be brought. In addition, the defendants cite to an outline prepared by the DOJ's Office of Legal Education that advises federal prosecutors to file Section 3292 applications before the statute runs. (Pinkerton Mem. at 21; Bourke Mem. at 6-7, 9-10, 12.) That outline, which appears not to have been updated in more than 10 years (*see* Ex. N to the Queler Aff. and Ex. I to the Berke Decl.), describes advice, not a rule of law, and in any event is contrary to the cases discussed above and not binding on this Court.

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[17] Pinkerton and Bourke take pains to argue that *Bischel* and *Neill* are wrongly decided by claiming (1) that neither opinion examined the language of Section 3292 (Bourke Mem. at 7 n.9); and (2) that both opinions relied on "unrelated issues concerning § 3292" in the *Miller* case, 830 F.2d 1073. (Pinkerton Mem. at 22.) These attempts to distinguish plainly contrary authority should be rejected, as a reading of *Bischel* and *Neill* shows that the courts there did examine the statutory language. Moreover, the portion of *Miller* upon which these cases relied is in fact central to the question here, as *Miller* made plain that under the terms of the statute, the "*only* relevant time the [Section 3292] application must be made" is before an indictment is returned. 830 F.2d at 1076 (emphasis added). By arguing that the Government must move for a suspension before the original statute of limitations runs, the defendants are attempting to impose burdens on the Government that the statute does not require.

Pinkerton and Bourke further argue that allowing a revival of an already-expired statute of limitations based upon a Section 3292 application would violate their constitutional rights under the *Ex Post Facto* and Due Process Clauses. (Pinkerton Mem. at 21; Bourke Mem. at 10-12.) This argument misses the mark. The Ex Post Facto Clause prohibits *laws* that retrospectively disadvantage a defendant. *United States* v. *Keller*, 58 F.3d 884, 889 (2d Cir. 1995). Here, there is no new law at issue. Section 3292 was enacted as part of the 1984 Comprehensive Crime Control Act, and therefore was in effect before the alleged criminal conduct. *See Bischel*, 61 F.3d at 1434 (rejecting due process and *ex post facto* challenges to Section 3292).[18] The Due Process Clause, similarly, is inapplicable because it does not "guarantee any specific statute of limitations scheme as such specifics are within the discretion of the legislature." *United States* v. *King*, No. 98-CR-91A, 2000 WL 363036, at *21 (W.D.N.Y. March 24, 2000) (citing, among other cases, *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), and turning aside a due process challenge to Section 3292); *accord Bischel*, 61 F.3d at 1434-35 (rejecting a due process challenge to Section 3292 based on the argument that its application revived an expired limitations period); *see also Chase Securities Corp.*, 325 U.S. at 304 (protection of statutes of limitations "has never been regarded as what is now called a 'fundamental' right," but is instead "good only by legislative grace and . . . subject to a relatively large degree of legislative control").

Pinkerton and Bourke's second claim in support of their motions to dismiss based on the statute of limitations is that the Government has failed to meet its burden of proof with regard

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[18] The principal case on which the defendants rely, *Stogner* v. *California*, 539 U.S. 607 (2003), is inapposite. That case involved an *ex post facto* challenge to a statute that created a new limitations period, whereas here, there is no "new statute that is the culprit, but its judicial application." *Bischel*, 61 F.3d at 1434.

to the Section 3292 suspension. The defendants make several points here, and all of them are without merit.

First, Pinkerton speculates that the Dutch authorities took final action on the Netherlands Request on February 27, 2004, because that is the latest date on any certifications produced by the Dutch. (Pinkerton Mem. at 27.) As discussed above, however, final action did not occur until November 8, 2005. (*See* copy of transmittal letter from the Netherlands, which is Ex. J to the Berke Decl.; *see* also Friedman Decl. at ¶ 6.)

