

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

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

ORDER

AND NOW, this day of , 2009, after a review of the motions of Defendants, the Government's responses thereto, it is hereby ORDERED that the Motions to Dismiss of Defendants Nexus Technologies, Inc., Nam Quoc Nguyen, An Quoc Nguyen, and Kim Anh Nguyen, are DENIED.

BY THE COURT:

HONORABLE TIMOTHY J. SAVAGE
United States District Court

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

UNITED STATES OF AMERICA :

v. : **CRIMINAL NO. 08-CR-522**

NAM QUOC NGUYEN, et al. :

**GOVERNMENT'S RESPONSE IN OPPOSITION
TO DEFENDANTS' SECOND MOTION TO DISMISS**

COMES NOW the United States, by and through its undersigned counsel, and hereby opposes Defendants' Second Motion to Dismiss for Failure to State an Offense and Vagueness (Doc. 110). Defendants Nexus Technologies, Inc. ("Nexus") and Nam Nguyen, joined by Order of the Court by Kim and An Nguyen (Doc. 114), request that the Court order dismissal of the Superseding Indictment (Doc. 106) for failure to state an offense and because the Foreign Corrupt Practices Act ("FCPA") is unconstitutionally vague. As set forth below, Defendants do not identify any valid basis whatsoever for dismissing any part of the Superseding Indictment. Defendants' arguments regarding the FCPA and the Travel Act are deeply flawed arguments and misstate the law, but the Court need not address any of these faulty arguments at this time. Although styled as a "motion to dismiss," Defendants' submission is instead a premature request for a ruling on the sufficiency of the Government's evidence before any of that evidence has been presented. These arguments, which are premature at best, will be moot after presentation of the Government's case.

BACKGROUND

A. Indictment

On September 4, 2008, a grand jury sitting in the Eastern District of Pennsylvania returned an Indictment charging Defendants and one other individual, in five counts, with

conspiracy, 18 U.S.C. § 371, and violations of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2. (Doc. 1.) On October 29, 2009, a grand jury sitting in the Eastern District of Pennsylvania returned a 31-page Superseding Indictment (Doc. 106), which charges Defendants,¹ in 28 counts, with one count of conspiracy, in violation of 18 U.S.C. § 371; nine counts of violating the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2; nine counts of violating the Travel Act, 18 U.S.C. §§ 1952(a)(3) and 2; and nine counts of money laundering, 18 U.S.C. §§ 1956(a)(2)(A) and 2, arising from the bribery scheme. *Id.*

The Superseding Indictment clearly sets forth the charges, contains detailed factual allegations, and appropriately apprises Defendants of the illegal conduct with which they have been charged. Indeed, these details are described thoroughly in the three-page description of the conspiracy and the 68 overt acts identified in furtherance of that conspiracy. Sup. Ind. At 6-19. As alleged in the Superseding Indictment, U.S. citizen Nam Nguyen, President of Nexus, a Pennsylvania company, obtained lucrative contracts for Nexus from Vietnamese Government agencies and companies for equipment, such as air traffic control systems, by agreeing to pay bribes to individuals employed by such agencies and companies. Sup. Ind. ¶ 19. Defendants established relationships with Vietnamese government officials and employees of customers, typically described as “supporters,” who, in exchange for the bribes, assisted Nexus in obtaining business by providing confidential information to Nexus, rigging bids, and other means. *Id.*

Defendants Kim and An Nguyen, who ran the Nexus head office in Philadelphia, Pennsylvania, paid bribes as directed by defendant Nam Nguyen through a Hong Kong company

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

Nam Nguyen controlled, identified in the Superseding Indictment as HKC 1, in order to conceal them. *Id.* Also under instructions from Nam Nguyen, HKC 1 then funneled bribes into Vietnam and to Vietnamese government officials and employees of customers on behalf of Defendants in Pennsylvania and elsewhere. *Id.* Defendants then mischaracterized and concealed the transfer of funds to HKC 1 and the bribe payments in Nexus' books and records to prevent detection. *Id.*

The Superseding Indictment describes Nexus' foreign government customers as follows:

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

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

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

10. T&T Co. Ltd. ("T&T"), a customer of defendant NEXUS TECHNOLOGIES, was engaged in activities related to border security and was the procurement arm of Vietnam's Ministry of Public Security. Accordingly,

T&T was an agency and instrumentality of the Government of Vietnam within the meaning of the FCPA, 15 U.S.C. § 78dd-1(h)(2)(A).

Sup. Ind. ¶¶ 7-10. For convenience, these organizations are referred to herein as the Vietnamese Government Organizations (“VGOs”).

B. The Foreign Corrupt Practices Act

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

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

See 15 U.S.C. § 78dd-2; *see also United States v. Bourke*, No. 05 Cr. 518 (S.D.N.Y.) (Jury Charge at 23-29, attached as Exhibit A).

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

ARGUMENT

I. STANDARD FOR A MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that the indictment “shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). It is a long-established matter of law that:

the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for similar offenses, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Hagner v. United States, 285 U.S. 427, 431 (1932). This well-known rule is simple to apply. An indictment is sufficient if it: (1) states the elements of the offense sufficiently to apprise the defendant of the charges against which he or she must defend, and (2) provides a sufficient basis for the defendant to make a claim of double jeopardy. *See Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Banks*, 300 Fed. Appx. 145, 148 (3d Cir. 2008) (citing *Russell v. United States*, 369 U.S. 749 (1962)). Nothing more is required.

Defendants do not seriously contest that the Superseding Indictment fails on either prong of the *Hagner* test. The Superseding Indictment clearly states every element of the offense and the step-by-step description in the overt acts makes it impossible for the Defendants to credibly claim either that they do not know the offense against which they must defend or that they would later be unable to assert a claim of double jeopardy. Rather, Defendants ask the Court to assume the allegations of the Government are not true and invite the Court to invade the province of the jury by accepting unsupported factual allegations based on unwarranted extrapolations

from a website. Moreover, Defendants request that the Court adopt insupportably narrow interpretations of statutes that are clear on their face; interpretations that are contradicted by the case law, legislative history, and international treaties that Defendants themselves cite, in order to eventually reach the flawed conclusion that the Superseding Indictment should be dismissed.

Because Defendants' arguments turn entirely on issues of fact, they are premature. As is now well established, "[i]t should not be necessary to mention the familiar rule that, at this stage of the case, the allegations of the indictment must be taken as true." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 and n. 16 (1952). Taken as true, the Superseding Indictment is more than sufficient to meet the *Hagner* standard and the motions should be dismissed.

II. THE SUPERSEDING INDICTMENT PROPERLY PLEADS FCPA VIOLATIONS

Defendants first contend that the FCPA counts should be dismissed for failure to sufficiently allege violations of the FCPA, based on Defendants' tortured interpretation of the words "agency" and "instrumentality," within which they claim none of the VGOs described in the Superseding Indictment can fall. Defendants' arguments, while completely without merit,²

² Defendants argue that *only* government function, and not government ownership or government control, can render an entity an agency or instrumentality. Not only do Defendants fail to cite a single case standing for that proposition, their argument is directly contradicted by a number of the cases and sources *they themselves* cite. *See, e.g., H. Rep. No. 95-640* at 4-5 (1977) (expressing Congress' intent that the FCPA be read broadly and should include commercial industries with significant government ownership, such as oil and gas, airlines, and aerospace); *Conf. Rep. 100-576* at 918 (1988) (expressing Congress' intent that the prohibition of the FCPA extend to any corrupt payment related to the execution or performance of contracts, including commercial contracts, excluding only lobbying) (cited in Second Motion at 8-9); *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 918 (2d Cir. 1987) (noting that "whether control and supervision of the organization is vested in public authority or authorities" is relevant to determining whether or not an entity is an agency or instrumentality under the Employee Retirement Income Security Act); Foreign Sovereign Immunities Act ("FSIA") 28 U.S.C. § 1603(b)(2) (defining "agency or instrumentality" as an entity with majority government ownership or if it is an organ of a foreign state); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474

are in any event arguments for jury instructions or after the Government's case-in-chief pursuant to Federal Rule of Criminal Procedure 29.

Defendants attempt to sidestep the long-established requirements of *Hagner* by claiming that, under the Supreme Court's decision in *Russell*, 369 U.S. at 765, even where an indictment provides all necessary information to apprise the defendant of the charges and avoid double jeopardy, more is required if the statute contains "generic terms." That is not what *Russell* says, but even if it did, the Superseding Indictment contains much more detail than generic terms. It certainly contains sufficient information to make the violations of law alleged therein clear to the Defendants.

*Russell*³ stands for the proposition that it is insufficient for an indictment to do *nothing more* than track the language of a statute where the language of the statute alone renders the

(2003) (stating that direct ownership of a majority of shares satisfies the definition of instrumentality under FSIA); *USX Corp. v. Adriatic Insurance Company*, 345 F.3d 190, 208 and 211 (3d Cir. 2003) (defining government control as the most important element in a determination of whether an entity is an "agency or instrumentality" under the "organ" prong of FSIA, 28 U.S.C. § 1603(b)(2)) (cited in Second Motion at 10-12); Organization of Economic Co-Operation and Development's Convention on Combating Bribery of Foreign Officials in International Business Transactions, December 17, 1997, U.S.T. LEXIS 105, Art. 1, paragraph 2a and Commentary 14 (defining an employee of a public enterprise as a foreign official and defining a public enterprise as "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.") (cited in Second Motion at 13-14). In fact, Defendants' so-called requirement of a government function is notably absent from prior FCPA jury instructions. *See, e.g., Bourke*, 05 Cr. 518 (Exhibit A at 27) (defining "instrumentality" as a government-owned or government-controlled company).

