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F. #2019R00102

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

- against -

Docket No. 19–CR-102 (RJD)

JOSE CARLOS GRUBISICH,

Defendant.

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THE GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFEDANT'S MOTION TO DISMISS AND TO COMPEL A BILL OF PARTICULARS

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PRELIMINARY STATEMENT

The government respectfully submits this memorandum of law in opposition to the defendant Jose Carlos Grubisich's motion to dismiss the Indictment and to compel a bill of particulars.

The defendant has been charged with a decades-long bribery scheme on behalf of a U.S.-publicly traded company where he and others used U.S. financial institutions to execute the scheme and secure contracts worth over a hundred million dollars, and where he personally profited from this involvement in the scheme. In the face of a clear and sufficient statement of his crimes, the defendant asks the Court to take the extraordinary step of dismissing the Indictment against him based on his misunderstanding of the charges, his misinterpretation of the relevant case law, and an impermissible challenge to the sufficiency of the government's evidence at the pretrial stage. Specifically, the defendant's motion to dismiss fails because: (1) Count One charges one cohesive conspiracy and is not duplicitous; (2) withdrawal is a question of fact for a jury and the defendant has presented no evidence to prove that he withdrew from the conspiracy charged in Count Two; (3) the defendant's duplicity and withdrawal arguments fail as to Count Three; (4) the government is not required to plead or prove the defendant knew that the transfers alleged in Count Three would travel to, from, and/or through the United States; (5) Count Three is not an extraterritorial application of the money laundering statute; and (6) Count Three does not violate the defendant's Due Process rights.

The defendant's motion for a bill of particulars is similarly meritless because the detailed Indictment, as well as the fulsome discovery and additional disclosures provided by the government, permit the defendant to understand the nature of the charges against him and prepare a defense, avoid unfair surprise, and assert a claim of double jeopardy if appropriate. Thus, the defendant's motions should be denied.

BACKGROUND

I. PROCEDURAL BACKGROUND

A. Charges Against the Defendant

Odebrecht S.A. ("Odebrecht") is a Brazilian holding company. Ind. ¶ 4. Odebrecht had a controlling interest in Braskem S.A. ("Braskem"), a Brazilian petrochemical company, through its ownership of more than fifty percent of Braskem's voting shares. Id. ¶¶ 2, 4. During the period of the Indictment, American depositary shares of Braskem traded on the New York Stock Exchange, and Braskem filed annual reports with the United States Securities and Exchange Commission ("SEC"). Id. ¶ 2. Thus, Braskem was an "issuer" for purposes of the anti-bribery and accounting provisions of the Foreign Corrupt Practices Act ("FCPA") (15 U.S.C. §§ 78dd-1 et seq.).

The defendant was the Chief Executive Officer ("CEO") of Braskem from about 2002 until 2008. Ind. ¶ 1. Thereafter, he served on Braskem's Board of Directors from about 2010 to 2012. Id. From 2008 to 2012, the defendant was the CEO of ETH Bionergia S.A. ("ETH"), a subsidiary of Odebrecht in the ethanol business. Id. The defendant then entered into a commercial agreement with Odebrecht from about 2012 to 2015. Id.

On February 27, 2019, a grand jury in the Eastern District of New York returned the Indictment against the defendant. The Indictment alleges that from about 2002 to 2014, the defendant, together with other Braskem and Odebrecht employees and agents, diverted approximately $250 million of Braskem's funds into a secret slush fund, in part to pay bribes to government officials and political parties in Brazil so that Braskem could obtain and retain business.[1] Ind. ¶ 17. For this conduct, the Indictment charges the defendant with: (1) conspiracy

[1] On December 21, 2016, Odebrecht and Braskem pleaded guilty before this Court to two criminal informations charging conspiracy to violate the anti-bribery provisions of the FCPA in

to violate the FCPA's anti-bribery provisions, in violation of 18 U.S.C. § 371 (Count One); (2) conspiracy to violate the FCPA's books and records provisions and to fail to accurately certify financial reports, in violation of 18 U.S.C. § 371 (Count Two); and (3) conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Three). Ind. ¶¶ 41-48. On November 20, 2019, the defendant was arrested on the Indictment when he flew into John F. Kennedy International Airport in Queens, New York.

II. THE CHARGED CONDUCT ALLEGED IN THE INDICTMENT

A. The Defendant's Involvement in the Creation of the Braskem Slush Fund

The Indictment alleges that from about the beginning of the defendant's tenure as CEO of Braskem in 2002, Odebrecht made corrupt payments to government officials on Braskem's behalf to further Braskem's economic interests with the defendant's knowledge. Ind. ¶ 22. In or about 2006, the defendant learned that Odebrecht would no longer pay bribes on Braskem's behalf unless Braskem contributed funds to make the payments; as a result, the defendant agreed with others at Braskem and Odebrecht to create an off-books illegal slush fund for Braskem, referred to internally as caixa dois ("Caixa 2"). Id. ¶ 23. Money from the Caixa 2 slush fund was transferred to the Division of Structured Operations ("DSO"), a department within Odebrecht that was created and operated for the purpose of carrying out corrupt and other improper transactions in order to assist Odebrecht and Braskem in their efforts to obtain and retain business and economic benefits around the world. Id. ¶¶ 18-20, 23-24.[2] The defendant

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connection with the decades-long bribery scheme. See Docket Nos. 16-CR-643 (Odebrecht) and 16-CR-644 (Braskem).

[2] To conceal the origin of the funds and to distance Odebrecht and its related entities from the final bribe beneficiaries, payments executed by the DSO were layered through multiple levels of offshore entities and banks accounts throughout the world. Ind. ¶ 18.

agreed to have Odebrecht, through the DSO, continue paying bribes to government officials on Braskem's behalf using Braskem's Caixa 2. Id. ¶ 24.

The Indictment also alleges that the defendant instructed an executive in Braskem's finance department to create a system for Braskem to generate funds for Caixa 2. Ind. ¶ 24. To this end, with the defendant's authorization, a consultant paid by Braskem set up three shell companies controlled by Braskem ("Caixa 2 Entities"). The Caixa 2 Entities did not provide any legitimate services to Braskem, but helped to generate Caixa 2 funds by entering into fraudulent contracts with Braskem and causing Braskem and its subsidiaries to make payments on those contracts from Braskem's bank accounts, including in Brazil, New York and Florida, to the Caixa 2 Entities' bank accounts. Id. ¶ 24-25. The fraudulent payments were then transferred from the Caixa 2 Entities' bank accounts to bank accounts controlled by the DSO, and were then used, in part, to bribe government officials on Braskem's behalf. Id. ¶¶ 25-26.

B. Bribe Payments Approved by the Defendant While CEO of Braskem

The Indictment also alleges that the defendant approved specific bribe payments as part of the scheme. In or about 2006, the defendant was instrumental in an effort to retain a contract with Petroleo Brasileiro S.A.— Petrobras ("Petrobras"), a Brazilian state-owned and controlled oil company, for the construction of a polypropylene (plastics) plant (the "Plant"). Ind. ¶ 27. Specifically, the defendant ordered a director of Braskem to negotiate a bribe to Foreign Official 1, who was then an executive and director of Petrobras, and others in exchange for Foreign Official 1's help in retaining the Petrobras contract for Braskem. Id. ¶¶ 27-28. The defendant approved $4.3 million in bribe payments to Foreign Official 1, Foreign Official 2, a then-official in the legislative branch of the Brazilian government, and their affiliated political party. Id. ¶¶ 31-32. Braskem retained the contract, and the majority of these bribes was paid while the defendant was still CEO of Braskem. Id.

In or about 2008, while the defendant was still CEO, Braskem began negotiating a contract to buy naphtha, a raw material used by Braskem, from Petrobras. Ind. ¶ 30. To secure a favorable price for naphtha from Petrobras, the defendant met with Foreign Official 1 to initiate negotiations and discuss bribe payments, and ordered the same Braskem director who negotiated the Plant bribes to initiate bribe negotiations with Foreign Official 2. Id. ¶ 31. The defendant also asked another executive at Braskem to introduce an intermediary associated with Foreign Official 1 to a senior DSO executive. Id.

In or about 2009 through 2011, after the defendant left Braskem and became CEO of Odebrecht ETH, and while he was on Braskem's Board of Directors, Braskem paid Foreign Official 1 and Foreign Official 2 approximately $12 million in bribes through the DSO in exchange for favorable pricing on the naphtha contract. Ind. ¶ 32. Some of the payments to Foreign Official 1 and Foreign Official 2 were made using correspondent bank accounts in New York. Id. The naphtha contract between Petrobras and Braskem was effective from March 1, 2009 to February 28, 2014, and Braskem made the last payment on the contract to Petrobras on or about May 15, 2014. Ind. ¶ 33.

The Indictment also alleges that after he became CEO of ETH, between 2008 and 2012, the defendant communicated with the DSO about a slush fund for ETH and the payment of bribes from that fund. Ind. ¶¶ 39-40. During this period, the defendant also received emails from the DSO indicating that Braskem continued to maintain and use its slush fund. Id. ¶ 39.

C. The Defendant's Falsification and False Certification of Braskem's Books and Records

The Indictment alleges that while he was CEO of Braskem, the defendant agreed with his co-conspirators to falsely record payments diverted to the Caixa 2 Entities as "commissions" payments in Braskem's financial records, and that he did so knowing that the

contracts authorizing these payments were false and that the payments themselves were sent to the DSO and ultimately used, in part, to pay bribes. Ind. ¶ 35. Additionally, in 2007 and 2008, the defendant signed written certifications to Braskem's Annual Report filed with the SEC, which certified that the Annual Reports were accurate, when, in fact, the defendant knew that they contained false information. Id. ¶ 36. Lastly, as part of the scheme, the defendant also personally and falsely certified that he had disclosed any fraud, whether material or not, that involved management and/or other employees at Braskem, when, in fact, he never disclosed the bribery and money laundering scheme. Id. ¶ 37.