Second, Pinkerton claims that the suspension with regard to the Swiss Request lasted only 20 months, or the time between the Swiss Request and the last piece of correspondence from Switzerland. (Pinkerton Mem at 27.) This argument is wrong in two respects. First, it fails to take into account that the Netherlands Request preceded the Swiss Request by two and a half months, and that Judge Daniels' Order tolled the statute of limitations for both requests. (*See* Ex. H to the Queler Aff. and Ex. F to the Berke Decl.) Second, it ignores the fact that every transmittal letter from Switzerland, including the last one, indicated that the documents were being sent in *partial*, not final, execution of the request. (*See* Ex. L to the Berke Decl.)[19]

Third, Bourke claims that the Section 3292 application was defective because, at the time the Government made the official requests of the Netherlands and Switzerland, the Government had already amassed a considerable amount of evidence and therefore the information sought was

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[19] Pinkerton seeks a hearing to address "disputed factual issues" with regard to the Section 3292 suspension. (Pinkerton Mem. at 24.) The law is clear, however, that no hearing is required if there is no factual issue. *United States* v. *Wilson*, 249 F.3d 366, 372 (5th Cir. 2001). The Government respectfully submits that if Pinkerton had any factual issues, those have been clarified by the Friedman Declaration. In particular, given that Declaration, it cannot now reasonably be disputed that the Netherlands did not take final action until more than three years had passed, which was one of Pinkerton's theories. (*See* Friedman Decl. at ¶ 6.) The rejection of that theory disposes of the issue.

not needed to bring charges. (Bourke Mem. at 13.) The same argument was rejected by the Ninth Circuit in *DeGeorge* v. *U.S. Dist. Court for Cent. Dist. Of California*, 219 F.3d 930 (9th Cir. 2000), which held that under the plain meaning of Section 3292, "the government need only establish that 'evidence of an offense,' *not evidence essential to bringing charges on an offense*, is 'in [a] foreign country.'" *Id.* at 938 (quoting 18 U.S.C. § 3292(a)(1)) (emphasis added). To accept Bourke's argument that foreign evidence has to be necessary to toll the statute of limitations (Bourke Mem. at 13) "would require district courts to make a determination of the value of the foreign evidence the government seeks – to second-guess the government's investigation – which the statute simply does not contemplate." *DeGeorge*, 219 F.3d at 938-39.

Fourth, both defendants contend that the Government has wrongly withheld production of the official requests (or "MLATs") that were provided to Judge Daniels as part of the Section 3292 application. (Pinkerton Mem. at 25-26; Bourke Mem. at 13-14.) Yet the defendants fail to articulate how the MLATs are material to preparing a defense. *Cf. United States* v. *Maniktala*, 934 F.2d 25, 28 (2d Cir. 1991) (evidence is "material" if pretrial disclosure will enable the defendant "significantly to alter the quantum of proof in his favor."). Apart from improperly gaining insight into the Government's work product at the time the official requests were made, the only conceivable use the defendants could make of the MLATs would be to challenge the foreign governments' determinations regarding final action -- to somehow compare what the Government requested to what was provided. *See* Bourke Mem. at 14 (contending that the Government "has not demonstrated the absence of final action by the foreign authorities"). Yet, the text of Section 3292 does not allow

any such challenge, nor are we aware of any cases that do.[20]

The defendants also contend that the MLATs should be treated like search warrants or wiretaps, which are produced in discovery (Pinkerton Mem. at 25). But there is an important difference: search warrants and wiretaps are produced so that the defense can move to suppress the evidence obtained through them. In contrast, the documentary evidence gained from an MLAT is not subject to suppression and therefore there is no need for the underlying materials.[21]

Finally, Pinkerton and Bourke suggest that the Government may have lacked a proper purpose in keeping the Indictment sealed for nearly five months, and therefore that the Indictment should be treated for limitations purposes as if it was returned when it was unsealed in October 2005. (Pinkerton Mem. at 27; Bourke Mem. at 14 n.15.) The reason for the sealing was simple: the Government needed time to coordinate with OIA and the authorities in The Bahamas to secure and execute a provisional arrest warrant for Viktor Kozeny, and the Government did not want the Indictment made public out of a concern that Kozeny posed a risk of flight. (Abernethy Decl. ¶ 2.)[22]

For all of these reasons, the Government respectfully submits that the Section 3292 Order was timely and properly obtained, and that it served to extend the statue of limitations to eight

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[20] In addition, and contrary to Bourke's claim, the Government *has* proven final action here: the November 8, 2005 letter from the Netherlands, the effect of which was to toll the statute of limitations for the full three years provided for under Section 3292. (Friedman Decl. at ¶ 6.)