³ *Russell* reviewed the convictions of six individuals for refusing to answer questions of the House of Representatives Committee on Un-American Activities. The statute, 2 U.S.C. § 192, made it a misdemeanor for any person testifying before Congress to refuse to answer "any question pertinent to the question under inquiry." The indictments failed because none of the indictments identified the "question under inquiry," and therefore it was impossible to tell whether the questions the defendants refused to answer were pertinent to that question or not. *Russell*, 369 U.S. at 751-755, 765.

indictment so cryptic that the indictment “requires the defendant to go to trial with the chief issue undefined.” *Id.* at 766. The indictment in *Russell* failed because of its “failure to fulfill its primary office - to inform the defendant of the nature of the accusation against him.” *Id.* at 767. The *Russell* rule is not about whether a statute contains generic terms or not, it is about whether doing nothing more than tracking statutory language is sufficient to inform the defendant of the charges.⁴ The Superseding Indictment in this case goes far beyond simply reciting the statutory language of the FCPA regarding the definition of “foreign official.” It avers multiple facts in support of that definition. As such, it more than meets the *Russell* standard.

⁴ Where the *Russell* standard is not met, the first resort is to a bill of particulars, not dismissal of the indictment. *See e.g. United States v. Grass*, 274 F. Supp. 2d 648, 659-660 (M.D. Pa. 2003). It is notable that nowhere in the Motion for a Bill of Particulars (Doc. 95) or the Defendants’ Reply thereto (Doc. 111) did Defendants request any additional specificity whatsoever as to the ownership, control, or public purpose of the VGOs. Rather, Defendants argue only that they require such a bill because it is “impossible to determine whether the bribe recipients are foreign officials” if their identities are unknown. Def. Reply at 2. This argument is not only belied by their 23-page argument in the Motion to Dismiss that these individuals cannot be foreign officials, which makes it clear that the Superseding Indictment *is* sufficient for them to prepare a defense, it is directly contradicted by the language of the statute itself. Under most circumstances, including the instant case, whether or not an individual is a foreign official turns on their employing entity, 15 U.S.C. § 78dd-2(h)(2)(A), and their specific identity is irrelevant to that determination. Here, all the entities employing the officials who received bribes have been specifically identified and, as noted at length herein, all are properly and fully alleged to be agencies and instrumentalities of foreign governments. The Government is not required to identify with particularity the officials, *even at trial*, in order to meet its burden of proof. As the statute clearly states, it is sufficient for the Government to prove that Defendants authorized the giving of anything of value to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to *any* foreign official...” 15 U.S.C. 78dd-2(a)(3) (emphasis added). Thus, it is sufficient for the Government to prove that Defendants wired money to HKC 1, knowing that HKC 1 would pass it on to *any* government official, even if that official is identified only as “our supporter” within the particular agency or instrumentality. *See Bourke*, 05 Cr. 518 (Exhibit A at 27). The Superseding Indictment more than sufficiently alleges that Defendants knew the payments would be passed to *any* foreign government official. *See, e.g.,* Superseding Indictment, Overt Acts ¶¶ 2, 5, 6, 7, 8, 10, 12, 13, 17, 19, 21, 23, 34, 41, 41, 42, 44,, 55, 56, 58, and 66.

Moreover, the Third Circuit has clearly stated that *Russell* does *not* stand for the proposition that more is required than the Supreme Court established in *Hagner*. The Third Circuit stated,

Russell, relied on heavily by appellants, is of no help to them. To the extent that the holding in *Russell* rests on the failure of the indictment to allege an essential element of the offense, it is inapposite, since here all the elements were charged. To the extent *Russell* relies on the failure of the indictment adequately to apprise the defendant of the charges against him, it is distinguishable, since the indictment in this case possesses none of the ‘cryptic’ qualities found in *Russell*.

United States v. Addonizio, 451 F.2d 49, n8 (3d Cir. 1971); *see also United States v. Saybolt*, 577 F.3d 195, 205 (3d Cir. 2009) (“As we have held, ‘no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution.’”) (citing *United States v. Kemp*, 500 F.3d 257, 280 (3d Cir. 2007)). In fact, where an indictment is clear as to the nature of the accusation against the defendant, it is not even required that an indictment explicitly allege all of the elements of an offense, as long as they are implied somewhere in the indictment. *Gov. of Virgin Islands v. Moolenaar*, 133 F.3d 246, 249 (3d Cir. 1998). The test remains that expounded in *Hagner*: an indictment that is sufficiently clear to understand the charges and avoid double jeopardy is sufficient, whether it tracks the statute or not, and whether the statute contains “generic terms” or not.

Defendants’ own arguments demonstrate that this is a factual matter for the jury. Defendants seek to dismiss any possibility that the VGOs are “agencies” on the basis of a single website listing Vietnamese government ministries and ministry-level agencies. They state, “Although this list may not be controlling and exhaustive for FCPA purposes, the list, combined with the ordinary meaning of the word ‘agency,’ *suggests* that any conclusion that employees of

[the VGOs] are ‘foreign officials’ could only credibly be premised on the term instrumentality.” Second Motion at 7 (emphasis added). Defendants conclusion that a website “suggests” that the VGOs are not agencies of the Vietnamese government is an issue of fact for the jury, after all the evidence has been presented at trial, not a challenge to the sufficiency of the Superseding Indictment. There is no requirement that the Superseding Indictment itself must plead all the facts relevant to a determination that the bribe recipients were foreign officials. Defendants cite no case that requires such a pleading, because there is no such case. To the contrary, the Government is not limited in its proof to that listed in the indictment. *United States v. Adamo*, 534 F.2d 31, 38 (3d Cir. 1976).

When an indictment directly tracks the statutory language, as does the Superseding Indictment here, it complies with Rule 7(c)(1) as long as there is sufficient factual detail in the indictment to allow the defendant to prepare his defense. *United States v. Hodge*, 211 F.3d 74, 77 (3d Cir. 2000); *United States v. Rankin*, 870 F.2d 109, 111 (3d Cir. 1989). Pursuant to the Third Circuit’s holding in *Moolenaar*, the express allegation that the VGOs were agencies and instrumentalities of a foreign government is -- by itself -- more than sufficient. *Moolenaar*, 133 F.3d at 249. Yet the Superseding Indictment contains even more detail regarding Vietnamese government ownership, control, and public function of the VGOs. The Superseding Indictment not only implies the “foreign official” element of the FCPA, it clearly states that this element is present.

Indeed, the 31-page Superseding Indictment provides a detailed rendition of the crimes at issue, and more than sufficiently pleads that the VGOs are agencies and instrumentalities of the Government of Vietnam (and in the case of VSP, also the Russian Federation). See Sup. Ind. ¶¶

7-10. The Superseding Indictment specifically alleges that the VGOs are government-owned, government controlled, and serve governmental functions. It states how the ownership descends. It states the segment of the Vietnamese government of which they are an agency or instrumentality. It identifies the governmental function they performed.⁵ Sup. Ind. ¶¶ 7-10. In short, under the relevant legal standards, there is no question that the Superseding Indictment more than adequately informs Defendants of the charges and is clear enough to avoid a claim of double jeopardy. Accordingly, the Court should deny the Defendants' motions to dismiss the Superseding Indictment.

III. THE SUPERSEDING INDICTMENT PROPERLY PLEADS TRAVEL ACT VIOLATIONS

Defendants next argue that, based on the limited holding of *Parise v. United States*, 2000 U.S. Dist. LEXIS 9034 (E.D. Pa. June 20, 2000), the Superseding Indictment fails to properly plead violations of the Travel Act. Like their arguments regarding the FCPA, Defendants seek to have the Court usurp the purview of the jury and make determinations of fact as to an element of the offense, namely jurisdiction under the Pennsylvania commercial bribery statute, notwithstanding the fact that the violations of the Travel Act are pled in a manner exceeding the *Hagner* requirements.

Defendants claim that *Parise* stands for the proposition that the receipt of bribes outside of Pennsylvania cannot constitute a violation of the Pennsylvania commercial bribery statute, 18 Pa. Cons. Stat. Ann. § 4108 ("Section 4108"), the underlying offense to the Travel Act charge in

⁵ As noted in the Government's Opposition to the First Motion to Dismiss (Doc. 109), the public purpose of some of the organizations, such as Southern Services Flight Center, which is part of the Vietnamese Army, and T&T Co. Ltd., which is part of the Ministry of Public Security, is patently obvious.

the Superseding Indictment. Second Motion at 26. *Parise* stands for no such thing. The narrow and fact-specific holding in *Parise*, which came *after* the Government had fully presented its evidence of jurisdiction at trial, was restricted to situations where the Government had proven *no relevant conduct whatsoever* inside Pennsylvania at trial.⁶ *Parise*, 2000 U.S. Dist. at 11; *Parise v. United States* (denial of rehearing), 2000 U.S. Dist. LEXIS 11968 at 2-3.

In *Parise*, the Court reviewed Title 18, Section 102(a) of the Pennsylvania Criminal Code, and found no conduct within the state that fell within one of its provisions. That Section, entitled “territorial jurisdiction,” states, in relevant part, as follows:

(a) General rule. Except as otherwise provided in this section, a person may be convicted under the law of this Commonwealth of an offense committed by his own conduct or the conduct of another for which he is legally accountable if either:

(1) the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth;⁷

⁶ Prior to the District Court opinion cited by the Defendants, the Third Circuit held that the Government had sufficiently proven violations of the Pennsylvania commercial bribery statute to sustain a conviction under the Travel Act. *United States v. Parise*, 159 F.3d 790, 798-804 (3d Cir. 1998). The District Court decision cited by Defendants, which was a petition for habeas, was not appealed to the Third Circuit because Louis Parise had nearly completed his sentence and the appeal would have been moot before it could have been heard.

