UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. JOSE CARLOS GRUBISICH, Defendant.	No. 19 Cr. 102 (RJD)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTIONS TO DISMISS THE INDICTMENT AND TO COMPEL PRODUCTION OF A BILL OF PARTICULARS

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This memorandum is respectfully submitted in support of Jose Carlos Grubisich's motions to dismiss the charges against him.

Introduction

The Indictment charges Jose Carlos Grubisich with three counts of conspiracy -- a Foreign Corrupt Practices Act ("FCPA") bribery conspiracy, a Books and Records conspiracy, and a Money Laundering conspiracy -- and contains no substantive counts. It takes this form, no doubt, in an attempt to breathe life into conduct that is more than a decade old. The thrust of the charges is that, while CEO of Braskem S.A. ("Braskem") (a position that he held from August 2002 to June 2008), Mr. Grubisich approved bribe payments to Brazilian government officials and falsely certified Braskem financial statements, which did not disclose those payments.[1] According to the Indictment, the bribes were negotiated in 2006 and 2008-2009. Ind. ¶¶ 28, 31. The financial statements at issue are for the years 2006 and 2007. Id. at ¶ 36. Conspiracy has been called the "darling of the modern prosecutor's nursery," Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925)(Hand, J.), but this case stretches the bounds of conspiracy law beyond anything seen in this District.[2]

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[1] Braskem is an affiliate of Odebrecht S.A. ("Odebrecht"), a Brazilian-based conglomerate in the fields of engineering, construction, and petrochemicals. During the relevant years, Odebrecht owned 38.1 percent of Braskem's shares and a majority of its voting shares. Petróleo Brasileiro S.A. ("Petrobras"), a Brazilian state-owned oil company, owned 36.1 percent of Braskem's shares. Ind. ¶¶ 4, 5. Mr. Grubisich was an outsider to the Odebrecht orbit; he was brought in from Europe for his technical expertise. His successor, Bernardo Gradin, was an insider whose family was a major shareholder in Odebrecht.

[2] This case recalls Justice Jackson's warning more than 70 years ago in Krulewitch:

> This case illustrates a present drift in the federal law of conspiracy which . . . is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the tendency of a principle to expand itself to the limit of its logic. The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition

This case also evidences the tendency of American prosecutors to assume the role of policemen of the world. At its core, this is a case in which a Brazilian executive allegedly approved the payment of bribes to Brazilian officials in Brazil in connection with (i) the construction of a polypropylene plant in Brazil, Ind. ¶¶ 27-29, and (ii) a contract negotiated in Brazil between two Brazilian companies for the sale of a product (naphtha) made in Brazil and to be used there, Ind. ¶¶ 30-33. Only the thinnest of reeds -- the fact that American depositary shares of Braskem traded on the New York Stock Exchange -- links this case to this country.

Notably, the Brazilian bribe payments were uncovered in a Brazilian investigation ("Operation Car Wash"), in which more than 400 people were prosecuted in Brazil, but not Mr. Grubisich.[3] Moreover, a civil class action suit filed in the Southern District of New York by Braskem shareholders names two Braskem executives, but not Mr. Grubisich. See In re Braskem Securities Litigation, No. 15 Civ. 5132 (PAE). (Both the Brazilian investigation and the class action lawsuit focus on the naphtha contract issue that is central to this case.) Yet in 2019 -- eleven years after his removal as Braskem's CEO -- he finds himself the subject of an indictment in this District. Why him? Why now? Why here? The answers to those questions escape us.[4]

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thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

Krulewitch v. United States, 336 U.S. 440, 445-46 (1949)(Jackson, J., concurring)(internal footnotes and quotation marks omitted).

[3] Terrence McCoy, "He's the 'Hero' Judge Who Oversaw Brazil's Vast Car Wash Corruption probe. Now He's Facing His Own Scandal," WASH. POST, June 17, 2019. The Brazilian investigation was dubbed "Operation Car Wash" because a car wash was discovered early on to be one of the companies used to launder funds. Operation Car Wash focused on some of the very same conduct that is the focus of the Indictment in this case.

[4] Braskem pleaded guilty in this District in December 2016 to a one-count criminal information charging it with an FCPA conspiracy. The plea agreement included a lengthy statement of facts that detailed numerous corrupt payments. Notably, however, the plea agreement

As discussed below, this case should not be permitted to proceed.