ARGUMENT

I. THE DEFENDANT CANNOT MEET HIS HIGH BURDEN TO DISMISS ANY COUNT OF THE INDICTMENT

A. Legal Standard

The law is well-settled that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits." Costello v. United States, 350 U.S. 359, 363 (1956). Accordingly, motions to dismiss indictments are disfavored, and must satisfy a high standard. See United States v. Bustos de la Pava, 268 F.3d 157, 165 (2d Cir. 2001) ("[D]ismissal of an indictment is an extraordinary remedy reserved only for extremely limited circumstances implicating fundamental rights."); United States v. Kerik, 615 F. Supp. 2d 256, 262 (S.D.N.Y. 2009) ("A defendant seeking to dismiss counts under Rule 12 must satisfy a high standard.").

An "indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998) (internal quotations

omitted). The Federal Rules of Criminal Procedure require only that an indictment contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Thus, an indictment that tracks the language of the statute is sufficient to meet these notice requirements. United States v. Yannotti, 541 F.3d 112, 127 (2d Cir. 2008).

On a motion to dismiss, the court must accept all factual allegations in an indictment as true. Alfonso, 143 F.3d at 776-77. The defendant can challenge the lawfulness of a prosecution on purely legal, as opposed to factual, grounds. See United States v. Aleynikov, 676 F.3d 71, 75–76 (2d Cir. 2012) ("[A] federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute."). Thus, a defendant's factual arguments challenging facially valid pleadings do not justify pretrial dismissal of the indictment. The government is entitled to marshal and present its evidence at trial and, if warranted, have its sufficiency tested by a motion for judgment of acquittal. A motion to dismiss a properly pled indictment "confuse[s] standards of pleading with standards of proof." United States v. Reale, No. S4 96 CR. 1069 (DAB), 1997 WL 580778, at *7 (S.D.N.Y. Sept. 17, 1997); United States v. Perez, 575 F.3d 164, 166 (2d Cir. 2009) (defendants had no basis to challenge "sufficiency of the indictment before trial because it met the basic pleading requirements").

B. The Defendant Cannot Meet His High Burden to Dismiss the Indictment

The defendant cannot meet his high burden to show that the "extraordinary remedy" of dismissing any count in the Indictment is appropriate here. Because the Indictment alleges each element and sets forth the time and place of the charged crimes in approximate terms, and because nothing further is required to withstand a motion to dismiss, the defendant's motion should be denied on that basis alone. Tellingly, the defendant neither articulates the applicable legal standard for dismissal in his brief, nor does he grapple directly with his inability

to meet his burden. Instead, the defendant makes a series of arguments that are not cognizable at this stage of the case and fail on the merits.

II. COUNT ONE OF THE INDICTMENT IS NOT DUPLICITOUS

The defendant argues that Count One (conspiracy to violate the anti-bribery provision of FCPA) of the Indictment is impermissibly duplicitous, because it purportedly charges two different conspiracies in one. Br. 5-11. The defendant seeks to dismiss Count One or, in the alternative, asks that it be severed to reflect two different conspiracies. Br. 11. The defendant's arguments are without merit because Count One alleges a single continuous scheme. Simply because the defendant engaged in multiple corrupt acts in furtherance of the decade-long conspiracy does not transform a single conspiracy into multiple ones. Moreover, the defendant's argument is not appropriate at the pretrial stage, before the government has presented its evidence to demonstrate that the acts constitute a single conspiracy.

A. Legal Standard

An indictment is impermissibly duplicitous where (1) it combines two or more distinct crimes into one count, and (2) thereby prejudices the defendant. United States v. Sturdivant, 244 F.3d 71, 75 (2d Cir. 2001) (internal citation omitted). The policy considerations underlying duplicity include: (1) avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another; (2) avoiding the risk that jurors may not have been unanimous as to any one of the crimes charged; (3) providing inadequate notice to the defendant of the charges against him; (4) interfering with appropriate sentencing; and (5) protecting the defendant against double jeopardy in a subsequent prosecution. See United States v. Margiotta, 646 F.2d 729, 732-33 (2d Cir. 1981); see also United States v. Murray, 618 F.2d 892, 896-97 (2d Cir. 1980) (doctrine of duplicity should only be invoked "when an indictment affects the policy consideration" underlying the doctrine). The

remedy for a duplicitous indictment before trial is reformulation rather than dismissal. See United States v. Barrett, No. 10-CR-809 (KAM), 2011 WL 6780901, at *2-5 (E.D.N.Y. Nov. 27, 2011) ("Courts can employ alternatives that are less drastic than dismissal, such as instructing the jury that it must be 'unanimous as to the conduct underlying the conviction.'"); see also United States v. Droms, 566 F.2d 361, 363 n. 1 (2d Cir. 1977) (finding that duplicity "is only a pleading rule [that] would in no event be fatal to the count.").

A conspiracy indictment presents "unique issues" in the duplicity analysis, because "a single agreement may encompass multiple illegal objects." United States v. Aracri, 968 F.2d 1512, 1518 (2d Cir. 1992). The allegation in a single count of a conspiracy to commit several crimes is not duplicitous because the "conspiracy is the crime and that is one, however diverse its objects." Id. Furthermore, "[a]cts that could be charged as separate counts" may be charged "in a single count if those acts could be characterized as part of a single continuing scheme." United States v. Tutino, 883 F.2d 1125, 1141 (2d Cir. 1989).[3]

A related issue is that of multiple conspiracies. The question of whether a charged conspiracy is a single conspiracy or in fact multiple conspiracies "is a question of fact for a properly instructed jury." United States v. Chavez, 549 F.3d 119, 125 (2d Cir. 2008). On the other hand, where only one conspiracy has been alleged and proved, the defendant is not entitled to a multiple conspiracies charge. See United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990). A single conspiracy "is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance." United States v. Geibel, 369 F.3d 682,

[3] The Second Circuit has noted that aggregation may "inure to a defendant's benefit" by limiting a defendant's sentencing exposure, and avoiding a defendant's portrayal as someone accused of multiple crimes. United States v. Olmeda, 461 F.3d 271, 281 (2d Cir. 2006).

689 (2d Cir. 2004). A single charged conspiracy can properly be found by the jury even where there are multiple groups within it, as long as they "share a common goal and depend upon each other and assist each other" and the jury finds that "'each actor was aware of his part in a larger organization where others performed similar roles.'" United States v. Berger, 224 F.3d 107, 115 (2d Cir. 2000) (internal quotation omitted); see also United States v. Jones, 482 F.3d 60, 72 (2d Cir. 2006) ("Changes in members, differences in time periods, and/or shifting emphasis in the location of operations do not necessarily require a finding of more than one conspiracy.").[4] Thus, where a conspiracy count charges one continuing scheme, even where the scheme involves several offenses in the same count, the conspiracy count is properly pled and not duplicitous. See Aracri, 968 F.2d at 1518-19 (rejecting duplicity challenge to conspiracy to defraud the Internal Revenue Service by evading the payment of gasoline taxes using a series of different shell companies and a series of transfers, because the charged conspiracy could be characterized as one continuing scheme that was all for a single purpose—concealing the non-payment of taxes and transferring liability for the same).

B. Count One Properly Charges a Single Conspiracy

As an initial matter, the defendant's argument that the Indictment would prove multiple conspiracies rather than a single conspiracy, and correspondingly that one of these conspiracies is time-barred, is premature because that "is a question of fact for a properly instructed jury." Aracri, 968 F.2d at 1519 (internal quotations omitted); see also United States v. Gabriel, 920 F. Supp. 498, 504 (S.D.N.Y. 1996) (same). Moreover, based on the allegations in the Indictment, it is clear that the defendant's acts were in furtherance of a "single continuous

[4] Even where a multiple conspiracies versus single conspiracy charge is submitted to the jury, it is well settled that the jury should be instructed that it should convict if it finds that one of the proven conspiracies was the conspiracy charged in the indictment and that the defendant was a member of the conspiracy. See, e.g., United States v. Payne, 591 F.3d 46, 63 (2d Cir. 2010).

scheme" to violate the FCPA by agreeing to make bribe payments to government officials in Brazil to secure economic benefits for Braskem, and that the Indictment describes two specific bribes made during the course of that conspiracy. Ind. ¶¶ 41-43; see Berger, 224 F.3d at 115 (a single conspiracy exists where there is a "common goal" and interdependence).

The defendant is charged with agreeing with others to pay bribes to government officials, whenever necessary, to advance Braskem's economic interests. Ind. ¶ 20. The defendant joined the bribery conspiracy in around 2002, when he became Braskem's CEO, and furthered the scheme throughout his tenure as CEO and beyond. Id. ¶¶ 22-34. For example, in 2006, the defendant, as CEO of Braskem, instructed that Braskem create a slush fund (Caixa 2) to pay for its own bribes instead of relying on Odebrecht for the funds. Id. ¶¶ 18-24. The Indictment also provides two examples of bribes that the defendant authorized in furtherance of this scheme: (1) the Plant and (2) the naphtha contract. Id. ¶¶ 27-31. These two bribes are acts that the defendant took in furtherance of the larger conspiracy.

That these two bribes are part of the same scheme is demonstrated by, first, the almost complete overlap in the individuals and entities involved. See, e.g., Berger, 224 F.3d at 115 (schemes that were led by the same core group of community leaders and shared common participants supported the jury's finding of a single conspiracy). Second, the methods employed to effect the bribery scheme were largely the same throughout the course of the conspiracy. See id. (creation of sham organizations, submission of fraudulent documentation, and opening of special bank accounts to conceal fraudulently obtained funds were the "same distinctive methods and means" employed across the "[co-conspirators'] different frauds"); see also United States v. Reid, 475 Fed. App'x. 385, 388 (2d Cir. 2012) (same conspiracy established where evidence

established the same participants using the same methods and means to import drugs by plane into the United States over a course of four years).