⁷ The only conduct occurring in Pennsylvania in *Parise* was that the funds used to pay the bribes was secured in Pennsylvania. On rehearing, the Court found that the location where Parise (the payor of the bribe) got the money used to pay the bribe was not an element of Section 4108(a). *Parise v. United States* (denial of rehearing), 2000 U.S. Dist. LEXIS 11968 at 2 (E.D. Pa. August 8, 2000). Parise physically paid the bribes in cash and in person outside Pennsylvania, so where he secured the cash was not an element of the offense. That is not what happened in this case. The wire transfers originating in Philadelphia were the physical transmission of the *bribes themselves*, and the physical payment of the bribe is, of course, an element of the offense under both Section 4108(a) and (c).

(3) conduct occurring outside this Commonwealth is sufficient under the law of this Commonwealth to constitute a conspiracy to commit an offense within this Commonwealth and an overt act in furtherance of such conspiracy occurs within this Commonwealth;⁸

(4) conduct occurring within this Commonwealth establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of this Commonwealth....

18 Pa. Cons. Stat. Ann. § 102(a) (“Section 102(a)”). Any allegation in the Superseding Indictment of conduct falling within the purview of any of these three provisions would bring the conduct at issue within the purview of the Pennsylvania commercial bribery statute.

In *United States v. Ali*, 2005 U.S. Dist. LEXIS 17162 (E.D. Pa. Aug. 16, 2005), the Court declined to interpret *Parise* to mean that the bribes had to be passed entirely in Pennsylvania for Section 4108 to apply, precisely the flawed interpretation of *Parise* that Defendants are requesting the Court adopt in their Second Motion to Dismiss.⁹ In *Ali*, the Court stated that

⁸ Title 18, Section 903, of the Pennsylvania Criminal Code provides, “Criminal conspiracy: (a) Definition of conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one of more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.” 18 Pa. Cons. Stat. Ann. § 903 (“Section 903”). Section 102(a)(3) requires that the conduct “be sufficient” to constitute a conspiracy, it does not require that a violation of Section 903 be charged and, in fact, does not cite to Section 903 or restrict its terms to charges of Section 903 violations. *See Commonwealth v. Dennis*, 385 A.2d 480, 483 (Pa. Super. Ct. 1978) (holding that Pennsylvania had jurisdiction over a robbery committed in Ohio, because “acts constituting a conspiracy [under Section 903] occurred in Pennsylvania,” although the defendant was not charged with violating Section 903). Defendants are charged in this case with conspiracy under a federal law that includes all the elements of the Pennsylvania statute, thus violation of the federal conspiracy statute would be “sufficient under the law of this Commonwealth to constitute a conspiracy to commit an offense....”

⁹ In addition, *Parise* cannot stand for the proposition claimed by the defense; namely, that a commercial bribery charge under Section 4108 can only stand if the *bribe itself* was paid in

where there *are* activities within Pennsylvania that fall within the territorial jurisdiction provisions of Section 102(a), such as where the agreement that resulted in the bribes was reached in Pennsylvania or where the bribe payments originated in Pennsylvania, that is sufficient to establish a jurisdictional nexus for a Travel Act charge with an underlying Section 4108(c) violation, even when the bribes themselves were not paid in Pennsylvania. *Ali*, 2005 U.S. Dis. LEXIS at 13-15. It is notable that in *Ali* the convictions were upheld even for bribes that were not paid in Pennsylvania. *Id.*

The Superseding Indictment sufficiently pleads actions occurring inside Pennsylvania to bring the conduct within the territorial applicability of the Pennsylvania Criminal Code as defined in Section 102(a) and to meet the standard set in *Ali*. As in *Ali*, the Superseding

Pennsylvania, because such a determination not only conflicts with the Pennsylvania criminal jurisdiction statute cited in *Parise* and discussed above, it would conflict with Supreme Court precedent and would render the Travel Act a nullity. In *Perrin v. United States*, 444 U.S. 37 (1979), the Supreme Court addressed whether commercial bribery fell within the meaning of the Travel Act. In holding that commercial bribery was precisely one of the evils the Travel Act was designed to deter, the Supreme Court reviewed the history of the passage of the Travel Act, concluding that the Travel Act was designed to be read broadly, as it was designed to reach conduct that states were not prosecuting because they went outside the state, noting, “Because the offenses are defined by reference to existing state as well as federal law, it is clear beyond doubt that Congress intended to add a second layer of enforcement supplementing what it found to be *inadequate state authority* and state enforcement.” *Id.* at 42 (emphasis added). The Supreme Court went on to state that where, as here, the interstate nexus is not at issue, “the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement.” *Id.* at 50. *See also United States v. Welch*, 327 F.3d 1081, 1090 (10th Cir. 2003) (holding that the purpose of the Travel Act was to prevent the use of interstate commerce by those who intend to engage in commercial bribery). To read *Parise* as interpreted by the defense would mean that no Travel Act charge could ever be sustained on the basis of Section 4108, because all the relevant conduct would have to occur within Pennsylvania, and therefore there would be no interstate or international travel or use of interstate or international commerce. It would fly in the face of *Perrin’s* conclusion that Congress intended to reach precisely these sorts of failures of state law -- Congress sought to keep criminals from evading state bribery statutes simply by crossing a border to hand over the cash.

Indictment alleges that the physical payment of the bribes began in Pennsylvania and were transferred from Pennsylvania bank accounts. It also alleges, among other things, that email communications between Defendants and a bribe recipient were sent to and from Pennsylvania (Sup. Ind., Overt Act ¶ 58); that the benefit of the bribes, namely, the contracts secured for Nexus by the officials as the result of the bribes, accrued to Nexus, a Pennsylvania company (Sup. Ind. ¶ 19); dozens of the overt acts in the conspiracy occurred in Pennsylvania (*see generally* Sup. Ind. Overt Acts); the payments from VGOs, inflated to cover the cost of the commercial bribes, were transferred to Nexus, a Pennsylvania company (Sup. Ind. ¶ 19); and that every bribe originated with a wire transfer from a Pennsylvania bank account (Sup. Ind. Counts Eleven through Nineteen).

The Superseding Indictment, simply stated, adequately alleges that elements of commercial bribery and the result of the bribery under both 4108(a) and (c) occurred in Pennsylvania, thus bringing it within Section 102(a)(1); that dozens of overt acts in furtherance of the conspiracy to violate Section 4108 occurred in Pennsylvania, thus bringing it within Section 102(a)(3); and that conduct occurred within Pennsylvania that demonstrated complicity of the foreign officials in the commission of commercial bribery and solicitation to commit commercial bribery, bringing it within Section 102(a)(4). Taking the allegations in the Superseding Indictment as true, the Government has demonstrated a more than sufficient jurisdictional nexus to Pennsylvania.

More importantly, however, the Superseding Indictment goes well beyond the requirements to plead sufficiently violations of the Travel Act. In *United States v. Welch*, the 10th Circuit noted that the Travel Act “imposes criminal sanctions upon the person whose work

takes him across State or National boundaries in aid of certain ‘unlawful activities’” and was “in short, an effort to deny individuals who act [with the requisite] criminal purpose access to the channels of commerce.” 327 F.3d 1081, 1090 (10th Cir. 2003) (citing *H.R. Rep. No. 966*, at 4 (1961) and *Erlenbaugh v. United States*, 409 U.S. 239, 246 (1972)). The critical elements of the Travel Act that must be pled in the indictment are the use of a facility in interstate commerce with the *intent to promote* the unlawful activity. *Id.* It is clear from the Superseding Indictment that Defendants are charged with making international wire transfers (using a facility in interstate commerce) on specified dates with the intent to further a commercial bribery scheme (promoting the unlawful activity).

As discussed above, the Government may prove additional facts at trial that further demonstrate that the activities charged in the Superseding Indictment fall well within the purview of Sections 4108(a) and (c) and 102(a), and more importantly, the Travel Act itself, which will demonstrate even more clearly that Defendants’ argument is factually and legally baseless. *Adamo*, 534 F.2d at 38. Those actions alleged within the Superseding Indictment are above and beyond those required to meet the standards for sufficiency of the pleading of Travel Act violations under the Supreme Court’s decision in *Hagner*, in that they put Defendants fully on notice of the crimes with which they are charged and allow them to avoid double jeopardy. Defendants’ arguments plainly go to the sufficiency of the evidence on the charges, which is not a matter for consideration at this stage in the proceedings. *See Costello v. United States*, 350 U.S. 359, 363-64 (1956). Defendants’ motion, in essence, is actually a request that the Court review the sufficiency of the evidence at this pre-trial stage, rather than at the close of the Government’s case. As such, the motion should be denied.

IV. THE INDICTMENT PROPERLY PLEADS CONSPIRACY AND MONEY LAUNDERING VIOLATIONS

The Superseding Indictment also alleges money laundering, that is, transportation, transmission, and transfer of a monetary instrument from inside the United States to outside the United States with the intent to promote the carrying on of a specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(2)(A) (Counts Twenty through Twenty-Eight), and conspiracy to violate the FCPA, violate the Travel Act, and launder money, in violation of 18 U.S.C. § 371 (Count One).