Factual Background

At this stage of the proceeding, our knowledge of the facts supporting the allegations is limited. The discussion below relies on the Indictment and on witness statements from the Brazilian investigation that have been disclosed in discovery. What is clear is that the Indictment centers on two distinct schemes.

A. The Polypropylene Plant Scheme

The Indictment alleges that in 2005 Braskem, a Brazilian petrochemical company, and Petrobras Quimica S.A. ("Petroquisa"), a subsidiary of Petrobras, a Brazilian state-owned oil company, entered into a joint venture to construct a polypropylene plant in Brazil. When completed, the plant would produce 350,000 tons of polypropylene a year from propylene. (Polypropylene is a heat-resistant plastic used widely throughout the world.) Early on, however, Braskem apparently became concerned that Petrobras might reassign the contract to a Braskem competitor and took steps to prevent that from occurring. Ind. ¶ 27. The Indictment alleges that Mr. Grubisich agreed to a $4.3 million bribe payment to "Foreign Official 1" (Paulo Roberto Costa, Petrobras' supply director who ran its refinery division) and "Foreign Official 2" (Jose Janene, a leader of Brazil's Progressive Party and head of the country's Energy Commission) to ensure that Braskem would retain the contract. Id. at ¶ 28. No bribe payments were to be made until the plant's construction was underway. Id. The payments to Costa and Janene were allegedly made in 2007 and 2008 in installments.[5] Id. at ¶ 29.

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did not allege that Mr. Grubisich had any connection to the Naphtha Contract Scheme, as defined below.

[5] The Indictment details the efforts that were made to disguise the bribes. Braskem funds were paid as "commissions" to offshore shell companies and then funneled back to a department

B. The Naphtha Contract Scheme

According to the Indictment, the second bribery scheme commenced in 2008 and involved a contract for the sale of naphtha. Naphtha is a flammable liquid that is derived from the refining of crude oil. Petrobras was Brazil's only domestic supplier of naphtha and supplied some 70 percent of Braskem's needs. Pursuant to various agreements, Petrobras sold naphtha to Braskem at slightly more than 100 percent of the international reference price -- the average price charged for naphtha in Amsterdam, Rotterdam, and Antwerp, the so-called "ARA" price. Braskem viewed that pricing formula, which was unchanged during Mr. Grubisich's tenure, as resulting in an excessive price and sought to negotiate a different pricing formula in the new contract. Eventually it succeeded in doing so. The approved contract, which was finalized in July 2009, set a pricing floor and ceiling at 92.5% of ARA (the floor) to 105% of ARA (the ceiling) with the expectation that the actual price would hover close to the floor. Thus, the contract was seen as favorable to Braskem, for which naphtha was a critical raw material.

According to the Indictment, "Co-Conspirator 2" (Alexandrino Alencar) played a key role in the naphtha bribery scheme. Ind. ¶ 31.[6] In Brazil, Alencar gave this testimony about the scheme:

> In the middle of 2008, although I was no longer at BRASKEM, I was informed of the start of negotiations between the technical teams of BRASKEM and

(the Division of Structured Operations ("DSO")) of Odebrecht, Braskem's parent company, where the funds were used "to pay bribes to government officials, political parties and others in Brazil to obtain and retain business." Ind. ¶ 17; see also Ind. ¶ 18 ("[t]he DSO effectively functioned as a stand-alone bribe department within Odebrecht for the benefit of Odebrecht and its subsidiaries, including Braskem").

[6] The Indictment alleges that Mr. Grubisich "directed Co-Conspirator 2 [Alencar] to initiate bribe negotiations on behalf of Braskem with Foreign Official 2 [Janene]." Ind. ¶ 31. Alencar is also alleged to have had a key role in the Polypropylene Plant Scheme. See Ind. ¶ 28 ("Co-Conspirator 2 then negotiated bribe payments to Foreign Official 1, Foreign Official 2, their affiliated political party and others totaling $4.3 million in exchange for Braskem retaining the contracts.").