[21] The defendants correctly point out that there are several reported cases in which the courts discussed, and even quoted from, the MLATs at issue in those cases. (Pinkerton Mem. at 24 n.12.) But none of those cases address the concerns the Government has here -- that the official requests reveal investigative work product. Even though we believe the official requests themselves have no bearing on whether the statutes of limitations were properly tolled, we will be happy, upon the Court's request, to provide the Court with the official requests *in camera*.

[22] As the Court is aware, Kozeny has been in custody in The Bahamas since the time of his arrest, which was made immediately before the Indictment was unsealed.

years, a period within which this prosecution was brought.

III. THE ADDITIONAL REQUESTS FOR DISCOVERY SHOULD BE DENIED

Bourke moves for the following additional discovery: (1) the FBI FD-302 reports ("302s") of interviews conducted of non-prospective Government witnesses; (2) the 302s of non-prospective Government witnesses that contain the substance of alleged co-conspirator statements, to the extent those statements were made in furtherance of the conspiracy; and (3) the 302s of Viktor Kozeny's proffer sessions. Pinkerton joins in these motions. (*See* Pinkerton Mem. at 2, n. 1.) All of these requests should be denied.[23]

A. The 302s of Non-Prospective Witnesses Are Not Discoverable.

Bourke's motion for production of 302s of non-prospective Government witnesses is premised on the belief that these 302s contain *Brady* material or information that is material to Bourke's defense. (Bourke Mem. at15.) The Government is aware of its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and under Rule 16 of the Federal Rules of Criminal Procedure ("Rule 16"), has complied with those obligations, and will continue fully to comply with them. Indeed, we have already informed the defense of the names of four individuals who might possess information that is favorable to Bourke and Pinkerton. (*See* Ex. J to the Queler Aff. at 3.) In addition, we have advised the defense that we are continuing to review materials in the

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[23] As a preliminary matter, we note that our productions of discovery to date have been quite extensive. Among other material, we have produced DVD discs containing more than 100 boxes worth of documentary material, as well as a nine-page index of the sources from which each of the more than 100 boxes of documents produced was obtained. (*See* Ex. J to the Queler Aff. at 1.) In addition, the Government acceded to several requests for additional discovery by the defendants, producing (1) all notes taken by Agent Choundas in the interviews of Bourke and Pinkerton, (2) the transcript of Bourke's state grand jury testimony; and (3) correspondence from the Netherlands and Switzerland concerning their production of documents in response to official requests. (*See id.*)

Government's possession for possible *Brady* material, and will provide timely notification if there is any such additional material. (*Id.*)

Courts in this Circuit have repeatedly denied requests for discovery orders pursuant to *Brady* where the Government has represented to the Court and defense counsel that it recognizes and has complied with its *Brady* disclosure obligations. *See, e.g.*, *United States* v. *Gallo*, No. 98 Cr. 338 (JGK), 1999 WL 9848, at *7 (S.D.N.Y., Jan. 6, 1999) (denying motion to compel production of *Brady* material based on Government's representations that "it is aware of its obligations under *Brady* . . . and will produce any *Brady* material to the defense well before trial"); *United States* v. *Yu*, No. 97 Cr. 102 (SJ), 1998 WL 57079, at *4-5 (E.D.N.Y. Feb. 5, 1998) (denying defense request that Government provide disclosure of *Brady* material because Government acknowledged its continuing obligation to provide exculpatory material and assured that it would comply with that obligation); *United States* v. *Perez*, 940 F. Supp. 540, 543 (S.D.N.Y. 1996) ("Courts in this Circuit have repeatedly denied pretrial requests for discovery orders pursuant to *Brady* where the government . . . has made a good-faith representation to the court and defense counsel that it recognizes and has complied with its disclosure obligations under *Brady*."). The Government makes that representation here, and the Court should therefore deny the defendants' request.[24]