Defendants make no argument challenging the money laundering and conspiracy counts beyond those made against the FCPA and Travel Act counts. Because the allegations of the specified unlawful activities, namely violations of the FCPA and the Travel Act,¹⁰ underlying the money laundering charges are more than sufficiently pled in the Superseding Indictment, the money laundering charges are likewise sufficiently pled and should not be dismissed.

Moreover, because the FCPA, Travel Act, and money laundering charges are sufficiently pled, the conspiracy charges are likewise properly pled and should not be dismissed. However, even if Defendants' motion had merit, which it does not, the conspiracy charge survives the motion to dismiss in any event. As the Third Circuit held in *United States v. Werme*:

To be legally sufficient, a conspiracy count in an indictment need only set forth the agreement and specific intent to commit an unlawful act, and when required by statute, an overt act. A conspiracy indictment need not allege every element of the underlying offense, but need only put defendants on notice that they are being charged with a conspiracy to violate the underlying substantive offense.

¹⁰ Felony violations of the FCPA and the Travel Act are specified unlawful activities for purposes of 18 U.S.C. § 1956(a)(2)(A). 18 U.S.C. § 1956(c)(7)(D) (FCPA) and 18 U.S.C. § 1956(c)(7)(A) (Travel Act).

939 F.2d 108, 112 (3d Cir. 1991). The Third Circuit found the indictment in *Werme*, which stated only that there was a conspiracy “in the Eastern District of Pennsylvania and elsewhere, to obtain bids containing confidential information from competitors on the Seabrook project for money and other things of value,” was sufficient to establish conspiracy to violate the Travel Act in violation of Section 4108 of the Pennsylvania Criminal Code, because it “put Werme on notice that he was charged with a conspiracy to commit state law bribery through interstate travel or use of interstate facilities.” *Id.* at 113. The conspiracy charge in the Superseding Indictment goes well beyond the bare statements of the indictment in *Werme*. Therefore, the motions to dismiss the conspiracy charge must also be denied.

CONCLUSION

Because the Superseding Indictment clearly meets all the requirements for sufficiency of pleading the offenses charged, the Government respectfully submits that Defendants’ motions to dismiss should be denied in their entirety.

Respectfully submitted,

MICHAEL LEVY
United States Attorney

//s//

JENNIFER ARBITTIER WILLIAMS
Assistant United States Attorney

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

//s//

KATHLEEN M HAMANN
Trial Attorney, Fraud Section

CERTIFICATION

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

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

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

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

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

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

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

//s//

KATHLEEN M HAMANN
Trial Attorney, Fraud Section

Date: November 23, 2009

Exhibit A

TABLE OF CONTENTS

I. INTRODUCTORY REMARKS 1

A. Function of Court and Jury 1

**B. Statements of Court and Counsel Not Evidence; Jury’s
Recollection Controls 2**

C. Burden of Proof and Presumption of Innocence 3

D. Reasonable Doubt 4

E. Inferences 5

F. Direct and Circumstantial Evidence 6

G. Credibility of Witnesses 8

H. Defendant’s Right Not To Testify 9

I. Stipulations of Fact 9

J. Government Treated Like Any Other Party 10

K. Accomplice Testimony 10

L. Informal Immunity of Government Witnesses 12

**M. Testimony of a Witness Who Has Entered into a Cooperation
Agreement with the Government 12**

N. Accomplice Testimony – Not Proper to Consider Guilty Plea .. 14

O. Bias and Hostility 14

P. Preparation of Witnesses 14

Q. Impeachment by Prior Inconsistent Statements 15

R. Expert Testimony 15

S. Indictment Is Not Evidence 16

T. Redaction of Evidentiary Items 16

U. Charts and Summaries 17

V. Persons Not on Trial 17

W. Particular Investigative Techniques Not Required 17

X. Sympathy; Oath as Jurors 18

Y. Punishment Is Not to Be Considered by the Jury 18

Z. Improper Considerations 19

AA. Note Taking by Jurors 19

II. APPLICABLE LAW 19

A. The Indictment 19

B. Summary of the Offenses 20

**C. Conspiracy to Violate the Foreign Corrupt Practices Act and the
Travel Act
..... 20**

1.	The Indictment and the Statute	20
2.	Elements of a Conspiracy	21
a.	First Element of a Conspiracy – Existence of a Conspiracy	22
b.	Object of the Conspiracy – Violation of the FCPA	23
i.	First Element – Domestic Concern	24
ii.	Second Element – Interstate Commerce	24
iii.	Third Element – Corruptly and Willfully	24
iv.	Fourth Element – Offer, Promise, or Payment of Anything of Value	25
v.	Fifth Element – Knowledge of Payment to a Foreign Official	26
vi.	Sixth Element – Purpose of the Payment	28
vii.	Seventh Element – Business Nexus	28
viii.	Solicitation of a Bribe Not a Defense	29
c.	Object of the Conspiracy – Violation of the Travel Act	29
i.	First Element – Travel or Use of a Facility	30
ii.	Second Element – Required Knowledge	31
iii.	Third Element – Activity	32
d.	Second Element of a Conspiracy – Membership in the Conspiracy	32
e.	Third Element of a Conspiracy – Overt Acts	36
D.	Money Laundering Conspiracy	37
1.	The Indictment and the Statute	37
2.	Elements	38
a.	First Element of a Conspiracy – Existence of a Conspiracy	38
b.	Object of the Conspiracy	38
i.	First Element – Transportation of Funds From the United States	39
ii.	Second Element – Intent To Promote Specified Unlawful Activity	40
c.	Second Element of a Conspiracy – Membership in the Conspiracy	40
E.	False Statements	41

1.	The Indictment and the Statute	41
2.	Elements	42
a.	First Element – Statement or Representation	42
b.	Second Element – Materiality	43
c.	Third Element – Falsity	43
d.	Fourth Element – Knowing and Willful Conduct	44
e.	Fifth Element – Matter Within the Jurisdiction of the United States Government	44
	44
F.	Venue	44
G.	Variance in Amounts and Dates	45
III.	CONCLUDING REMARKS	46
A.	Verdict Sheet	46
B.	Selection of Foreperson; Right to See the Exhibits and Have Testimony Read During the Deliberations	46
C.	Consider Each Count Separately	47
D.	Duty to Consult and Need for Unanimity	47
E.	Closing Comment	48

I. INTRODUCTORY REMARKS

A. Function of Court and Jury

Members of the jury, we now approach the critical time in this case – the time when the case will be given to you for your judgment and verdict on the facts. It is my responsibility to instruct you on the law. Before I do, I want to thank you for your patience and cooperation.

I begin by explaining to you my role and your role. The jury's role is by far the more important. It is to decide the questions of fact and on that basis to render the verdict. It is your duty to decide whether or not the defendant's guilt has been proven beyond a reasonable doubt and to render verdicts of guilty or not guilty accordingly.

You are the sole judges of the facts. That is a great responsibility that you are to exercise with complete fairness and impartiality. Your decision is to be based solely on the evidence or the lack of evidence. It may not be influenced by bias, prejudice or sympathy. I remind you that this is the duty you have sworn you would perform faithfully.

My job includes two basic functions. First, I make rulings on disputed issues of law. What rulings I have made should not concern you. My second function is very much your concern. It is to instruct you on the law – that is, to

explain to you the rules of law that govern your deliberations and to tell you what are the questions you must answer in reaching your verdict.

It is your duty to accept the law as I state it to you in these instructions and apply it to the facts as you decide them. You must not substitute your concept of what the law should be for what I tell you the law is. Just as you alone find the facts, I alone determine the law, and you are duty-bound to accept the law as I state it.

**B. Statements of Court and Counsel Not Evidence; Jury's
Recollection Controls**

In determining the facts, you must rely upon your own recollection of the evidence. What is evidence? Evidence consists primarily of the testimony of witnesses and the exhibits that have been received. One exception to this is that you may not consider any answer that I directed you to disregard or that I ordered to be stricken from the record.

This case is not to be decided on the rhetoric of the attorneys. What the lawyers have said in their opening arguments, in their summations, in their objections, or in their questions is not evidence. What I say is not evidence. Only the answer of a witness is evidence and documents and other tangible things received in evidence.

You should draw no inference or conclusion for or against any party

by reason of lawyers making objections. Counsel have not only the right but the duty to make legal objections when they think that such objections are appropriate.

Also, do not draw any inference from any of my rulings. The rulings I have made during trial are not any indication of my views of what your decision should be as to whether or not the defendant has been proved guilty beyond a reasonable doubt.

Do not concern yourself with what was said at side bar conferences or during my discussions with counsel. Those discussions related to rulings of law and not to matters of fact. You should draw no inference or conclusion of any kind, favorable or unfavorable, with respect to any witness or any party in the case, by reason of any comment, question or instruction of mine.

C. Burden of Proof and Presumption of Innocence

The defendant has pleaded not guilty. Thus, the Government has the burden of proving the charges against him beyond a reasonable doubt. The defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the charges contained in the Indictment. This presumption of innocence was in his favor at the start of the trial, continued in his favor throughout the entire trial, is in his favor even as I instruct you now, and continues in his favor during the course of your deliberations in the jury room. It is removed if and when

you, as members of the jury, are satisfied that the Government has sustained its burden of proving the defendant's guilt beyond a reasonable doubt.

D. Reasonable Doubt

The question that naturally comes up is: "What is a reasonable doubt?" The words almost define themselves. A reasonable doubt is one founded in reason and arising out of the evidence or the lack of evidence in the case. It is doubt that a reasonable person has after carefully weighing all the evidence.