Specifically, the defendant discussed both bribes with the same Braskem director, who in turn negotiated both sets of bribe payments. Ind. ¶¶ 28, 31. Fraudulently generated funds from Caixa 2, established at the defendant's direction, were used to pay both bribes using the same DSO structure. Id. ¶¶ 27-32. Lastly, as the defendant concedes, see Br. 8, the same two government officials were recipients of both bribe payments and the illicit payments were made to influence contract negotiations with one entity—Petrobras. Ind. ¶¶ 28-29, 31-32.

As a result, the policy considerations underlying duplicity and warning against uncertainty in jury verdicts are not implicated here since the charged conspiracy involves overlapping modus operandi and actors. See Margiotta, 646 F.2d at 733; see also Murray, 618 F.2d 896-97 (doctrine of duplicity should only be invoked "when an indictment affects the policy consideration"). Given the specificity of the Indictment, including the identification of the Plant and naphtha contract bribes, the defendant is protected from any potential double jeopardy in an unlikely subsequent prosecution. Id.; see also Sturdivant, 244 F.3d at 77 (where the government has conceded that the indictment is non-duplicitous, it would in all likelihood be estopped from asserting that a jury's general verdict was not a final resolution of the crimes charged).

Moreover, the defendant fails to apply the relevant duplicity case law here. Instead, his argument relies almost exclusively on the Second Circuit's decision in United States v. Korfant, 771 F.2d 660 (2d Cir. 1985), and cases interpreting Korfant, see Br. 7-10, which do not address the question of whether a conspiracy improperly combines two distinct crimes into one count. Rather, Korfant provides a framework for analyzing whether successive conspiracy

prosecutions have improperly charged the same scheme in violation of double jeopardy.[5] Yet a finding that successive conspiracy prosecutions do not violate the Korfant test does not necessarily lead to a further finding that those two conspiracies could not have been pled as one continuous scheme. See Machia, 35 F.3d 662, 668 (2d. Cir. 1994) (holding there were two different conspiracies charged because there were "sufficient distinctions between the schemes" in the two indictments such that "the defendants have not been twice put in jeopardy for the same offense," but acknowledging that the conduct alleged in the two indictments "could have been properly pleaded within the parameters of [a single] overarching conspiracy"). Indeed, the defendant does not cite any cases that apply the Korfant factors in the context of a duplicity analysis. Consequently, the Korfant analysis is not determinative of whether Count One properly pleads a single conspiracy.[6]

Even if this Court were to apply the Korfant factors, it is clear that the Indictment charges a single conspiracy. The defendant argues that the "temporal gap[s]" in the negotiations with respect to the bribes for the Plant and naphtha contract are indicative of separate conspiracies. Br. 8-10. However, mere differences in time periods do not make conspiracy counts duplicitous. See Jones, 482 F.3d at 72 (finding that changes in members of conspiracy,

[5] For example, the defendant relies on United States v. Guzman, Br. 7, which conducted a limited analysis of the Korfant factors on appeal in determining whether the defendant was properly charged in two conspiracies as part of RICO. 7 F.App'x 45, 54 (2d Cir 2001). That limited analysis is inapplicable here because it was examining post-conviction and on a full factual record whether there were two properly charged conspiracies, not seeking to determine pretrial whether there was one properly pleaded conspiracy at the motion to dismiss stage.

[6] Moreover, the Korfant analysis is generally conducted based on a full trial record, and not at the motion to dismiss stage. The government is aware of less than a handful of cases that even reference Korfant when conducting a motion to dismiss analysis, see, e.g., In re Copper Antitrust Litigation, 98 F. Supp. 2d 1039 (W.D. Wis. 2000) (referencing one of the Korfant factors in connection with a motion to dismiss a complaint).

differences in time periods and shifting emphasis in the location of operations do not render charge duplicitous); United States v. Nersesian, 824 F.2d 1294, 1300, 1303 (2d Cir. 1987) (a "lapse of time" and shifting phases involving different participants did not "transpose[]" a "large-scale, loosely organized conspiracy" into multiple ones).[7] Moreover, the defendant ignores the clear overlap in time between the bribes negotiated and paid in connection with the Plant and the naptha contract. The bribe payments made in connection with the Plant took place between 2007 and 2008, which overlapped with the time period in which negotiations started for the bribes made in connection with the naphtha contract in 2008. Ind. ¶¶ 28-30.

Similarly, the defendant argues that the overt acts alleged with respect to the Plant and naptha contract bribe payments were different, therefore indicating separate conspiracies. Br. 9. However, this Korfant factor is not dispositive of a multiple conspiracies finding. See United States v. McGowan, 854 F.Supp. 176, 182 (E.D.N.Y. 1994) (because the government has discretion in listing particular overt acts in a charged conspiracy, such acts are "by no means dispositive of whether two conspiracies are distinct"). Contrary to the defendant's contention, the Plant and naphtha contract bribes were overlapping and related. Br. 9. First, the benefit from both bribe payments ran directly to Braskem. See United States v. Tuzman, 301 F. Supp.3d 430 (S.D.N.Y. 2017) (finding indictment sufficiently alleged a "common aim or purpose" because the acts of the defendant and his co-conspirators were approved by and continued to benefit the

[7] United States v. Votrobek, cited by the defendant, Br. 8-9, is inapplicable here both because the court's review in Votrobek was in the double jeopardy context and because there was an absence of overlapping co-conspirators and the defendant "intentionally severed ties" to the first conspiracy one month before the second conspiracy began. 847 F.3d 1335, 1340, n.4 (11th Cir. 2017). Similarly, the defendant's citation to United States v. Thomas, Br. 9, is inapposite because that case, too, was in the double jeopardy context, the central figures changed from one conspiracy to the other, and the means used to achieve the ends of the conspiracy were different. 759 F.2d 659, 660, 666 (11th Cir. 2017).

defendant). Second, because the bribe recipients and target entity (Petrobras) were the same, the fact that Braskem made the Plant bribes necessarily had a direct impact on the negotiations and success of the naphtha contract bribes, establishing a course of conduct that showed the bribe recipients that Braskem intended to fulfill its corrupt promises.

The defendant further argues that Count One of the Indictment is infirm because it inappropriately extends the statute of limitations as to the Plant bribes by combining it with the bribes related to the naphtha contract. Br. 6-8.[8] This argument is similarly unavailing because, as discussed above, the defendant has failed to show that there is more than one conspiracy here. Moreover, such an inquiry is likewise an issue for the jury decide. See United States v. Szur, No. 97-108, 1998 WL 132942, at *11 (S.D.N.Y. March 18, 1998) (a single conspiracy held sufficient to warrant denial of a motion to dismiss and presentation to the jury as a question of fact); United States v. Rajaratnam, 736 F. Supp. 2d 683, 689 (S.D.N.Y. 2010), ("[I]f a jury could find some set of facts that demonstrate a single conspiracy as charged in [a count], dismissal on duplicity grounds is unjustified").

The defendant relies on United States v. Gabriel, where the court held that a conspiracy count that employed "boiler plate" language and included conduct that had "different

[8] In a footnote, the defendant questions the timeliness of the naphtha contract conduct, asserting that the 2014 payments on the contract are insufficient to bring that conduct within statute. Br. 6, n. 8. Here too, the defendant is incorrect. These payments were not "ordinary" or "typical," United States v. Grimm, 738 F.3d 498, 502 (2d Cir. 2013), and constituted the precise benefit that was sought by Braskem in making the bribe payments in the first place. Moreover, the secret system that the defendant authorized and set up during his tenure as CEO to allow for undetected bribe payments, such as the naphtha contract, was still ongoing and the defendant never withdrew from the conspiracy. United States v. Rutigliano, 790 F.3d 389, 401 (2d Cir. 2015) (holding that Grimm was inapplicable because the defendant continued to receive pension payments to which he was not entitled, and co-conspirators engaged in "measures of concealment" and "other corrupt intervention" within the limitation period).

impetus, duration, personnel and purpose," was really two conspiracies improperly "lumped together" into one, time-barring the earlier conduct. 920 F. Supp. 498, 503 (S.D.N.Y. 1996). Nonetheless, the court declined to dismiss the count on grounds of duplicity, holding that the "relevant inquiry" as to whether the count should be dismissed for statute of limitations issues was "not so much whether [it] represents a strained attempt to bind two conspiracies together through conclusory language of unity," but rather whether attempts to cover up after the crime begins to come to light were legally insufficient to extend the scope of the conspiracy under Grunewald.[9] Id. at 505-506.

In contrast, here, the Indictment alleges a single continuing scheme, the objective of which was to secure economic advantages for Braskem, the methods of which were consistent and the participants of which—those negotiating, carrying out and receiving the bribe payments—were overlapping. Gabriel and Grunewald are also distinguishable because the charged conspiracy does not extend its scope with evidence of concealment. See United States v. Israilov, No. 08-CR-1327 (HB), 2009 WL 3642867, at *2 (S.D.N.Y. Nov. 4, 2009) (holding that the single conspiracy was not duplicitous and time-barred, in contrast to Gabriel, even though the conspiracy involved four distinct robberies over the span of years, because the indictment was not "mere boilerplate," did not "boot-strap unrelated criminal conduct" and involved overlapping actors.).

Thus, the defendant's motion to dismiss Count One should be denied.

[9] In Grunewald, the Supreme Court similarly stated that "attempts to cover up after the crime begins to come to light" cannot alone serve to extend the period of the conspiracy. 353 U.S. at 403.