As to Bourke's request for production of the 302s, rather than the names of witnesses who have potential *Brady* material, that, too, should be denied. The Government satisfies its *Brady* obligations by disclosing the names of individuals, thereby providing the defense with the essential

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[24] Bourke claims that the Government has an overly narrow view of *Brady*, and cites to unspecified conversations with the Government in support of this theory. (Bourke Mem. at 15; Queler Aff. ¶ 21.) Bourke's interpretation of those conversations is irrelevant at this point because the Government, in good faith, has made and continues to make a representation that it recognizes its obligations under *Brady* and that those obligations are ongoing.

facts which permit them to take advantage of any exculpatory information possessed by those individuals. *See United* States v. *LeRoy*, 687 F.2d 610, 618 (1982) (Government not obligated to produce allegedly exculpatory grand jury testimony when the defendant knew the identity of the witnesses before trial and could have subpoenaed them to testify); *United States* v. *Salerno*, 868 F.2d 524, 542 (2d Cir. 1989) (no *Brady* violation where Government did not produce an individual's grand jury testimony, but rather informed defendants during trial that they may want to interview that individual).[25]

Bourke maintains that he needs the 302s because some witnesses in this matter have "forgotten numerous details in the passage of time" or because some witnesses "are reluctant to cooperate" with Bourke out of concern that they would be indicted. (Bourke Mem. at 22.) But Bourke fails to explain how the "details" he seeks could amount to *Brady* information, particularly in light of the requirement that such information be "material," or subject to a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *See United States* v. *Brunshtein*, 344 F.3d 91, 101 (2d Cir. 2003) (citations omitted). Similarly, Bourke fails to explain how his possession of a 302 would make a witness who is reluctant to cooperate for fear of indictment any more available to the defense at this point.

For all of these reasons, Bourke's request for the 302s of non-prospective Government witnesses should be denied.

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[25] Bourke cites two cases in support of his contention that "302s *are* plainly subject to discovery" if they contain information material to the defense. (Bourke Mem. at 16) (emphasis in memorandum). But both cases are inapposite because they involved production of agent notes of interviews of an individual defendant, in the case of *United States* v. *Vallee*, 380 F. Supp. 11 (D. Mass. 2005), and notes of interviews of employees of a corporate defendant under agency principles, in the case of *United States* v. *W.R. Grace*, 434 F. Supp.2d 861 (D. Mont. 2006). Here, the Government has already produced the interview notes taken by Agent Choundas in the interviews of the defendants.

B. Discovery of Co-Conspirator Statements in the 302s Should Be Denied.

Bourke's motion to compel production of 302s containing statements of alleged co-conspirators made in furtherance of the conspiracy should also be denied. As the Second Circuit has held, "Rule 16(a) simply does not encompass these statements, nor does the Jencks Act permit their disclosure over the objection of the government." *United States* v. *Percevault*, 490 F.2d 126, 131 (2d Cir. 1974); *accord In re United States*, 834 F.2d 283, 287 (2d Cir. 1987); *United States* v. *Nelson*, 606 F. Supp. 1378, 1389 (S.D.N.Y. 1985); *United States* v. *Payden*, 613 F. Supp. 800, 820 (S.D.N.Y. 1985). *See also United States* v. *Nachamie*, 91 F. Supp.2d 565, 577-78 (S.D.N.Y. 2000) (oral statements of co-conspirators not discoverable).