> PETROBRAS, related to a new long-term (ten year) naphtha contract . . . . I was informed by Bernardo Gradin, Chief Executive Officer of BRASKEM at the time [having replaced Mr. Grubisich], about the difficulties experienced by the negotiating teams to reach an agreement in terms of the price formula. Because of my involvement with José Janene, Bernardo Gradin asked me to intercede with [him] and Paulo Roberto Costa to facilitate the negotiations. In meetings held with José Janene and Paulo Roberto Costa I was asked for payment of a bribe and we agreed on an amount of around US$ 12 million, as an improper benefit for the success of the transaction . . . . In my conversations with Representative Janene, I made it clear that the payments to him were directly linked to the success of the negotiations, represented by a formula that would guarantee the competitiveness of BRASKEM in the petrochemical market. . . . In March of 2009, Bernardo Gradin asked me about the . . . negotiations . . . [on] the naphtha contract . . . . At that time, BRASKEM's technical department believed that a competitive price formula should have been a floor of at least 92.5% of ARA. I then sought out Representative Janene . . . and I informed him that to receive the pre-agreed success amount of around US$ 12 million, the floor of the formula should [be] 92.5% of ARA . . . . He informed me that he would speak to Paulo Roberto Costa.
>
> In April, I found out through [Janene] that PETROBRAS's Executive Committee approved the formula as we had agreed. However, our agreement stipulated the start of the payments at the time the contract was signed, which only occurred in August of 2009. From that time, Bernardo Gradin authorized the payments . . . and they were completed in 2011. For the last payment made in the middle of 2011, I requested authorization from Carlos Fadigas, Chief Executive Officer of BRASKEM at the time.

BRASKEM_000611715 at 18-19. Thus, as Alencar told it in Brazil, Mr. Grubisich had no involvement in the Naphtha Contract Scheme, which began after Mr. Grubisich's departure.[7]

With this as background, we turn to the legal issues.

Argument

COUNT ONE SHOULD BE DISMISSED, OR AT A MINIMUM SEVERED, AS DUPLICITOUS

An indictment is impermissibly duplicitous when it combines two or more crimes in one count. Among the vices of duplicity is that a general verdict of guilty on a duplicitous count

[7] We recognize, of course, that this is not the time to litigate Mr. Grubisich's culpability. We set forth Mr. Alencar's account only as a backdrop to the motions that follow.

might "conceal[] a finding of guilty as to one crime and a finding of not guilty as to another" or that it might create a "risk that the jurors may not [be] unanimous as to [either] one of the crimes charged." United States v. Sturdivant, 244 F.3d 71, 75 (2d Cir. 2001)(quoting United States v. Margiotta, 646 F.2d 729, 733 (2d Cir. 1981)). Moreover, there is a significant statute of limitations concern when, as here, the count at issue charges a conspiracy for old conduct. Thus, if two separate conspiracies -- Conspiracy 1 and Conspiracy 2 -- are lumped together in one count and Conspiracy 1 is time barred, a duplicitous count may obscure the statute of limitations problem and mistakenly save the time barred conspiracy from dismissal. See United States v. Gabriel, 920 F.Supp. 498, 505-06 (S.D.N.Y. 1996).

That statute of limitations concern exists here. If the Polypropylene Plant Scheme, which the Indictment indicates ended "between 2007 and 2008," when the bribe payments were made to Costa and Janene, is a separate conspiratorial agreement from the Naphtha Contract Scheme, then Count One is duplicitous and should be dismissed in its entirety or severed into two and the Polypropylene Plant Scheme dismissed as untimely. (The Indictment was filed in February 2019.)[8] Thus, the question here is this: are the two schemes the objects of a single agreement and therefore properly joined in one count or are they two separate conspiracies, one ending in 2008

[8] The timeliness of the Naphtha Contract Scheme is itself questionable. The last payment to Costa was made in September 2011. The Indictment seeks to bring the Naphtha Contract Scheme within the limitations period by alleging two "overt acts" -- a $1.4 million payment in April 2014 (Overt Act ¶ 43(h)) and a "payment for the purchase of naphtha" in May 2014 (Overt Act ¶ 43(i)). Overt Act ¶ 43(h) is not linked in any way to the Naphtha Contract Scheme. And Overt Act ¶ 43(i) is part of "a lengthy . . . series of ordinary . . . non-criminal [payments] . . . posing [no] special societal dangers of conspiracy," a type of payment that does not keep a conspiracy alive. See United States v. Grimm, 738 F.3d 498, 502 (2d Cir. 2013) (quoting United States v. Salmonese, 352 F.3d 608, 616 (2d Cir. 2003). We recognize that the government submitted several Mutual Legal Assistance Treaty ("MLAT") requests to Brazil beginning in April 2016. Whether those requests tolled the limitations period for the Naphtha Contract Scheme is an issue that we are not now in a position to address.