III. THE DEFENDANT'S WITHDRAWAL DEFENSE IS PREMATURE, AND HE HAS NOT PROVED THAT HE WITHDREW FROM THE CONSPIRACY CHARGED IN COUNT TWO

The defendant's claim that Count Two must be dismissed because he withdrew from the false books and records and false certifications conspiracy prior to the beginning of the statute of limitations period fails for two reasons. First, withdrawal from a conspiracy is a question of fact for a jury. Second, the defendant has presented no evidence to prove that he withdrew from the conspiracy "as a matter of law." To the contrary, having played a key role in a scheme to falsify Braskem's books and records in order to divert money from Braskem into a slush fund that was used to pay bribes, the defendant cannot point to an affirmative act that he took to disavow or defeat the conspiracy. In fact, far from disavowing the scheme, the defendant continued to receive payments from Odebrecht's slush fund well into the limitations period.

A. The Defendant's Claim of Withdrawal is a Factual Question for the Jury

Count Two is facially sufficient because it charges at least one overt act within the limitations period. See United States v. Cianchetti, 315 F.2d 584, 589 (2d Cir. 1963) ("By charging an overt act within the five-year period of limitations . . . , [an] indictment was not subject to attack upon its face."). Unable to mount a facial challenge, the defendant alleges that Count Two is nonetheless untimely because he withdrew from the conspiracy before the statute of limitations period. The resolution of this claim requires factual determinations that are not appropriate pretrial.

1. Legal Standard

"A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution." Smith v. United States, 568 U.S. 106, 107 (2013). However, the issue of whether a defendant effectively withdrew from a conspiracy prior to the statute of limitations period is one "of fact for the jury to decide." United States v. Carnesi, 461

F. Supp. 2d 97, 99 (E.D.N.Y. 2006); see also United States v. Leslie, 658 F.3d 140, 143 (2d Cir. 2011) ("it is well-settled that withdrawal from a conspiracy is an affirmative defense for which the defendant bears the burden of proof at trial."); United States v. Burke, No. 09 CR 135 SJ, 2011 WL 2609837, at *5 (E.D.N.Y. July 1, 2011), aff'd, 552 F. App'x 60 (2d Cir. 2014) (finding that whether a defendant's incarceration "constitutes a withdrawal from the alleged conspiracy is 'a fact-dependent question' that is not appropriate for a pretrial motion."); Berger, 22 F. Supp. 2d at 154 (holding that a claim of withdrawal prior to the limitations period was not properly brought as a motion to dismiss).[10]

2. Argument

The defendant does not address the overwhelming legal consensus that withdrawal is not an issue to be resolved pretrial. Instead, he cites a single case from another circuit from approximately twenty years ago where an indictment was dismissed pretrial based on a withdrawal defense where the government did not dispute the defendant's version of the facts. Br. 14-15 (citing United States v. Grimmett (Grimmett II), 236 F.3d 452 (8th Cir. 2001)).

[10] Courts in other circuits have reached the same conclusion. See e.g. United States v. Gardley, No. 2:10-CR-236 (GMN), 2013 WL 4786208, at *3 (D. Nev. Sept. 5, 2013) (citing Smith, 568 U.S. at 108-12, for the proposition that "withdrawal is an affirmative defense to be raised at trial, not in a motion to dismiss"); United States v. Ngige, No. 2:12CR98(JAW), 2013 WL 950689, at *2 (D. Me. Mar. 12, 2013) (relying on Smith, 568 U.S. at 112, and holding that "whether [the defendant] will be able to establish the demanding defense of withdrawal is a matter for a jury to decide upon hearing evidence, not for a judge to decide upon reviewing memoranda"); United States v. Searles, No. 7CR195(CVE), 2009 WL 302306, at *3 (N.D. Okla. Feb. 6, 2009) ("[Defendant] may be entitled to an instruction at trial concerning his alleged withdrawal from the conspiracy, but it would inappropriate [sic] for the Court to resolve this fact issue on a pretrial motion."); United States v. Battle, 473 F. Supp. 2d 1185, 1206 (S.D. Fla. 2006) (holding that defendant's affirmative defense of withdrawal cannot be decided as a matter of law because such a defense "requires scrutiny of all of the pertinent facts in each case, including the scope of the conspiratorial agreement").

Specifically, in United States v. Grimmett (Grimmett I), the court held that where the defendant entered a conditional plea of guilty and the government did not dispute the defendant's version of the facts, the court could determine in a pretrial motion the issue of withdrawal. 150 F.3d 958, 962 (8th Cir. 1998). Critically, the government and defendant "both agreed to have the [withdrawal] issue decided by the magistrate judge upon stipulated facts and the testimony of Grimmett's stepfather." Grimmett II, 236 F.3d at 457 n.3 (Murphy, J., dissenting). The court of appeals stated that "[g]iven the fact intensive nature of conspiracy withdrawal issues, there is always a question whether they should be resolved before or at trial," but "[t]he government does not raise that procedural issue, and we decline to consider it." Id. at 454 n.2.[11]

Unlike in Grimmett, there is no stipulated set of facts here. The defendant asks this Court to find that he has proved that he withdrew from the conspiracy based on two paragraphs in his memorandum describing the circumstances of his removal as Braskem's CEO. Br. 13-14. First, allegations in a memorandum are not facts or evidence. Second, even if the defendant had presented evidence to support his withdrawal defense, the government is entitled to test before a jury the veracity and completeness of any such evidence, the inferences that the defendant claims it warrants, and to present to a jury the government's own witness testimony and documents on the issue of withdrawal.

For example, the defendant alleges that his removal as Braskem's CEO

[11] In reviewing the district court's ruling, the Eighth Circuit concluded the defendant need only establish a prima facie showing of withdrawal before the burden of proof shifted to the Government to rebut that showing. Id. at 454. The defendant tries to employ this same burden-shifting, saying the government must put forth "evidence that Mr. Grubisich either furthered the alleged conspiracy or profited from it within the limitations period." Br. 15. However, the Supreme Court has since soundly rejected such burden-shifting. See Smith, 568 U.S. at 113-14.

"foreclosed his ability to supervise Braskem's accounts and to attest (truthfully or not) to their accuracy." Br. 13. As described more fully below, the defendant's alleged cessation of conspiratorial activity (here, his alleged loss of the ability to supervise Braskem's accounts or attest to their accuracy) is not sufficient to disavow or defeat the conspiracy. Even if it were, however, the government is entitled to offer testimony of witnesses and cross-examine the defendant, should he take the stand, or any witnesses who may testify on his behalf, regarding his knowledge of Braskem's continued falsification of its books and records and his ability to supervise those records after his removal as Braskem's CEO, when he served on Braskem's Board of Directors and continued to work for Odebrecht. Br. 14.

The defendant's motion is also inappropriate for pretrial adjudication because the facts relating to his withdrawal argument are "intermeshed with questions going to the merits" and it is a "premature challenge to the sufficiency of the government's evidence." Gardley, 2013 WL 4786208, at *3. The defendant helped create a system to falsify Braskem's books and records to divert funds from the company to pay bribes. The government intends to present evidence that the defendant knew that the system he was creating was intended to continue following his tenure as CEO and that he did nothing to undo the fraudulent contracts or stop the improper payments and false books and records that he put in motion, authorized and approved.

To decide the defendant's motion before trial would place the Court in the role of factfinder of the ultimate issue—whether and to what extent the defendant was a part of the charged conspiracy; the nature and scope of the conspiracy; what foreseeable results flowed from the defendant's membership in the conspiracy; and any interplay between the evidence bearing on such issues and any evidence of withdrawal. But "the Court cannot make such factual determinations pretrial because there is no federal criminal procedural mechanism that resembles

a motion for summary judgment in the civil context." United States v. Hoskins, 73 F. Supp. 3d 154, 161 (D. Conn. 2014) (internal quotations and citations omitted); see also United States v. Bicoastal Corp., 819 F. Supp. 156, 158 (N.D.N.Y. 1993) (because withdrawal is an affirmative defense "the defendants could escape trial only by a method analogous to civil summary judgment"). In sum, where the defendant raises a defense of withdrawal that is "inevitably bound up with the evidence pertaining to the conspiracy itself, those issues cannot be decided as a matter of law after a short fact-finding hearing." United States v. Stroh, No. 396-CR-139 (AHN), 2000 WL 1833397, at *4 (D. Conn. Nov. 3, 2000).[12]

B. The Defendant Has Not Proffered Any Evidence To Prove His Withdrawal Defense

Not only does the defendant ask this Court to usurp the jury's role and improperly resolve a factual question as a matter of law prior to trial, he does so based on a standard that ignores Supreme Court law and misapplies Second Circuit law. Under the proper legal standard, the defendant has not demonstrated that he withdrew from the conspiracy charged in Count Two.

1. Legal Standard

The Supreme Court held long ago that "having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until [the defendant] does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law." Hyde & Schneider v. United States, 225 U.S. 347, 369 (1912). In United States v. United States Gypsum Co., the Court reaffirmed the Hyde "disavow and defeat" standard and clarified that withdrawal carries no talismanic formula, so

[12] While the government has made plain here that there are many factual disputes that remain to be resolved regarding the defendant's claim of withdrawal, it has neither provided an exhaustive list nor proffered all the evidence it intends to introduce either in its case-in-chief or its rebuttal case, should the defendant raise such a defense.

long as the defendant establishes that he engaged in "affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." 438 U.S. 422, 464–65 (1978). More recently, the Court again reaffirmed Hyde, saying that "'to avert a continuing criminality,' there must be 'affirmative action . . . to disavow or defeat the purpose of the conspiracy.'" Smith, 568 U.S. at 113 (quoting Hyde, 225 U.S. at 369).

"Mere cessation of the conspiratorial activity by the defendant is not sufficient to prove withdrawal." Leslie, 658 F.3d at 143. "The defendant must also show that he performed some act that affirmatively established that he disavowed his criminal association with the conspiracy, either the making of a clean breast to the authorities, or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." Id. (internal quotations omitted). "Establishing individual withdrawal was a burden that rested firmly on the defendant regardless of when the purported withdrawal took place." Smith, 568 U.S. at 110; see also United States v. Diaz, 176 F.3d 52, 98 (2d Cir. 1999) ("Unless a conspirator produces affirmative evidence of withdrawal, his participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators.") (quoting United States v. Greenfield, 44 F.3d 1141, 1150 (2d Cir. 1995). The defendant must prove withdrawal by a preponderance of the evidence. Smith, 568 U.S. at 109-113.