C. The 302s of Kozeny's Proffer Sessions Are Not Discoverable.

The Court should also deny Bourke's motion to compel production of 302s conveying the substance of Kozeny's proffers with the Government. Rule 16 requires only that the Government disclose to a defendant the substance of oral statements made by him, not the substance of statements made by other defendants. *See, e.g.*, *United States* v. *Heatley*, 994 F. Supp. 483, 490 (S.D.N.Y.1998) ("Rule 16 permits discovery only of a defendant's statement, not those of others."); *United States* v. *Birkett*, 99 Cr. 338 (RWS), 1999 WL 689992 at *3 (Sept. 2, 1999) ("The language of [Rule] 16(a)(1)(A) has been consistently interpreted by this Circuit to require disclosure by the Government only of a defendant's *own* statements to such defendant.") (emphasis in original).

IV. THE DEFENDANTS ARE NOT ENTITLED TO A BILL OF PARTICULARS

Despite the fact that the Indictment is 63 pages long and contains great detail about how the bribery scheme was perpetrated, and despite the fact that the Government has produced in discovery more than 100 boxes worth of documentary material, the defendants both move for a bill

of particulars. Their motions should be denied.

The proper scope and function of a bill of particulars is to furnish facts, in addition to those alleged in the indictment, that are necessary to apprize a defendant of the charges against him with sufficient precision so that he can prepare his defense, avoid unfair surprise, and plead double jeopardy as a bar to any subsequent prosecution for the same offense. *United States* v. *Torres*, 901 F.2d 205, 234 (2nd Cir. 1990); *United States* v. *Bortnovsky*, 820 F.2d 572, 574 (2nd Cir. 1987). "A bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." *Torres*, 901 F.2d at 234 (quoting *United States* v. *Feola*, 651 F. Supp. 1068, 1132 (S.D.N.Y. 1987)). The ultimate test must be "whether the information sought is *necessary*, not whether it is *helpful*." *See United States* v. *Love*, 859 F. Supp. 725, 738 (S.D.N.Y. 1994) (emphasis in original).

Under these well-established principles, a bill of particulars is hardly warranted in this case. Moreover, the following specific contentions of the defendants are without merit:

- Pinkerton's request with respect to Count Five (charging a substantive FCPA violation in connection with commissions on voucher sales to an Azeri Official) -- that the Government be required to identify the recipients of the commissions, the dates, and the amounts received -- should be denied because Pinkerton is not entitled to pretrial discovery of the specific evidence the Government will offer to prove this count. *See Feola*, 651 F. Supp. at 1132.

- Pinkerton's request that the Government identify the specific question and answers that give rise to the false statements charge should be denied, particularly since the Indictment adequately pleads the general nature of the false statements and the Government has produced in discovery Agent Choundas' notes from the interviews of Pinkerton.[26]

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[26] Pinkerton's complaint about being "forced to speculate" about exactly what he said in the interviews (Pinkerton Mem. at 29) is unfounded. Agent Choundas's notes taken in those interviews, and his 302 of the interviews, is incredibly detailed, often including what appear to be verbatim accounts of the questions and answers.

- Bourke's demand for more detail about his involvement in Counts 4, 10, 11, and 12 (Bourke Mem. at 29) should be denied because the Government may not be compelled to provide a bill of particulars disclosing the manner in which it will attempt to prove the charges, the precise manner in which a defendant committed the crime charged, or to give a preview of its evidence and legal theories. *See, e.g.*, *Torres*, 901 F.2d at 233-34.[27]

- Bourke's and Pinkerton's request for the identity of all co-conspirators whose statements the Government will seek to offer at trial is premature, given that trial is still months away. The Government's normal practice is to provide all such names in advance of trial, and we will do so as directed by the Court.

V. THE GOVERNMENT CONSENTS TO A *KASTIGAR* HEARING, BUT SUCH A HEARING SHOULD OCCUR AFTER THE TRIAL

In February 2002, Bourke testified before a New York State grand jury that was investigating, and ultimately charged, Kozeny for larceny. (*See* Ex. L to the Queler Aff.) Bourke testified under a grant of transactional immunity. In his motion, Bourke seeks a pretrial hearing under *Kastigar* v. *United States*, 406 U.S. 441 (1972). He suggests that the federal prosecution was tainted by discussions between the Government and Assistant District Attorney John Moscow, who was in charge of the state investigation. (Bourke Mem. at 26-27.)