Reasonable doubt is a doubt that appeals to your reason, your judgment, your experience, your common sense. It is not caprice, whim, or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of the defendant's guilt, in sum, if you have such a doubt as would cause you, as prudent persons, to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt, and in that circumstance it is your duty to acquit the defendant.

On the other hand, if after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you do have an abiding

conviction of the defendant's guilt, such a conviction as you would be willing to act without hesitation upon in important matters in the personal affairs of your own life, then you have no reasonable doubt; under such circumstances it is your duty to convict the defendant.

One final word on this subject. Reasonable doubt does not mean a positive certainty or proof beyond all possible doubt. It is practically impossible for a person to be absolutely and completely convinced of any disputed fact that by its nature is not susceptible of mathematical certainty.

E. Inferences

During the trial you may have heard the attorneys use the term "inference," and in their arguments they may have asked you to infer, on the basis of your reason, experience and common sense, from one or more proven facts, the existence of some other facts.

An inference is not a suspicion or a guess. It is a logical conclusion that a disputed fact exists that we reach in light of another fact that has been shown to exist. There are times when different inferences may be drawn from facts. It is for you, and you alone, to decide what inferences you will draw.

Keep in mind that the mere existence of an inference against the defendant does not relieve the Government of the burden of establishing its case

beyond a reasonable doubt. If the Government has failed, then your verdict must be for the defendant. If you should find that all of the evidence is evenly balanced, then the Government has not sustained its burden of proof and your verdict should be for the defendant.

F. Direct and Circumstantial Evidence

The law recognizes two types of evidence, direct and circumstantial. Jurors may rely upon either type to find an accused guilty of a crime.

Direct evidence is evidence that, if believed, tends to show a fact without need for any other amplification. For instance, when a witness testifies to what he saw, heard, and observed, and what he knew of his own knowledge, about things that came to him by virtue of his own senses, that is direct evidence.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts that reasonably follow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is a fact or series of facts in evidence that, if believed, has a logical tendency to lead the mind to a conclusion that another fact exists – even though there is no direct evidence to that effect.

Let us take one simple example that is often used in this courthouse to illustrate what is meant by circumstantial evidence. We will assume that when you

entered the courthouse this morning the sun was shining brightly outside and it was a clear day. There was no rain. The sky was clear. Now, assume that in this courtroom the blinds are drawn. As you are sitting in this jury box, and despite the fact that it was dry when you entered the building, someone walks in with an umbrella dripping water, followed in a short time by a man with a raincoat that is wet.

Now, on our assumptions, you cannot look out of the courtroom and see whether it is raining or not, and if you are asked, “Is it raining?” you cannot say that you know it directly because of your own observation. But, certainly upon the combination of facts as given, even though when you entered the building it was not raining outside, it would be reasonable and logical for you to conclude that it is raining now.

You would arrive at this conclusion from circumstantial evidence. In other words, you would infer on the basis of reason and experience from one or more established facts – in this example, the dripping umbrella and the wet raincoat – the existence of some further fact: that it is now raining outside.

Many material facts – such as state of mind – are rarely susceptible of proof by direct evidence.

Circumstantial evidence is as valuable as direct evidence. The law

makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, based on all the evidence in the case, circumstantial and direct.

G. Credibility of Witnesses

Much of the evidence that you have heard was presented to you in the form of testimony from witnesses. Let me remind you that it is your job to decide the credibility of witnesses who appeared here and the weight that their evidence deserves. How, you might ask, do you judge the credibility of a witness?

Your determination of the credibility of a witness largely depends upon the impression the witness made upon you as to whether or not she or he gave an accurate version of what occurred.

The degree of credit to be given a witness should be determined by his or her demeanor, relationship to the controversy and the parties, bias, or impartiality, the reasonableness of the witness's statement, the strength or weakness of the witness' recollection viewed in the light of all other testimony, and the attendant circumstances in the case.

How did the witness impress you? Did his or her version appear straightforward and candid, or did he or she try to hide some of the facts? Is there

a motive to testify falsely? In passing upon the credibility of a witness, you may also take into account inconsistencies or contradictions as to material matters in his or her testimony.

If you find that any witness has willfully 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.

H. Defendant's Right Not To Testify

The defendant did not testify in this case. Under our Constitution, he has no obligation to testify or to present any other evidence because it is the Government's burden to prove the defendant's guilt beyond a reasonable doubt.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way in your deliberations in the jury room.

I. Stipulations of Fact

In this case you have heard evidence in the form of stipulations. A

stipulation of fact is an agreement among the parties that contains facts that are agreed to be true. In such cases, you must accept those facts as true.

J. Government Treated Like Any Other Party

In reaching your verdict, you are to perform the duty of finding the facts without bias or prejudice as to any party. You must remember that all parties stand equal before a jury in the courts of the United States. The fact that the Government is a party and the prosecution is brought in the name of the United States does not entitle the Government or its witnesses to any greater consideration than that accorded to any other party. By the same token, you must give it no less consideration. Your verdict must be based solely on the evidence or the lack of evidence.

For the same reasons, the personalities and the conduct of counsel are not in any way in issue. If you formed reactions of any kind to any of the lawyers in the case, favorable or unfavorable, whether you approved or disapproved of their behavior, those reactions must not enter into your deliberations.

K. Accomplice Testimony

You have heard from several witnesses who testified that they were actually involved in planning and/or carrying out some of the crimes charged in the Indictment.

There has been a great deal said about these so-called accomplice witnesses in the summations of counsel and whether or not you should believe them. The Government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.

For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, it is also the case that accomplice testimony is of such nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.

You should ask yourselves whether these so-called accomplices would benefit more by lying, or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth? Did this

motivation color his testimony?

L. Informal Immunity of Government Witnesses

You have heard the testimony of witnesses who have been promised that in exchange for testifying truthfully, completely, and fully, they will not be prosecuted for any crimes which they may have admitted either here in court or in interviews with the prosecutors. This promise was arranged directly between the witnesses and the Government.

The Government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed that you may convict a defendant on the basis of such witnesses' testimony alone, if you find that their testimony proves the defendant guilty beyond a reasonable doubt.

However, the testimony of witnesses who have been promised that they will not be prosecuted should be examined by you with greater care than the testimony of ordinary witnesses. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witnesses' own interests or whether the witnesses' interests would be advanced by testifying truthfully.

M. Testimony of a Witness Who Has Entered into a Cooperation Agreement with the Government

You have heard that some witnesses pled guilty to certain crimes after entering into an agreement with the Government to testify. If the Government determines that the witness has provided substantial assistance, the Government will bring the witness' cooperation to the attention of the sentencing court. This provides a basis for the sentencing court to reduce the witness' sentence below what it might otherwise be.

The Government is permitted to enter into this kind of cooperation agreement. You, in turn, may accept the testimony of such a witness and convict the defendant on the basis of this testimony alone, if you find that it is sufficient to convince you of the defendant's guilt beyond a reasonable doubt.

However, you should bear in mind that a witness who has entered into such an agreement has an interest in this case different from that of an ordinary witness. A witness who believes that he may be able to receive a lighter sentence by giving testimony favorable to the Government has a motive to testify falsely. On the other hand, if such a witness intentionally gives false testimony, he may be prosecuted for perjury and may lose the benefits of the cooperation agreement. Therefore, you must examine his testimony with caution and weigh it with great care. If, after scrutinizing his testimony, you decide to accept it, you may give it whatever weight, if any, you find it deserves.

N. Accomplice Testimony – Not Proper to Consider Guilty Plea

You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that one or more prosecution witnesses pled guilty to similar charges. The decision of those witnesses to plead guilty was a personal decision those witnesses made about their own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

O. Bias and Hostility

In connection with your evaluation of the credibility of the witnesses, you may consider any evidence of resentment or anger which some government witnesses may have toward the defendant.

Evidence that a witness is biased, prejudiced, or hostile toward the defendant requires you to view that witness' testimony with caution, to weigh it with care, and subject it to close and searching scrutiny.

P. Preparation of Witnesses

You have heard evidence during the trial that witnesses have discussed the facts of the case and their testimony with the lawyers before the witnesses appeared in court.

Although you may consider that fact when you are evaluating a

witness' credibility, there is nothing either unusual or improper about a witness meeting with lawyers before testifying so that the witness can be aware of the subjects he will be questioned about, focus on those subjects and have the opportunity to review relevant exhibits before being questioned about them. In fact, it would be unusual for a lawyer to call a witness without such consultation.

Q. Impeachment by Prior Inconsistent Statements

You have heard evidence that several witnesses made statements on earlier occasions that counsel argue are inconsistent with the witnesses' trial testimony. Evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence bearing on the defendant's guilt. Evidence of the prior inconsistent statement was placed before you for the more limited purpose of helping you decide whether to believe the trial testimony of the witnesses who contradicted themselves. If you find that the witnesses made earlier statements that conflict with their trial testimony, you may consider that fact in deciding how much of their trial testimony, if any, to believe.

R. Expert Testimony

You have heard testimony from one expert witness. An expert is allowed to express his opinion on relevant matters about which he has special knowledge and training. Expert testimony is presented to you on the theory that

someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, his opinions, his reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept this witness' testimony merely because he is an expert. Nor should you substitute it for your own reason, judgment, and common sense.

S. Indictment Is Not Evidence

Let me remind you that the Indictment itself is not evidence. It simply contains the charges against the defendant, and no inference may be drawn against the defendant from the existence of the Indictment. The grand jury did not pass upon the guilt or innocence of the defendant. Indeed, it only heard the evidence presented by the Government. You must keep in mind always that the defendant is presumed innocent, that he has entered a plea of not guilty to the charges against him, and that the Government must prove beyond a reasonable doubt the charges in the Indictment.