2. Argument

Count Two charges the defendant with agreeing with others to falsify Braskem's books and records in order to divert funds from Braskem into a secret slush fund that was used, in part, to pay bribes to government officials.[13] The defendant played a critical role in this

[13] The defendant erroneously asserts that the "conspiracy here is to falsely certify Braskem's books" to the SEC in 2007 and 2008. Br. at 14. The conspiracy charged in Count

scheme by authorizing the creation of the slush fund, the generation of money for the slush fund through fake contracts, falsifying accounting for those payments in Braskem's financial records as "commissions," and further concealing the scheme through false certifications to the SEC. Id. at ¶¶ 24, 25, 35, 36-37. Critically, the defendant knew that the false books and records and bribery schemes would continue (which, in fact, they did) after his tenure as Braskem's CEO. See Ind. ¶ 39. Having been part of this scheme, the question is not, as the defendant asserts, whether he "can be charged with being a member of a conspiracy . . . when he has left the company," Br. 12, but rather, whether he performed some affirmative act "to disavow or defeat" the charged conspiracy, see United States v. Mandell, 752 F.3d 544, 552 (2d Cir. 2014). The defendant has failed to show any such affirmative acts.

The defendant argues that his removal as Braskem's CEO constituted withdrawal because his co-conspirators knew of his removal, it "foreclosed his ability to supervise Braskem's accounts and to attest (truthfully or not) to their accuracy," and he "was not compensated by Braskem after June 2008." Br. 13-14. This argument fails because a defendant's alleged inability to continue actively contributing to the conspiracy does not necessarily constitute withdrawal. See Leslie, 658 F.3d at 144, (holding no withdrawal due to incarceration where the defendant devised the scheme, executed it, and taught it to others who continued the scheme after his incarceration, and where the defendant "never told the authorities how to stop the conspiracy" or that he had abandoned the conspiracy).

Like in Leslie, the defendant's removal as Braskem's CEO does not constitute withdrawal as a matter of law. Moreover, the defendant has not pointed to any other evidence of

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Two is broader and includes the agreement to falsify Braskem's books and records by accounting for the diverted funds as "commissions" to shell companies.

withdrawal like informing the authorities of the conspiracy, and he does not explain how the public nature of his removal informed his co-conspirators that he had abandoned the conspiracy when he still served on Braskem's Board of Directors and continued to participate in the larger Odebrecht diversion and bribery scheme, alongside Braskem executives. Indeed, the defendant did not even separate from Braskem and Odebrecht, and continued working for the very same companies engaged in the very same illegal conspiracies.

To escape this conclusion, the defendant cites Berger, 224 F.3d 107 and United States v. Nerlinger, 862 F.2d 967 (2d Cir. 1988). However, neither of these two cases confront the question here: whether removal from a particular position at a corporation through and for which the alleged conspiracy was conducted—without more—can constitute the affirmative step required to prove withdrawal from a conspiracy, even though the defendant continued working for an affiliate of that corporation. In any event, the defendant does not meet the factors enumerated in those cases.

The defendant claims that Berger stands for the proposition that "departure from a company involved in criminal activity 'plus the absence of any subsequent activity in furtherance of the conspiracy' or the receipt of benefits from the conspiracy establishes withdrawal." Br. 12. Yet the defendant misstates the test outlined in Berger, which provides that "resignation from a criminal enterprise, standing alone, does not constitute withdrawal as a matter of law." 224 F.3d at 118 (emphasis added).[14] The court in Berger required that the defendant (1) totally sever ties with the enterprise, and (2) not act in furtherance of the conspiracy or "receive benefits from the conspiracy's operations." Id. at 119 (internal quotation omitted).

[14] In Berger, the defendant resigned not from a legitimate business organization at which criminal conduct was occurring, but rather from a fictional entity that was the vehicle for the fraudulent scheme. Id. at 118.

The defendant here does not meet any of the elements set out in Berger. First, as the defendant admits in his brief, he did not resign from Braskem, but was removed from his position. See Br. 12, 13. Therefore, his removal does not qualify as a voluntary, affirmative act that he took to abandon the conspiracy. Second, the Berger test applies to wholly criminal enterprises, and the defendant has proffered no evidence that Braskem itself was a criminal enterprise as opposed to a legitimate corporation engaged in criminal activity. Indeed, Braskem pled guilty in connection with this scheme but continues to operate a legitimate business. Third, as the defendant admits, far from severing ties with Braskem, he served on Braskem's Board of Directors and took a position as CEO of another Odebrecht entity where he received communications from the DSO regarding the use of slush funds. See Br. 14; Ind. ¶ 39. Fourth, although the defendant alleges that he "was not compensated by Braskem after June 2008," Br. 14, the government intends to present evidence at trial that the defendant continued to participate in a stock incentive plan after his removal as the company's CEO, and later continued receiving payments from Odebrecht out of the very same slush funds used to pay bribes.

Similarly, the defendant's reliance on Nerlinger is misplaced. In that case, the defendant played a narrow role in the conspiracy. He opened an account with his employer, a commodity-futures trading firm, that was used to receive profits of fraudulent trades. Nerlinger, 862 F.2d at 970. The defendant left his employer and closed the account prior to the beginning of the limitations period, and the conspiracy continued using other unrelated accounts of co-conspirators and from which the defendant received no proceeds. Id. Even so, in holding that the defendant withdrew from the conspiracy, the court stated that the defendant's resignation, standing alone, was insufficient to disavow the scheme. Id. at 974 ("The only question is whether his closing of the account constitutes an 'affirmative action' in light of the rules that

mere cessation of conspiratorial activity is not enough"). However, once the defendant closed the account, which constituted the extent of his participation in the conspiracy, the continuity of the scheme depended on the acts of other co-conspirators to funnel new trades through unrelated accounts, and the court found that the defendant could not be liable for acts that were beyond his role in the conspiracy. Id. at 974. The defendant here has not pointed to any "affirmative action" that he took to undo what he had done (like Nerlinger did when he closed the account that was being used in furtherance of the scheme). He did not terminate any of the fraudulent contracts that he had authorized to divert funds from Braskem, he did not correct any of the prior false records or financial statements he caused, nor did he take any other steps to dismantle the system for diverting funds and falsifying Braskem's books and records.

The remaining cases that the defendant relies on also fail to rescue his withdrawal claim. See Greenfield, 44 F.3d at 1149-50 (finding that if the defendant explained to his co-conspirator during a meeting that he no longer wished to be part of the conspiracy, that would constitute withdrawal); United States v. Steele, 685 F.2d 793, 804 (3d Cir. 1982) (applying a now-overruled withdrawal standard to find that the government had not brought forward evidence to carry its burden to disprove withdrawal).

Even assuming withdrawal can be decided as a pretrial motion, the defendant has not proved that his "withdrawal did occur and is not simply being invented ex post," Greenfield, 44 F.3d at 1150. Accordingly, the defendant's motion to dismiss Count Two should be denied.

IV. COUNT THREE IS PROPERLY PLED AND ALL ARGUMENTS TO DISMISS COUNT THREE FAIL

Count Three of the Indictment, which charges conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), predicated on an agreement to engage in acts that would violate 18 U.S.C. § 1956(a)(2)(A), is sufficient as a matter of law because it tracks the

language of the statute and sets forth the dates and times of the charged crime. This is all that is required to "withstand a motion to dismiss," and the Court can and should deny the defendant's motion on this basis alone. Yannotti, 541 F.3d at 127; United States v. Flaharty, 295 F.3d 182, 198 (2d Cir. 2002); United States v. Bernstein, 533 F.2d 775, 786 (2d. Cir. 1976). The defendant's multiple arguments for dismissal of Count Three are unavailing for the additional reasons set forth below.

A. There is No Legal Requirement That the Government Plead or Prove the Defendant's Knowledge of Money Transfers in Furtherance of the Conspiracy

The defendant seeks dismissal of Count Three because the "Indictment fails to plead that [the defendant] knew that any funds would be moving to or from the United States." Br. 19 (emphasis added). First, the Indictment sufficiently alleges a money laundering conspiracy. Second, the government does not need to prove at trial that the defendant knew that funds would be moving to or from the United States, as this is a jurisdictional element that does not require knowledge. Third, even if such proof were required, the defendant's motion would still fail under the heightened standard of a motion to dismiss.

The Second Circuit has rejected the premise of the defendant's argument—that an indictment, in addition to tracking the charged statute, must contain certain words consistent with a defendant's proposed jury instructions. Addressing a claim that a conviction for possession of a firearm by an alien unlawfully in the United States, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2), should be reversed because the indictment failed to allege knowledge of being unlawfully in the United States, which the Supreme Court had recently held was required for conviction, the Second Circuit observed that "it is difficult to understand how an indictment that tracks the exact language of the statute, and that expressly charges that the defendant violated it, fails on its face to charge that the defendant committed a federal crime." United States v. Balde,

943 F.3d 73, 90 (2d Cir. 2019) (emphasis in original);[15] see also United States v. Bout, 731 F.3d 233, 240-41 (2d Cir. 2013) (rejecting argument that indictment was insufficient for failure to use language specific to the concept of "murder," where indictment tracked language of the statute). Thus, even if the defendant must be shown at trial to have knowledge that the charged monetary transfers traveled to, from, and/or through the United States, where the indictment, as here, tracks the language of the statute, there is no requirement that the indictment allege such knowledge.