and clearly time-barred. See Grunewald v. United States, 353 U.S. 391, 397 (1957)("the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement"); see also United States v. Broce, 488 U.S. 563, 571 (1989)("multiple agreements to commit separate crimes constitute multiple conspiracies").

In this Circuit, the leading case on "individuating conspiracies" is United States v. Korfant, 771 F.2d 660 (2d Cir. 1985).[9] Korfant identified several factors that a court should consider in making this determination, including: (1) the overlap of participants; (2) the overlap of time; (3) similarity of operation; (4) the existence of common overt acts; (5) the geographic scope of the alleged conspiracies or location where overt acts occurred; (6) common objectives; and (7) the degree of interdependence between alleged distinct conspiracies. Id. at 662. There is "no dominant factor or single touchstone." United States v. Macchia, 35 F.3d 662, 668 (2d Cir. 1994).

Before turning to the facts of this case, it is instructive to consider another case first. In United States v. Guzman, 7 F.App'x 45 (2d Cir. 2001), the defendant Rivera was charged in separate conspiracies for the murder of Ayala and the murder of Ayala's fellow gang members. Applying the Korfant factors, the Court found that two separate conspiracies were properly charged. The overt acts were separate; the conspiracies "had different objectives, in that they contemplated different victims"; and they were "not interdependent as the success or failure of one conspiracy would not have a corresponding effect on the other." Id. at 56. Both conspiracies involved murder, and there was an overlap in time frame, locale and participants, but those facts

[9] Korfant arose in the context of double jeopardy law, where the defendant was convicted of conspiracy and the issue was whether a conspiracy charged in a successive prosecution was the same offense. But in both contexts -- double jeopardy and duplicity -- the inquiry is the same: is there one overarching conspiracy or two separate ones?

did "not negate the existence of two conspiracies," given the "distinctions between the [two]." Id. at 55 (quoting Macchia, supra, 35 F.3d at 668).

Here, too, there are two separate conspiracies, not one. Both schemes, of course, involved bribes to the same two Brazilian officials to advance Braskem's aims, and both apparently involved payments through Odebrecht's DSO system. But "similarity between modes of operation [and objectives] at this level of generality does not signify a single conspiracy." Macchia, supra, 35 F.3d at 670.[10] In this regard, Macchia cited with approval the Fifth Circuit's decision in Futch, in which that court held that the use of shrimp boats and trucks to import and off-load marijuana was a "common means of implementation" that did "not integrate two separate conspiracies." Id. (citing United States v. Futch, 637 F.2d 386, 390 (5th Cir. 1981). The same is true here. In the first decade of this century, currying favor with Petrobras' refinery division meant dealing with Costa and Janene. But following a similar path on two entirely separate occasions does not add up to one agreement. See United States v. Thomas, 759 F.2d 659, 666 (8th Cir. 1985)("[i]t is possible to have two different conspiracies to commit exactly the same type of crime").[11]

Significantly, the bribe in the Polypropylene Plant Scheme was negotiated in 2006 whereas the bribe in the Naphtha Contract Scheme was negotiated in late 2008 and 2009. When the first bribe was negotiated, the second was not on anyone's radar. That temporal gap "indicates

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[10] It bears note that Braskem apparently moved some $250 million to the DSO, the great majority of which had no identified connection to any bribery scheme. Statement of Facts, United States v. Braskem, 16 Cr. 644 (RJD), ECF No. 8 (Dec. 21, 2016), at ¶ 32.