T. Redaction of Evidentiary Items

We have, among the exhibits received in evidence, some documents that are redacted. “Redacted” means that part of the document or tape was taken out. You are to concern yourself only with the part of the item that has been admitted into evidence. You should not consider any possible reason why the other part of it has been deleted.

U. Charts and Summaries

During the course of trial there were charts and summaries shown to you in order to make the other evidence more meaningful and to aid you in considering that evidence. They are not direct, independent evidence; they are summaries of the evidence. They are admitted into evidence as aids to you. It is up to you to decide whether the charts and summaries fairly and correctly present the information in the testimony and the documents.

V. Persons Not on Trial

You may not draw any inference towards the Government or the defendant on trial from the fact that any persons in addition to the defendant are not on trial here. You also may not speculate as to the reasons why other persons are not on trial here. Those matters are wholly outside your concern and have no bearing on your function as jurors in deciding the case before you.

W. Particular Investigative Techniques Not Required

You have heard reference, in the arguments of defense counsel in this case, to the fact that certain investigative techniques were not used by the Government. There is no legal requirement, however, that the Government prove its case through any particular means. While you are to carefully consider the evidence adduced by the Government, you are not to speculate as to why it used the techniques it did or why it did not use other techniques. The Government is not on trial. Law enforcement techniques are not your concern.

X. Sympathy; Oath as Jurors

Under your oath as jurors you are not to be swayed by sympathy. You are to be guided solely by the evidence in this case, and the crucial question that you must ask yourselves as you sift through the evidence is: Has the Government proven the guilt of the defendant beyond a reasonable doubt? It must be clear to you that once you let fear, prejudice, bias or sympathy interfere with your thinking there is a risk that you will not arrive at a true and just verdict.

Y. Punishment Is Not to Be Considered by the Jury

You should not consider the question of possible punishment of the defendant. Under our system, sentencing and punishment is exclusively the function of the Court. It is not your concern and you should not give any consideration to that issue in deciding what your verdict will be.

Z. Improper Considerations

In reaching your decision as to whether the Government sustained its burden of proof, it would also be improper for you to consider any personal feelings you have about the defendant's race, religion, national origin, age, or economic status.

AA. Note Taking by Jurors

Any notes you may have taken during trial are simply an aid to your memory. Because the notes may be inaccurate or incomplete, they may not be given any greater weight or influence than the recollections of other jurors about the facts or the conclusions to be drawn from the facts in determining the outcome of the case. Any difference between a juror's recollection and a juror's notes should always be settled by asking to have the court reporter's transcript on that point read back to you.

II. APPLICABLE LAW

A. The Indictment

I will now turn to the specific charges in the Indictment, of which you each have been given a copy.

As I have instructed you, the Indictment is a charge or accusation. It is not evidence. The defendant is named in three counts of the Indictment. You

must consider each count separately and return a separate verdict of guilty or not guilty for the defendant on each count. Whether you find the defendant guilty or not guilty as to one offense should not affect your verdict as to the other offenses charged, except to the extent I explain otherwise.

B. Summary of the Offenses

Count One alleges that the defendant, FREDERIC BOURKE, participated in a conspiracy to violate two federal statutes – the Foreign Corrupt Practices Act and the Travel Act – in violation of Section 371 of Title 18 of the United States Code.

Count Two alleges that FREDERIC BOURKE participated in a conspiracy to launder money in violation of Section 1956(h) of Title 18 of the United States Code.

Count Three charges FREDERIC BOURKE with making false statements in connection with a federal investigation in violation of Section 1001 of Title 18 of the United States Code.

I will now instruct you about the elements of each of these offenses.

C. Conspiracy to Violate the Foreign Corrupt Practices Act and the Travel Act

1. The Indictment and the Statute

Count One charges that the defendant violated Section 371 of Title 18

of the United States Code. That section provides as follows:

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 [person is guilty of a crime].

The Indictment charges that the defendant participated in a conspiracy to violate two federal laws: the Foreign Corrupt Practices Act (“FCPA”) and the Travel Act. Specifically, Count One charges, and I am reading now from the Indictment, that:

From in or about May 1997, up to and including in or about 1999, in the Southern District of New York and elsewhere, Viktor Kozeny, FREDERIC BOURKE, JR., the defendant, Clayton Lewis, Hans Bodmer, Thomas Farrell, and others known and unknown to the Grand Jury, 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).

2. Elements of a Conspiracy

To sustain its burden of proof with respect to the allegation of conspiracy in this Count, the Government must prove three elements beyond a reasonable doubt. I will now discuss each of these elements.

a. First Element of a Conspiracy – Existence of a

Conspiracy

Starting with the first element, what is a conspiracy? A conspiracy is a combination, an agreement, or an understanding of two or more persons to accomplish by concerted action a criminal or unlawful purpose.

The essence of the crime of conspiracy is the unlawful combination or agreement to violate the law. The success of the conspiracy, or the actual commission of the criminal act that is the object of the conspiracy, is not an essential element of that crime.

The conspiracy alleged here is therefore the agreement to commit crimes. It is an entirely distinct and separate offense from the actual commission of any of the crimes.

If you find beyond a reasonable doubt that two or more persons came to an understanding, express or implied, to violate the law and to accomplish an unlawful plan, then the Government will have sustained its burden of proof as to this element.

In considering this first element, you should consider all the evidence that has been admitted with respect to the conduct and statements of each alleged co-conspirator and any inferences that may be reasonably drawn from them.

In this case, the Indictment charges that the conspiracy alleged in Count One had

two objects: (1) a violation of the FCPA and (2) a violation of the Travel Act.

These objects, or objectives of the conspiracy, are the illegal goals that the conspirators hoped to achieve. The Government must prove that the conspiracy intended to achieve one, but not necessarily both, of the objectives alleged in the Indictment.

b. Object of the Conspiracy – Violation of the FCPA

One of the objects of the conspiracy charged in Count One of the Indictment is a violation of the FCPA. Section 78dd-2(a) of Title 15 of the United States Code prohibits making use of the mails or any means or instrumentality of interstate commerce willfully and corruptly in furtherance of a payment — or offer, promise or authorization of payment — or offer, gift, promise to give, authorization of the giving of anything of value — to any foreign official for the purpose of:

(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, 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 [the person or company making the payment] in obtaining or retaining business for or with, or directing business to, any person.

The substantive offense has seven elements, which I will define for you. You

should note that the Government need not prove each of the following elements in order to prove that the defendant engaged in a conspiracy to violate the FCPA. I am instructing you on the elements only because they will aid you in your determination as to whether the Government has sustained its proof with respect to this Count.

i. First Element – Domestic Concern

A person cannot be found to have violated the FCPA unless he or she is a “domestic concern” or is an officer, director, employee, or agent of a “domestic concern.” A “domestic concern” is defined to include any individual who is a citizen, national, or resident of the United States.

ii. Second Element – Interstate Commerce

The person must have intended to make use of the mails or a means or instrumentality of interstate commerce. The term “interstate commerce” means trade, commerce, transportation, or communication among the several states, or between any foreign country and any state. An “instrumentality” of interstate commerce includes means of communication, such as a telephone, fax machine, or transportation, such as a car or plane.

iii. Third Element – Corruptly and Willfully

The third element of a violation of the FCPA is that the person

intended to act “corruptly” and “willfully.”

A person acts “corruptly” if he acts voluntarily and intentionally, with an improper motive of accomplishing either an unlawful result, or a lawful result by some unlawful method or means. The term “corruptly” is intended to connote that the offer, payment, and promise was intended to influence an official to misuse his official position.

A person acts “willfully” if he acts deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law. The person need not be aware of the specific law and rule that his conduct may be violating, but he must act with the intent to do something that the law forbids.

iv. Fourth Element – Offer, Promise, or Payment of Anything of Value

The person must also have intended to act in furtherance of a payment or an offer, promise, or authorization of payment of money, or an offer, gift, promise to give or authorization of the giving of anything of value.

It is not necessary that the bribe, or offer or promise of a bribe, was intended to be made directly by that person to the foreign official. A person who engages in bribery of a foreign official indirectly through any other person or entity is liable under the FCPA, just as if the person had engaged in the bribery directly.

Thus, if the person authorizes another to pay or promise a bribe, that authorization alone is sufficient to violate the FCPA.

Further, it is not necessary that the payment actually take place or that the gift actually be given. Instead, it is the offer, promise, or authorization of the bribe that completes the crime. Thus, this element is satisfied if the person authorized an unlawful payment or gift, even if the payment was not actually made or gift was not actually given — that it was diverted by middlemen or even that the middlemen never intended to pay the bribe.

Finally, the intended payment or authorization thereof need not be in the form of money. The phrase “anything of value” means any item, whether tangible or intangible, that the intended recipient considered to be valuable. Thus, objects, items, or something that provides a benefit, such as a service, is sufficient to satisfy this element.

You should note, however, that the FCPA makes an exception for payments that facilitate or expedite routine governmental action.

v. Fifth Element – Knowledge of Payment to a Foreign Official

The fifth element of a violation of the FCPA is that the person knew that all or a portion of the payment or gift would be offered, given, or promised, directly or indirectly, to any foreign official.

A “foreign official” is: (1) an officer or employee of a foreign government; (2) any department, agency, or instrumentality of such foreign government; or (3) any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality.

An “instrumentality” of a foreign government includes government-owned or government-controlled companies.