As a preliminary matter, Bourke is factually wrong when he speculates that there may have been taint. Attached as Exhibit B to the Abernethy Declaration is a Declaration of Mark F. Mendelsohn dated January 12, 2007 ("Mendelsohn Decl."). Mr. Mendelsohn, who was the Assistant United States Attorney in charge of the federal investigation, makes quite clear that there never were any discussions regarding the substance of Bourke's state grand jury testimony between Mr. Mendelsohn or any other representative of the Government and Mr. Moscow or his colleague on the

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[27] Bourke incorrectly contends that subparagraph 67o, 67nn, and 67ss of the Indictment allege that he "paid for" medical care. (Bourke Mem. at 29.) The plain language of those subparagraphs is not limited to paying for medical services, but also includes providing for such expenses and causing to be paid such expenses.

state case. (Mendelsohn Decl. at ¶¶ 6-7.) Further, the Government did not even obtain the minutes of Bourke's state grand jury testimony until Bourke's lawyers specifically requested the minutes in discovery, after the Indictment was returned. (*Id.* at ¶ 9.)

Nevertheless, the Government concedes that Bourke's state grand jury testimony concerned, in part, matters relating to the federal prosecution, and therefore that the Government has the burden to prove by a preponderance of the evidence that the evidence against Bourke is derived from sources independent of that immunized testimony. *See, e.g., United States* v. *Nanni*, 59 F.3d 1425, 1432 (2d Cir. 1995). Moreover, the Government recognizes that under current Second Circuit law, it cannot meet that burden merely by asserting that the immunized testimony was not used. *Id.* (quoting *United States* v. *Nemes*, 555 F.2d 51, 55 (2d Cir. 1977)); *accord United States* v. *Tantalo*, 680 F.2d 903, 908 (2d Cir. 1982). Accordingly, we consent to a *Kastigar* hearing.

However, the Court has the discretion to hold such a hearing after the conclusion of the trial, *see Tantalo*, 680 F.2d at 909, and the Government respectfully submits that this is the appropriate course here. Numerous courts in this Circuit have elected to defer *Kastigar* hearings until after trial. *See, e.g.*, *United States* v. *Macchia*, 861 F. Supp. 182, 189 (E.D.N.Y. 1994) (noting that a post-trial hearing will put the court "in a better position to determine whether the government has independent sources for the information and documents it used in the investigation and at trial" based upon "a fully developed trial record"); *accord United States* v. *Corrao*, No. Cr. 91-1343, 1993 WL 63018, at *2 (E.D.N.Y. March 1, 1993); *United States* v. *Rivieccio*, 723 F. Supp. 867, 868 (E.D.N.Y. 1989). Providing for a hearing after trial will allow for "a proper evaluation . . . as to whether in fact the evidence offered was obtained from wholly independent sources." *United States* v. *Gregory*, 611 F. Supp. 1033, 1042 (S.D.N.Y. 1985). In addition, postponing the hearing will

substantially shorten it, as the trial will make the Court fully familiar with the Government's evidence and, as such, the independent bases for the charges against Bourke.[28]

CONCLUSION

For all of the foregoing reasons, the pretrial motions of Frederic A. Bourke, Jr. and David B. Pinkerton should be denied with the exception of Bourke's request for a *Kastigar* hearing, which should be postponed until after trial.

Dated: January 18, 2007
New York, New York

Respectfully submitted,

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[28] The Government anticipates that at such a hearing, it will sustain its burden of proving a lack of taint and that its evidence against Bourke is derived from independent sources. In addition, the Government anticipates that a *Kastigar* hearing would establish that Bourke's testimony, which disclaimed any knowledge of bribery (*see* Ex. L to Queler Aff. at 353-354), would not have been useful to the Government. *See United States* v. *Gallo*, 863 F.2d 185, 190 (2d Cir. 1988) ("nature of [defendant's] grand jury testimony [mostly denials and ambiguous answers] makes any claim of its direct or indirect use untenable . . . . In short, there was nothing to use.")