Moreover, the defendant's contention that the government must prove such knowledge is wrong. On the contrary, as the defendant concedes, Br. 16, defendants are "not required to have knowledge of jurisdictional facts." United States v. Feola, 420 U.S. 671, 676 n.9 (1975) ("the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute"); see also United States v. Epskamp, 832 F.3d 154, 166-67 (2d Cir. 2016) (holding that the statute then codified at 21 U.S.C. § 959(b), which prohibits possession of a controlled substance on an aircraft "owned by a United States citizen or registered in the United States," does not require evidence of the defendant's knowledge about the aircraft's registration); United States v. Allen, 788 F.3d 61, 69 (2d Cir. 2015) (holding that 18 U.S.C. § 1855, which prohibits arson of "lands owned or leased by or under the partial, concurrent, or exclusive jurisdiction of the United States," does not require knowledge that the lands are federal); United States v. Blackmon, 839 F.2d 900, 908-10 (2d Cir. 1988) (holding, for both substantive wire fraud and wire fraud

[15] Although the defendant in Balde framed his argument as going to the jurisdiction of the court, the argument raised was the same advanced here—that the failure to include language reflecting a (potential) case law interpretation of a statute in addition to tracking the statute "means that the indictment does not charge a federal crime." 943 F.3d at 88.

conspiracy, that the requirement that a wire travel interstate or internationally is a "jurisdictional element" that "does not include a mens rea requirement"); United States v. Jennings, 471 F.2d 1310, 1312 (2d Cir. 1973) (holding that while the federal anti-bribery statute, codified at 18 U.S.C. § 201(b)(1), requires that "the official [bribed] must be a federal official . . . , nothing in the statute requires knowledge of this fact, which we perceive as a jurisdictional prerequisite rather than as a scienter requirement").

The government is no more required to prove at trial that the defendant knew that charged funds were transmitted to, from and/or through the United States than the government has to prove that a defendant in a wire fraud case knew that a wire traveled in interstate or internationally. See Blackmon, 839 F.2d at 908-910. The defendant cites no authority to the contrary.[16]

Instead, the defendant claims that the statutory requirement that a monetary transfer be to, from, and/or through the United States is a so-called "substantive" element requiring a showing of mens rea because "the international transfer of money is the very 'harm or evil' that the law seeks to prevent." Br. 17. The plain language of the statute, case law and settled jury instructions do not support this novel assertion. The statute reads:

> Whosoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument from a place in the United States to a place outside the United States or to a place in the United States from or through a place outside the

[16] That Count Three charges a conspiracy rather than a substantive offense does not alter the analysis. See Blackmon, 839 F.2d at 910 ("where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense" (quoting Feola, 420 U.S. at 696)); see also United States v. LeFaivre, 507 F.2d 1288, 1299 (4th Cir. 1974) ("[t]he jurisdictional element should be viewed for purposes of the conspiracy count exactly as we view it for purposes of the substantive offense—simply as a jurisdictional peg on which to hang the federal prosecution").

> United States with the intent to promote the carrying on of specified unlawful activity, shall be punished.

18 U.S.C. § 1956(a)(2)(A). Because nothing in this language even suggests that a defendant must have known that the transfer would be to, from and/or through the United States, no such meaning may be reasonably inferred from it. See United States v. Escalera, 957 F.3d 122, 131 (2d Cir. 2020) (noting that "when the statute itself provides no indication that Congress intended for the offense to require knowledge of a jurisdictional element," courts generally conclude that no such requirement exists); see also United States v. Albertini, 472 U.S. 675, 680 (1985) (explaining that statutory interpretation "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (internal quotation omitted)); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'") (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))). Nor do the Sand pattern jury instructions for this statute include such knowledge as an element. Leonard B. Sand et al., Modern Federal Jury Instructions (Nov. 1996).

Nor have courts in this circuit that have recently instructed juries on this statute included such knowledge as an element. See, e.g., United States v. Chi Ping Ho, No. 17-CR-779 (S.D.N.Y. Dec. 4, 2018), ECF No. 214, Jury Instructions at 1098-1102; United States v. Lawrence Hoskins, 12-CR-238 (D. Conn. Nov. 6, 2019), ECF No. 601, Jury Instructions at 1269-78; United States v. Jean Boustani, 18-CR-681 (E.D.N.Y. Nov. 22, 2019), Trial Transcript, Jury Instructions at 4876-4881; United States v. Donville Inniss, 18-CR-134 (E.D.N.Y. Jan. 16, 2020), ECF No. 99, at 34-36. To the government's knowledge, no court has. For good reason—it plainly is not the "harm or evil" that the statute "seeks to prevent." The harm or evil is promoting a specified unlawful activity—here, a massive bribery scheme that violated both

American and Brazilian law. It makes no more sense to say that the harm or evil are the transfers themselves, which are otherwise lawful, rather than the unlawful scheme to promote bribery, than it would be say that the harm or evil in a wire fraud case is the fact that the wire happened to travel interstate or internationally.[17]

Finally, even if the government were required both to plead and to prove that the defendant "knew that any funds would be moving to or from the United States," Br. 19, the Indictment still must not be dismissed because it details the involvement of the defendant in a complex, years-long bribery scheme in which funds, usually U.S. dollars, were funneled at the defendant's direction from Braskem, a company listed on the New York Stock Exchange—including through Braskem bank accounts in New York and Florida—through a series of offshore shell companies to the DSO, and then through another layer of offshore shell companies to the bribe recipients. That is sufficient, even assuming arguendo that the government has the burden that the defendant asserts it has. See Alfonso, 143 F.3d at 776-77. The defendant is not entitled to dismissal because he believes the government "could not prove" these or other alleged facts at trial, Br. 20. Perez, 575 F.3d at 166.

B. Count Three Is Not an Extraterritorial Application of the Money Laundering Statute

The defendant contends that Count Three is an "impermissible extraterritorial application of the money laundering statute" and must be dismissed because, he alleges, the

[17] In arguing to the contrary, the defendant cites a single excerpt from the legislative history of the statute. Br. 17. But, as here, where "the statutory language is unambiguous and the statutory scheme is coherent and consistent," the Court should not "resort to legislative history." Matal v. Tam, 137 S.Ct. 1744, 1756 (2017) (internal quotation marks omitted); see also, e.g., United States v. Albertini, 472 U.S. 675, 680 (1985) ("[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from [a statute's] language." (internal quotation marks omitted)). Moreover, the defendant's excerpt says nothing about mens rea.

charged conspiracy "was hatched by Brazilians in Brazil" and therefore the "agreement" to enter into the conspiracy occurred entirely in Brazil, such that no "conduct" occurred in the United States. Br. 20. This argument fails for multiple reasons.

First, Count Three does not constitute an extraterritorial application of the money laundering statute, as the government clearly alleges that money was transferred to, from and/or through the United States in furtherance of the charged conspiracy. To the extent that the defendant seeks to challenge the sufficiency of the government's evidence of transfers to, from and/or through the United States, such an argument is not cognizable on a motion to dismiss. Perez, 575 F.3d at 166; see also United States v. Bout, No. 08 Cr. 365 (SAS), 2011 WL 2693720, at *5 n.73 (S.D.N.Y. July 11, 2011) ("To the extent [that the defendant's] challenges are to the sufficiency of the Government's evidence to satisfy—as opposed to the sufficiency of the Indictment to allege—the federal elements of the crimes charged, those arguments are not appropriately decided on a motion to dismiss." (internal quotation omitted; emphases in original)), aff'd, 731 F.3d 233 (2d Cir. 2013).

Even if the defendant was correct that Count Three constitutes an extraterritorial application of the money laundering statute, however, the plain language of the statute permits such application "if the conduct occurs in part in the United States." 18 U.S.C. § 1956(f). The defendant admits that the statute contains this provision, but makes a convoluted argument that the "conduct prohibited" for a money laundering conspiracy is the "conspiratorial agreement itself," and not any subsequent acts in furtherance of that conspiracy, no matter how serious and no matter where they occurred, because the statute does not require the government to prove an overt act for a defendant to be found guilty. Br. 20. But simply because it is legally sufficient to prove the existence of a money laundering conspiracy based on an initial "conspiratorial

agreement" alone, without overt acts, does not mean that the conspiratorial agreement did not continue and include conduct in the United States, or that the government is precluded from proving that it did continue.

Moreover, the defendant's argument not only has no basis in the statute and basic principles of law but would also lead to perverse and absurd results. If the radical proposition for which the defendant advocates were accepted, where two people enter into a conspiracy to commit money laundering pursuant to 18 U.S.C. § 1956(a)(2)(A) while outside of the United States, there will never be jurisdiction over such a conspiracy—even if funds are, in the very next instant, transferred to, from and/or through the United States in furtherance of that conspiracy, and even if, in addition, other acts take place in the United States, no matter how serious or numerous—because the only "conduct" that purportedly matters, according to the defendant, is the initial agreement. But the purpose of the money laundering statute, "to criminalize the use of United States financial institutions as clearinghouses for criminal money laundering and conversion into United States currency," could not be achieved if that were the law. United States v. All Assets Held at Bank Julius Baer & Co., Ltd., 571 F. Supp. 2d 1, 13 (D.D.C. 2008). In short, the defendant's position leads to an "absurd result," without any basis in the statute, and must be rejected. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982); see also, e.g., United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000). The defendant cites no law to support his position or reason why this Court should presume that Congress so intended.