The FCPA provides that a person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if:

- i. such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
- ii. such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if 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.

It also bears noting that while a finding that the person was aware of the high probability of the existence of a fact is enough to prove that this person possessed knowledge, it is not sufficient in order to determine that the person acted “willfully” or “corruptly,” which is a separate and distinct element of the offense.

vi. Sixth Element – Purpose of the Payment

The sixth element of a violation of the FCPA is that the payment, gift, promise, or authorization thereof was for one of three purposes:

- (1) to influence any act or decision of a foreign public official in his official capacity;
- (2) to induce a foreign public official to do or omit to do any act in violation of that official’s lawful duty; or
- (3) to induce that 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.

One of these purposes must have been the reason for the payment, gift, or promise. Proof that any foreign official was actually influenced is not required.

vii. Seventh Element – Business Nexus

The final element of a violation of the FCPA is that a payment, gift, offer, promise, or authorization thereof was to be made for the purpose of assisting the person in obtaining or retaining business for any person or company. However, proof that the person actually obtained or retained any business whatsoever as a result of an unlawful offer, payment, promise, or gift is not necessary.

viii. Solicitation of a Bribe Not a Defense

It does not matter who suggested that a corrupt offer, payment, promise or gift be made. The FCPA prohibits any payment or gift intended to influence the recipient, regardless of who first suggested it. It is not a defense that the payment was demanded by a government official as a price for gaining entry into a market or to obtain a contract or other benefit. That the offer to pay, payment, promise to pay, or authorization of payment may have been first suggested by the intended recipient is not deemed an excuse for a person's decision to make a corrupt payment, nor does it alter the corrupt purpose with which the offer to pay, payment, promise to pay, or authorization of payment was made.

c. Object of the Conspiracy – Violation of the Travel Act

The other object of the conspiracy charged in Count One is Section 1952 of Title 18 of the United States Code, which makes it a federal crime for anyone to travel in interstate commerce or use interstate facilities for the purpose

of carrying on certain specified unlawful activities. The law says:

Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform [any of these acts is guilty of a crime].

In this case, the unlawful activity that is charged is a violation of the FCPA. I instruct you as a matter of law that a violation of the FCPA is an “unlawful activity” within the meaning of the Travel Act.

A violation of the Travel Act has three elements, which I will now describe.

i. First Element – Travel or Use of a Facility

The first element of a violation of the Travel Act is that the person traveled interstate or used a facility in interstate or foreign commerce, or that he caused someone else to do so.

Interstate travel is simply travel between one state and another state or a foreign country. A facility in interstate or foreign commerce is any vehicle or instrument that crosses state lines, or boundaries between a state and a foreign country, in the course of commerce. For example, making telephone calls or fax transmissions, or sending electronic mail, or wire-transferring funds from one state

to another, or into or out of the country, are uses of facilities in interstate or foreign commerce.

ii. Second Element – Required Knowledge

The second element of a violation of the Travel Act is that the person agreed to use a facility in interstate or foreign commerce — or caused another person to do so — with the intent to promote, manage, establish or carry on the unlawful activity charged in the Indictment: a violation of the FCPA.

Proof that the person used a facility in interstate or foreign commerce is not sufficient. It must be proven that the person used the facility, or that he caused another person to do so, for the purpose of facilitating the unlawful activity.

Similarly, proof that the person happened to use a facility in interstate or foreign commerce is not sufficient. Proof that the person used the facility and accidentally furthered a violation of the FCPA is also not enough. The person must have intended to advance the bribery in violation of the FCPA as a result of his use of the facility, or as a result of causing another person to perform these acts.

On the other hand, proof that the furtherance of the FCPA violation was the person's sole purpose in using the facility is not required. It is sufficient if one of the motives was a furtherance of the FCPA violation.

It must also be proven that the person traveled interstate — or used the

facilities of interstate or foreign commerce — with the intent to facilitate an activity which the person knew was illegal. Proof that the person knew that the actual interstate travel or actual use of interstate facilities was illegal is not required.

Finally, it must be proven that the activity that the person intended to facilitate was, in fact, unlawful under the FCPA. I have previously instructed you on the elements of the FCPA, and you should follow those instructions (see pages 23-29). Bear in mind, however, that a completed bribery scheme under the FCPA need not be proven. All that is required is proof that the person agreed to use interstate channels in order to facilitate the crime of violating the FCPA.

iii. Third Element – Activity

The third element of a violation of the Travel Act is that at some time **after** the travel or use of a facility in interstate or foreign commerce, the person performed or attempted to perform one or more acts in furtherance of the unlawful activity. This subsequent act need not itself be unlawful. However, this act must come after the use of the facility. Any act that happened before the use of a facility cannot satisfy this element.

d. Second Element of a Conspiracy – Membership in the Conspiracy

The second element that the Government must prove beyond a

reasonable doubt to establish the offense of conspiracy is that the defendant knowingly, willfully, and voluntarily became a member of the conspiracy.

In deciding whether the defendant was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly and willfully joined the conspiracy. Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective?

“Unlawfully,” “Intentionally,” and “Knowingly”

Before the defendant can be found to have been a conspirator, you must first find that he knowingly joined in the unlawful agreement or plan. To satisfy its burden of proof as to this element, the Government must prove beyond a reasonable doubt that the defendant knew that he was a member of an operation 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.

“Unlawful” means simply contrary to law. The defendant need not have known that he was breaking any particular law or any particular rule. He need only have been aware of the generally unlawful nature of his acts.

An act is done “knowingly” and “willfully” if it is done deliberately and voluntarily, that is, the defendant’s act or acts must have been the product of

his conscious objective rather than the product of a mistake or accident or mere negligence or some other innocent reason.

It is important for you to note that the defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged co-conspirators, and the reasonable inferences that may be drawn from them.

The defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need he have been apprised of all of their activities. Moreover, the defendant need not have been fully informed as to all of the details or the scope of the conspiracy to justify an inference of knowledge on his part. Furthermore, the defendant need not have joined in all of the conspiracy's unlawful objectives.

The duration and extent of the defendant's participation in the conspiracy charged in the Indictment has no bearing on the issue of the defendant's guilt. He need not have joined the conspiracy at the outset. He may have joined it at any time in its progress, and he may still be held responsible for all that was done before he joined and all that was done during the conspiracy's existence while he was a member, as long as you find that he joined the conspiracy with knowledge

as to its general scope and purpose. Indeed, each member of a conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy.

I want to caution you, however, that mere association with one or more members of the conspiracy does not automatically make the defendant a member. A person may know, or be friendly with, a criminal, without being a criminal himself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. I also want to caution you that mere knowledge or acquiescence without participation in the unlawful plan is not sufficient.

Moreover, the fact that the acts of a defendant, without knowledge, merely happens to further the purposes or objectives of the conspiracy does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated 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.

In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised, or assisted in it for the purpose of furthering the illegal undertaking. He thereby becomes a knowing and willing participant in the unlawful agreement – that is to say, a conspirator.

e. Third Element of a Conspiracy – Overt Acts

The third element in the crime of conspiracy under Count One is the requirement of an overt act. To sustain its burden of proof with respect to the conspiracy charged in Count One, the Government must show beyond a reasonable doubt that at least one overt act was committed in furtherance of that conspiracy by at least one of the co-conspirators in the Southern District of New York.

The purpose of the overt act requirement is clear. There must have been something more than mere agreement; some overt step or action must have been taken by at least one of the conspirators in furtherance of that conspiracy.

The overt acts are set forth in the Indictment. However, you may find that overt acts were committed which were not alleged in the Indictment. The only requirement is that one of the members of the conspiracy has taken some step or action in furtherance of the conspiracy in the Southern District of New York during the life of that conspiracy.

You should bear in mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act which in and of itself is criminal or constitutes an objective of the conspiracy.

Additionally, you must find that some member of the conspiracy committed any overt act in furtherance of the conspiracy on or after a certain date, in this case, July 22, 1998.

D. Money Laundering Conspiracy

1. The Indictment and the Statute

Count Two of the Indictment charges the defendant with participating in a conspiracy to violate the money laundering laws of the United States. The Indictment states that:

From in or about March 1998, up to and including in or about September 1998, in the Southern District of New York and elsewhere, Viktor Kozeny, FREDERIC BOURKE, JR., the defendant, Clayton Lewis, Hans Bodmer, Thomas Farrell, and others known and unknown to the Grand Jury, unlawfully, willfully, and knowingly did combine, conspire, confederate and agree together and with each other to violate Title 18, United States Code, Section 1956(a)(2)(A).

2. Elements

For you to find the defendant guilty of Count Two, you must be convinced beyond a reasonable doubt that the Government has proved two elements, which I will now describe.

a. First Element of a Conspiracy – Existence of a Conspiracy

The first element the Government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered into the unlawful agreement charged in Count Two. The instructions I gave to you concerning the existence of the conspiracy charged in Count One are equally applicable here (see pages 21-23). The only difference is that the object of the conspiracy alleged in Count Two is money laundering, which I will now discuss.

b. Object of the Conspiracy

Count Two charges that the conspiracy had one unlawful objective: money laundering in violation of Section 1956(a)(2)(A) of Title 18 of the United States Code. That statute provides, in pertinent part, that:

Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer 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 specified unlawful activity [is guilty of a crime.]

The following are the elements of the substantive crime of money laundering. Again, it is not necessary for the Government to have proven the following elements. I describe the elements here because they will aid you in your determination of whether the Government has sustained its proof with respect to this Count – conspiracy to launder money.

i. First Element – Transportation of Funds From the United States

The first element of the offense of money laundering is that there is a transport or attempt to transport a monetary instrument or funds from a place in the United States to or through a place outside the United States.

The term “monetary instrument” means coin or currency of the United States or of any other country, travelers’ checks, personal checks, bank checks, money orders, investment securities, and negotiable instruments.

The term “funds” refers to money or negotiable paper which can be converted into currency.

“Transportation” is not a word which requires a definition; it is a word which has its ordinary, everyday meaning. The person need not have physically carried the funds or monetary instrument in order for it to be proven that he was responsible for transporting it. All that is required is proof that the person caused

the funds or monetary instrument to be transported.

Proof that there was a transportation of funds or monetary instruments from somewhere in the United States to or through someplace outside the United States is also necessary.

ii. Second Element – Intent To Promote Specified Unlawful Activity

It must next be proven that the person transported funds from the United States with the intent of promoting the carrying on of a specified unlawful activity, namely a violation of the FCPA.

To act intentionally means to act deliberately and purposefully, not by mistake or accident, with the purpose of promoting, facilitating, or assisting in the carrying on of a violation of the FCPA. If the person acted with the intention or deliberate purpose of promoting, facilitating, or assisting in the carrying on of a violation of the FCPA, then this element would be satisfied.

c. Second Element of a Conspiracy – Membership in the Conspiracy

The second element that the Government must prove beyond a reasonable doubt to establish the offense of conspiracy to launder money is that the defendant knowingly, willfully, and voluntarily became a member of that conspiracy. You should apply the instructions I gave in Count One here (see pages

32-36).

With respect to this alleged conspiracy, which is different than the conspiracy charged in Count One, you need not find that an overt act was committed in furtherance of the conspiracy. However, you must find that the unlawful agreement to transport money from the United States to another country with the intent to promote violations of the FCPA continued after July 22, 1998. The conspiracy continued past that date if you find that the purpose of the money laundering conspiracy had not been completed as of that date. Alternatively, if you find that all of the conspirators had abandoned their efforts to achieve the purpose of the money laundering conspiracy on or before July 22, 1998, then you must find the defendant not guilty.

E. False Statements

1. The Indictment and the Statute

Count Three of the Indictment charges the defendant with making false statements to the Federal Bureau of Investigation, a department of the Government. Count Three reads:

Between on or about April 26, 2002, and on or about May 23, 2002, in the Southern District of New York, FREDERIC BOURKE, JR., the defendant, unlawfully, willfully and knowingly did make materially false, fictitious and fraudulent statements and representations in a matter within the jurisdiction of the executive branch of

the Government of the United States; to wit, in an interview conducted on four separate days with, among others, a Special Agent of the Federal Bureau of Investigation, BOURKE falsely stated in substance that he was not aware that Viktor Kozeny had made various corrupt payments, transfers and gifts to Azeri government officials, when in fact, BOURKE well knew and believed that Kozeny had made various corrupt payments, transfers, and gifts to the Azeri Officials.

The relevant statute is Section 1001(a) of Title 18 of the United States

Code, which provides in pertinent part that:

Whoever, in any matter within the jurisdiction of the executive . . . branch of the Government of the United States, knowingly and willfully —

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry [is guilty of a crime].

2. Elements

In order to prove that the defendant is guilty of the crime charged in Count Three, the Government must establish each of five elements beyond a reasonable doubt.

a. First Element – Statement or Representation

The first element that the Government must prove beyond a reasonable doubt is that on or about the date specified in the Indictment the

defendant made a statement or representation. Under this statute, there is no distinction between written or oral statements.

b. Second Element – Materiality

The Government must also prove beyond a reasonable doubt that the statement or representation was material. A false statement is material if it has a natural tendency to influence or is capable of influencing the decision or activities of the government. To find that the statement was material you need not find that it did in fact influence the decision of the government. You need only find that it was capable of influencing a decision.

c. Third Element – Falsity

The third element that the Government must prove beyond a reasonable doubt is that the statement or representation was false, fictitious or fraudulent. A statement or representation is “false” or “fictitious” if it was untrue when made, and known at the time to be untrue by the person making it or causing it to be made. A statement or representation is “fraudulent” if it was untrue when made and was made or caused to be made with the intent to deceive the government agent to which it was submitted.

If the FBI’s question was ambiguous, so that it reasonably could be interpreted in several ways, then the Government must prove that defendant’s

answer was false under any reasonable interpretation of the question.

d. Fourth Element – Knowing and Willful Conduct

The fourth element that the Government must prove beyond a reasonable doubt as to Count Three is that the defendant acted “knowingly” and “willfully.” I have already defined these terms for you in my instructions regarding Count One (see pages 33-34).

e. Fifth Element – Matter Within the Jurisdiction of the United States Government

The fifth element with respect to Count Three is that the statement be made with regard to a matter within the jurisdiction of the Government of the United States. To be within the jurisdiction of a department or agency of the United States Government means that the statement must concern an authorized function of that department or agency.

In this regard, it is not necessary for the Government to prove that the defendant had actual knowledge that the false statement was to be utilized in a matter which was within the jurisdiction of the Government of the United States so long as the false statement was made with regard to a matter within the jurisdiction of the Government of the United States.

F. Venue

In addition to all of the elements of the charges that I have described

for you, you must decide separately whether, as to each separate count, there is a sufficient connection to the Southern District of New York. The Southern District of New York includes Manhattan.

I note that on the issue of venue and on this issue alone, the Government need not offer proof beyond a reasonable doubt; rather, it is sufficient if the Government proves venue by a mere preponderance of the evidence. Thus, the Government has satisfied its venue obligations if you conclude that it is more likely than not that any act in furtherance of the crime you are considering occurred within the Southern District of New York.

G. Variance in Amounts and Dates

You will note that the Indictment alleges various amounts and that certain acts occurred on or about various dates. I instruct you that it does not matter if the evidence you heard at trial indicates a different amount or that particular acts occurred on different dates. The law requires only a substantial similarity between the amounts or dates in the Indictment and the amounts or dates established by the evidence.

With respect to the conspiracy counts, it is not essential that the Government prove that the conspiracy alleged started and ended on any specific dates. Indeed, it is sufficient if you find that the conspiracy was formed and that it

existed for some time around the dates mentioned in the Indictment. However, with respect to Count One – conspiracy to violate the FCPA and Travel Act – you must find that at least one overt act occurred after July 22, 1998, whether that act is charged in the Indictment or not.

III. CONCLUDING REMARKS

A. Verdict Sheet

I have provided each of you with a verdict sheet. With respect to each count, you are to resolve individually the issue of guilt – that is, whether the Government has established beyond a reasonable doubt the essential elements of each offense as I have described them to you. Remember, all answers must be unanimous.

B. Selection of Foreperson; Right to See the Exhibits and Have Testimony Read During the Deliberations

You are about to go into the jury room and begin your deliberations. Your first order of business is to select a foreperson. That individual holds no extra authority; she or he will merely be responsible for signing all communications to the court and for handing them to the marshal during your deliberations.

I am sending all of the exhibits in evidence into the jury room. If you want any of the testimony read, that can also be done. But please remember that it

is not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of testimony that you may want.

Your requests for testimony – in fact, any communication with the court – should be made to me in writing, signed by the foreperson, and given to one of the marshals. I will respond to any questions or requests you have as promptly as possible, either in writing or by having you return to the courtroom so I can speak with you in person. In any event, do not tell me or anyone else how the jury stands on the issue of the defendant's guilt until after a unanimous verdict is reached.

C. Consider Each Count Separately

You must consider each count separately and return a separate verdict of guilty or not guilty for each. Whether you find the defendant guilty or not guilty as to one offense should not affect your verdict as to any other offense charged, except to the extent I explain otherwise.

D. Duty to Consult and Need for Unanimity

To prevail, the Government must prove the essential elements by the required degree of proof, as already explained in these instructions. If it succeeds, your verdict should be guilty; if it fails, it should be not guilty. To report a verdict, it must be unanimous.

Your function is to weigh the evidence in this case and to determine whether or not the defendant is guilty solely upon the basis of such evidence or the lack of evidence.

Each juror is entitled to his or her opinion; each should, however, exchange views with his or her fellow jurors. That is the very purpose of jury deliberation – to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual view, to consult with one another and to reach an agreement based solely and wholly on the evidence or lack of evidence – if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself, after consideration of the evidence in the case. You should not hesitate to change an opinion that, after discussion with your fellow jurors, appears erroneous. However, if, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered.

In conclusion, ladies and gentlemen, I am sure that, if you listen to the views of your fellow jurors and if you apply your own common sense, you will reach a fair verdict here.

E. Closing Comment

Finally, I say this, not because I think it is necessary, but because it is the custom in this courthouse: You should treat each other with courtesy and respect during your deliberations.

After you have reached a verdict, your foreperson will fill out the form that has been given to you, sign it, date it and advise the Marshal outside your door that you are ready to return to the courtroom. I will stress that you should be in agreement with the verdict that is announced in court. Once your verdict is announced by your foreperson in open court and officially recorded, it cannot ordinarily be revoked.

All litigants stand equal in this room. All litigants stand equal before the bar of justice. All litigants stand equal before you. Your duty is to decide between these parties fairly and impartially, to see that justice is done, all in accordance with your oath as jurors.

Members of the jury, I ask your patience for a few moments longer. It is necessary for me to spend a few moments with counsel and the reporter at the side bar. I will ask you to remain patiently in the box, without speaking to each other, and we will return in just a moment to submit the case to you.

Thank you for your time and attentiveness.