C. Count Three Should Not Be Dismissed Based on Duplicity and Withdrawal

The defendant's assertion that the "same defects that doom Counts One and Two are fatal to Count Three" fails because he misunderstands the charged money laundering conspiracy. Br. 15-16. The defendant mistakenly presumes that Count Three charges him with agreeing with others to transfer money to, from, and/or through the United States to promote "the

conduct alleged in Counts One and Two." See Br. 15. But Count Three alleges that the international transfers promoted substantive violations of the FCPA, not the conspiracies to violate the FCPA that were alleged in Counts One and Two. Compare Ind. ¶ 48 ("to promote felony violations of 15 U.S.C. §§ 78dd-1, 78m(b)(5)") with Ind. ¶¶ 41-46 (charging violations of 18 U.S.C. § 371). Withdrawal is a not a defense to substantive charges and so the defendant's argument regarding withdrawal from the underlying FCPA violation is not relevant for Count Three. See United States v. Arocena, 778 F.2d 943, 948 n.3 (2d Cir. 1985); United States v. Hoskins, No. 3:12CR238 (JBA), 2019 WL 3996675, at *8 (D. Conn. Aug. 23, 2019). Similarly, the defendant's argument regarding duplicity is also inapplicable because it is permissible to charge international money laundering with the intent to promote multiple felony violations. Moreover, even if duplicity and withdrawal were a defense to Count Three, as discussed above, the defendant's claims that Count One is duplicitous and that he withdrew from the books and records conspiracy are meritless. Thus, the Court should deny the defendant's motion to dismiss Count Three based on duplicity and withdrawal.

D. Count Three Does Not Violate Due Process

Finally, the defendant contends that Count Three is a violation of due process because he could not "reasonably anticipate[] being haled into court in this country" on a money laundering charge. Br. 22-25. First, as discussed above, Count Three is not an extraterritorial application of the money laundering statute. Even if it were, "cases in which even the extraterritorial application of a federal criminal statute has been 'actually deemed a due process violation' are exceedingly rare, and a defendant's burden 'is a heavy one.'" United States v. Hayes, 99 F. Supp. 3d 409, 422 (S.D.N.Y. 2015) (report and recommendation) (quoting United States v. Ali, 718 F.3d 929, 944 n.7 (D.C. Cir. 2013)), aff'd, 118 F. Supp. 3d 620, 628-29 (S.D.N.Y. 2015). The defendant cannot meet his heavy burden here. Extraterritorial application

of the money laundering statute is not "unreasonable," and does not violate the Due Process Clause, because "Congress expressly commanded such an application." United States v. Hawit, No. 15 Cr. 252 (PKC), 2017 WL 663542, at *9 (E.D.N.Y. Feb. 17, 2017); see also United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (extraterritorial application of statutes, including money laundering, with explicit extraterritoriality provisions did not violate due process). Indeed, such prosecutions are common.

The defendant cites no case where a court has found the extraterritorial application of the money laundering statute constituted a violation of due process. Instead, the defendant discusses at length a district court case, United States v. Sidorenko, 102 F. Supp. 3d 1124 (N.D. Cal. 2015), which is inapposite. The defendants in Sidorenko were not charged with violations of the money laundering statute, which—as discussed above—contains express provisions permitting extraterritorial application; instead, they were charged with violations of statutes prohibiting wire fraud and the solicitation of bribes involving a federal program, neither of which contains express provisions permitting extraterritorial application. Id. at 1125-26. In addition, the government in Sidorenko conceded that no conduct in furtherance of the scheme occurred in the United States. Id. at 1133. Here, by contrast, the government has expressly alleged that the defendant worked for a U.S. publicly traded company, and that wires in furtherance of the money laundering scheme were transferred to, from and/or through the United States.

Finally, the defendant argues that he did not have "fair warning" that his conduct could subject him to criminal liability because the specific crime charged in Count Three, promotional money laundering, is a "peculiarly American offense" that does not require that the transaction involve the proceeds of a crime. Br. 25. The defendant further asserts that because

"the Indictment does not suggest that the money allegedly transferred here was in any way 'dirty,'" the defendant could have had no idea that he could be charged with this particular crime. Id. This argument is baseless. As the Second Circuit has explained, "fair warning does not require that [] defendants understand that they could be subject to criminal prosecution in the United States so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." Al Kassar, 660 F.3d at 119.

As alleged, and as the government expects to prove at trial, the defendant clearly understood the specified unlawful activity on which the money laundering charge is predicated—a massive scheme to generate off-book funds using fake contracts, falsify Braskem's books and records and falsely certify those records, funnel those funds to a secret "bribe department" through a series of offshore accounts, and then further funnel those funds through a second set of offshore accounts to the foreign officials, who received payments in exchange for helping the defendant's company obtain or retain business—was criminal. Given that the money laundering scheme was "self-evidently criminal," the defendant was not "ensnared by a trap laid by the unwary," and there is nothing unfair about the fact that he now must face prosecution for that criminal scheme in the United States. Id.

V. THE DEFENDANT HAS NOT DEMONSTRATED A NEED FOR A BILL OF PARTICULARS

Although the defendant has an Indictment with a detailed factual recitation, well-organized discovery of over ten million documents that provides additional information regarding the factual basis for the charges, detailed indices to help the defendant navigate the voluminous discovery and government disclosures with additional information about the charges, the defendant claims that he cannot "adequately defend this case" without a bill of particulars. Br. 26. The defendant requests particulars regarding: (1) whether "the government

is accusing him of participating in any bribery schemes other than the Polypropylene Plant Scheme and the Naphtha Contract Scheme," (2) details of these "other" alleged bribery schemes, including the bribe recipients, the individuals involved in bribing the officials, the specific acts, omissions, or decisions sought to be influenced, the payments made in exchange, bank accounts used, and dates of the relevant events; (3) (i) the bribery scheme that each transfer of funds identified in Counts One and Two relates to; (ii) the foreign officials who received the monies; and (iii) the routing of the payments, including the U.S. bank, if any, through which the funds were transferred; (4) the release of funds referenced in paragraph 40 of the Indictment; and (5) any other money transactions made in furtherance of the money laundering conspiracy and indicating which, if any, were routed through the United States. Br. 26-29. These demands seek an inappropriate use for a bill of particulars and should be denied in their entirety.

A. Legal Standard

A bill of particulars, under Fed. R. Crim. P. 7(f), is appropriate only when the indictment is too vague to inform the defendant of the nature of the charges to allow the preparation of a defense, avoid unfair surprise, and preclude double jeopardy. See United States v. Chen, 378 F.3d 151, 163 (2d Cir. 2004). Therefore, the question is not whether the information would be helpful to the defendant, but rather whether the information is necessary. United States v. Gotti, 784 F. Supp. 1017, 1019 (E.D.N.Y. 1992) (bill of particulars is necessary only if "directed to curing defects in an indictment; that is [only if it] clarifies the charges against a defendant") (emphasis in original). If the information sought by the defendant is provided in the indictment or through some other means, such as discovery, a bill of particulars is not warranted. See Chen, 378 F.3d at 163; United States v. Walsh, 194 F.3d 37, 47 (2d Cir. 1999).

Moreover, "[a] bill of particulars is not designed to: obtain the government's evidence; restrict the government's evidence prior to trial; assist the defendant's investigation;

obtain the precise way in which the government intends to prove its case; interpret its evidence for the defendant; or disclose its legal theory." United States v. Bellomo, 263 F. Supp. 2d 561, 580 (E.D.N.Y. 2003); see also United States v. Perryman, 881 F. Supp. 2d 427, 430-31 (S.D.N.Y. 2012) (holding that a bill of particulars "is not a discovery device and should not function to disclose evidence, witnesses, and legal theories to be offered by the Government at trial or as a general investigative tool for the defense." (internal quotes omitted)). "Because a bill of particulars confines the Government's proof to particulars furnished, requests for a bill of particulars should not be granted where the consequence would be to restrict unduly the Government's ability to present its case." Feola, 651 F. Supp. 1068, 1132 (S.D.N.Y. 1987).

B. Argument

The 23-page, 52-paragraph "speaking" Indictment and the government's voluminous discovery and additional disclosures provide the defendant with the necessary information to apprise him of the charges against him, prepare his defense, avoid unfair surprise and preclude double jeopardy. Moreover, the defendant fails to provide sufficient justification for the particulars he seeks.

1. The Defendant Has Sufficient Notice of the Pending Charges

The Indictment provides the defendant with extensive information about the genesis, structure and operation of the charged scheme, including examples of how the defendant furthered the schemes and conspiracies charged in the Indictments. See Ind. ¶ 17-40 (detailing his involvement in the creation of Caixa 2; his use of Caixa 2 to pay bribes to government officials; and his role in falsifying Braskem's books and records and providing false certifications to the SEC to conceal the bribery and money laundering schemes).

In addition to the detailed and lengthy Indictment, the government has produced in discovery over 10 million documents along with detailed indices describing and cataloguing those

documents, allowing the defendant to efficiently locate documents and determine how they relate to the charges. By way of example, the discovery included:

- statements of facts that accompanied Braskem and Odebrecht's corporate resolutions in Brazil, along with supporting documents[18] detailing the bribe payments made on behalf of Braskem, including dates, amounts and beneficiaries
- documents, including emails, relating to and/or belonging to the defendant and each of his co-conspirators;
- reports created by Braskem's financial analysts summarizing Caixa 2, general ledgers and records from the entities used to funnel money to officials; and
- a copy of "Drousys," the server that the DSO used to communicate and document the money laundering and bribery scheme.

The government also provided additional information in response to the defendant's requests, referencing the relevant index and Bates numbers, where appropriate, including:

- The names of all the co-conspirators referenced in the Indictment;
- The names of the foreign officials referenced in the Indictment, including the bank account name and number used to make transfers to one foreign official;
- The names of the Caixa 2 entities used in connection with the slush fund; and
- The bank account numbers of Braskem's U.S.-based bank accounts.

Given the amount and kind of information provided to the defendant, a bill of particulars is not warranted.

2. The Defendant Fails to Provide Proper Justification for His Requests

The defendant is charged with conspiracy to violate the FCPA and conspiracy to commit money laundering, which offenses do not require the government to establish the date,

[18] As the defendant notes, the instant bribery scheme has been litigated in Brazil, as well as in civil court in the Southern District of New York. The defendant has access to those publicly available court documents relating to the bribery scheme and co-conspirator statements; he even quotes Co-Conspirator 2's naphta related testimony in Brazil. Br. 4.

time and circumstances of each bribe or money laundering transaction over the charged period. United States v. Urso, 369 F. Supp. 2d 254, 272 (E.D.N.Y. 2005) ("As a general rule, a defendant is not entitled to receive details of the government's conspiracy allegations in a bill of particulars."). Instead, the government must prove only that the defendant agreed with others to commit the charged crimes. The government properly alleged overt acts for the two FCPA conspiracies and is under no obligation to disclose more. See United States v. Carroll, 510 F.2d 507, 509 (2d Cir. 1975) ("There is no general requirement that the government disclose in a bill of particulars all the overt acts it will prove in establishing a conspiracy charge."). As the defendant acknowledges, the money laundering conspiracy statute does not require the government to prove an overt act. Br. 21.

The defendant fails to cite any precedent in which a court granted a bill of particulars under circumstances similar to the facts here. This is not surprising, because, "as applied to a charge of conspiracy, . . . the view virtually universally held is that the defendant is not entitled to particulars regarding the formation of the conspiracy; [the] exact time and place of overt acts and the names and addresses of persons present; the details concerning how and when the conspiracy was formed or when each participant entered the conspiracy." United States v. Upton, 856 F. Supp. 727, 753 (E.D.N.Y. 1994); Feola, 651 F. Supp. at 1132 (collecting cases). Thus, each of the defendant's requests are unsupported because, by its nature, a conspiracy charge does not require more than what the Indictment has already alleged. Nor does the FCPA charge in the Indictment require the government to identify the officials or intermediaries who received or facilitated the bribe payments or even to prove that a payment took place, let alone to trace the bribe payment to a particular foreign official.

The FCPA prohibits, among other things, certain categories of individuals and entities from offering, paying, promising to pay or authorizing bribes to foreign officials for the purpose of influencing them to take or omit certain acts, and securing an improper advantage in obtaining or retaining business for, or directing business to, any person. 15 U.S.C. § 78dd-1 et seq. "By its plain terms, '[t]he language of the statute does not appear to require that the identity of the foreign official involved be pled with specificity.'" S.E.C. v. Straub, 921 F. Supp. 2d. 244, 265 (S.D.N.Y. 2013) (quoting SEC v. Jackson, 908 F. Supp. 2d 834, 849 (S.D.N.Y. 2012)). Any such requirement "would be at odds with the statutory scheme, which targets actions (such as making an 'offer' or 'promise') without requiring that the 'foreign official' accept the offer or reveal his specific identity to the payor." Id. (citing 15 U.S.C. § 78dd–1(a)). In Straub, the court denied a motion to dismiss the SEC's complaint in an FCPA enforcement action, rejecting the defendant's argument that the complaint was deficient for not alleging sufficient facts to establish that the intended bribe recipients were foreign officials under the FCPA. Id.[19] The court determined that the FCPA contains "no requirement that the 'foreign official' be specifically named and that reading such a requirement into the FCPA would be contrary to the statutory scheme." Id.[20]

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[19] The government recognizes that Straub is a civil case that did not implicate pleading requirements under the Federal Rule of Criminal Procedure or the constitutional protections that flow to criminal defendants facing federal felony charges. That said, Straub's analysis is rooted in the statutory scheme of the FCPA, which applies equally here.

[20] The same rationale and statutory interpretation governed the court's decision in Jackson, which rejected similar defense arguments attacking an SEC complaint that failed to identify the foreign official who received the bribe payments. 908 F. Supp. 2d at 850 ("[I]t would be perverse to read into the statute a requirement that a defendant know precisely which government official, or which level of government official, would be targeted by his agent; a defendant could simply avoid liability by ensuring that his agent never told him which official was being targeted and what precise action the official took in exchange for the bribe.")

Here, the Indictment alleges that the defendant agreed with others to pay bribes to foreign officials in exchange for favorable treatment for Braskem, and then specifically details the naphtha and the Plant contracts as two examples of bribes in execution of the scheme. For those two bribes, the Indictment then sets forth the dollar value, names of the officials bribed, U.S. nexus and overt acts within the statute of limitations. The defendant does not and cannot show how that sort of specific, detailed information is insufficient to understand the nature of the FCPA charge against him, nor does he articulate any legal basis that would entitle him to additional information.

Instead, the defendant relies on a single domestic bribery case, United States v. Murgio, in support of his sweeping request for details as to every bribe payment made out of Caixa 2 during the course of the conspiracy. Br. 28.[21] In Murgio, three defendants were charged with a substantive count of bribing a bank officer, but the indictment did not provide details as to the precise value and particulars of the bribes paid by one of the defendants, Lebedev, and the government suggested in briefing that Lebedev did not directly pay bribes. 209 F. Supp. 3d 698, 723 (S.D.N.Y. 2016). The court therefore ordered the government to either detail the particulars of any bribes paid by Lebedev or to confirm that none existed, so that Lebedev would know if the government's theory as to him was based on aider and abettor liability. Id. In stark contrast,

[21] The defendant also cites United States v. Bin Laden, 92 F. Supp. 2d 225 (S.D.N.Y. 2000) for the proposition that voluminous discovery is no substitute for a bill of particulars. Br. 27. Bin Laden was a terrorism case that involved "15 named defendants with 267 discrete criminal offenses, charged certain defendants with 229 counts of murder, covered a period of nearly ten years, and alleged 144 overt acts in various countries that covered an unusually vast geographical scope." United States v. Wedd, No. 15-CR-616 (KBF), 2016 WL 1055737, at *4 (S.D.N.Y. Mar. 10, 2016) (rejecting defendant's attempt to analogize an indictment charging conspiracy to commit wire fraud and money laundering to the indictment in Bin Laden, and declining to order a bill of particulars). As such, Bin Laden does not support defendant's arguments here.

here, as discussed above, the Indictment gives two specific examples of bribes paid, the officials' identities and the defendant's role in those bribes. Unlike in Murgio, the defendant knows what conduct he is alleged to have participated in, and there is also no question of the defendant's role in the conspiracy – he "instructed", he "authorized", he "approved," and he "certified." See Ind. ¶¶ 24, 26, 36-37.

Nor is the defendant entitled to details regarding every bribe payment he engaged in, which foreign officials received the monies and the routing of the payment, including if it passed through U.S. banks. Br. 29. The Indictment details how the bribery and money laundering schemes operated, who operated them, the defendant's role and examples of how payments were routed through U.S. banks within the statute of limitations period. As discussed above, through discovery and disclosures, the government has already provided the defendant with all the information necessary to prepare his defense.[22]

Though the defendant concedes that the Indictment identifies at least two instances where U.S. bank accounts were used, he asks the government to identify any other monetary transactions made in furtherance of the money laundering conspiracy and routed through the United States. Br. 29. However, the defendant fails to justify why he is entitled to this information or how it would help him understand the nature of the charges against him. He only vaguely argues that the purpose, location and timing of the payments could be relevant to

[22] With regard to defendant's request as to Paragraph 40 of the Indictment, Br. 29, which refers to the defendant's September 2010 email to the DSO for release of money relating to the ETH program, as discussed above, the defendant is not entitled to specific details of the particularities of each bribe request and details surrounding the money transfer because the statute does not require that a payment be consummated, let alone traced to the foreign official.

his jurisdictional or statutory deficiency arguments, each of which the government has responded to above.

The defendant also argues that it is not clear how paragraphs 43(e), 43(h)[23], 46(h), and 46(i) of the Indictment, which are each overt acts that detail Caixa 2 fund transfers, relate to the naptha or Plant contracts or are linked to the bribery scheme otherwise. Br. 29. The Indictment readily answers this question: the defendant and his co-conspirators agreed to create Caixa 2, a slush account, to pay bribes. Braskem then used Caixa 2 funds to make bribe payments, including for naptha and Plant contracts. Thus, the subject matters discussed in the overt acts in 43(e), 43(h), 46(h) and 46(i), which relate to transfers from Braskem to Caixa 2 entities, and co-conspirators' communications about the defendant's approval of funneling money from Caixa 2 to the DSO, are directly relevant to the bribe scheme.

The defendant asserts that there is no indication whether paragraphs 43(c), 43(e), 43(i), 46(b), 46(d) and 46(f) involved any U.S. bank, Br. 29, but makes no effort to explain why the government has an obligation to detail how each overt act involved a U.S. bank. The defendant asserts that the location of certain transfers is relevant to deficiencies asserted with regard to Count Three, including the allegedly impermissible extraterritorial application. The defendant is in possession of the bank subpoena responses, documents from Drousys, emails relating to the payment transfers and the spreadsheets summarizing the payment transfers—all categorized by index for his convenience to help him answer these questions. As discussed above, the government has given sufficient examples to show that some of the money transfers went through U.S. banks as late as 2014. At trial, and consistent with allegations in the Indictment, the government will introduce proof sufficient to establish jurisdiction; it is not

[23] Paragraphs 43(h) and 46(i) of the Indictment are identical overt acts.

required to catalogue the information and weave it into a narrative of a fully integrated trial theory for the benefit of the defendant. See United States v. Coburn, 19-120 (KM), 2020 U.S. Dist. LEXIS 26822 (D.N.J. Feb 14, 2020), at 34 (citing United States v. Addonizio, 451 F.2d 49, 64 (3d. Cir. 1972) ("A motion for a bill of particulars cannot be used to compel the government to organize the discovery by topic or to 'weave the information at its command into the warp of a fully integrated trial theory for the benefit of the defendants.'").

Accordingly, the defendant improperly seeks to compel the government to reveal its evidence, legal theories and trial strategy. The government respectfully requests that the Court deny defendant's request for a bill of particulars.

CONCLUSION

For the reasons stated above, the defendant's motion to dismiss the indictment and bill of particulars request should be denied.

Dated: Brooklyn, New York
July 22, 2020

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