[11] As noted above, Alencar, Costa and Janene participated in both schemes. The Naphtha Bribery Scheme, however, also involved Bernardo Gradin, Carlos Fadigas, Bernardo Freiburghaus and others. See supra at 4-5; Ind. ¶ 31. Some overlap of participants "has never been held to be sufficient" to establish a single overall conspiracy. United States v. Bertolotti, 529 F.2d 149, 155 (2d Cir. 1975). See also United States v. Barzie, 433 F.2d 984, 985 (2d Cir. 1970)("[t]he mere fact that Steenbakker and two other persons were charged with being members of both conspiracies and that both conspiracies involved dealing in stolen credit cards is far from establishing" a single conspiracy).

separate conspiracies." United States v. Votrobek, 847 F.3d 1335, 1340 (11th Cir. 2017); see also Thomas, supra, 759 F.2d at 666-67 ("so long as agreements are made at different times to do two separate illegal acts, the fact that both those acts involve [the same type of crime] does not mean that only one [conspiracy] offense has been committed").

Furthermore, the two conspiracies involved different overt acts. Overt Act ¶ 43(c) in the Indictment relates to the Polypropylene Plant Scheme, and Overt Acts ¶¶ 43(d), (f) and (g) relate to the Naphtha Contract Scheme. As the Eleventh Circuit has observed, overt acts "serve to describe the offense charged," and provide "insight . . . into the nature and scope" of a conspiracy. Votrobek, supra, 847 F.3d at 1341. The fact that the overt acts here do not overlap also indicates two distinct agreements charged improperly as one. Id. ("[d]ifferent overt acts indicate separate conspiracies"). Here, "[a] simple reading of the allegations of the indictment shows that there were two separate conspiracies which did not merge." United States v. Munoz-Franco, 986 F.Supp. 70, 72 (D.P.R.1997).

Also significant, if not conclusive, is the fact that the success or failure of the agreement to construct the polypropylene plant was independent of the success of obtaining a lower price for naphtha. See Korfant, supra, 771 F.2d at 662-63. "One conspiracy certainly could succeed without the other." United States v. Estrada, 320 F.3d 173, 184 (2d Cir. 2003). Naphtha was not a raw material used in the polypropylene plant, and reducing the price of naphtha was important to Braskem regardless of whether Braskem partnered with Petroquisa in constructing the polypropylene plant. Conversely, Petroquisa's involvement in the construction of the polypropylene plant had nothing to do with the price at which its parent company, Petrobras, sold naphtha to Braskem. The two objectives were not in any way intertwined. Korfant, supra, 771 F.2d at 663 ("[s]uch functional independence reflects two conspiracies").

The "gist of the crime of conspiracy . . . is the agreement . . . to commit one or more unlawful acts." Braverman v. United States, 317 U.S. 49, 53 (1942). Thus, a boiler room operator who manipulates the price of three stocks and profits thereby can properly be charged in one overarching conspiracy count, not three, when the conduct was interwoven and part of an integrated scheme. United States v. Wey, 2017 WL 237651 at *3 (S.D.N.Y. 2017). But this case is far different. No one could fairly conclude that the two schemes here were interwoven, integrated, or interdependent, and the second was not a twinkle in the eye of the participants in the first at the time. In sum, there were two separate conspiracies here, which should have been charged in two counts, and the failure to do so means that Count One is fatally duplicitous.

* * *

We anticipate that the government will argue that the question of single or multiple conspiracies is one of fact for a properly instructed jury, and not one to be decided on pre-trial motion. But two things set this case apart. First, this is a case in which there is no set of facts on which a reasonable jury could find a single conspiracy. See United States v. Marcus Schloss & Co., 710 F.Supp. 944, 950 (S.D.N.Y. 1989)(requiring government to proffer evidence of single agreement "in camera and ex parte" where there was insufficient evidence in the record to show a single overarching conspiracy); United States v. Camacho, 1996 WL 137318 at *2 (S.D.N.Y. 1996)(requiring the government to submit in camera evidence of proper joinder where there was reason to believe that new allegations were "tacked on . . . for strategic or tactical reasons of the government's own devising"). Second, this case implicates statute of limitations concerns that make pre-trial resolution especially appropriate. See Gabriel, supra, 920 F.Supp. at 506 (where two separate conspiracies are shown and one is time barred, there is "no authority that requires submission of this issue to a jury" when it can be decided "as a matter of law"). If the duplicity

decision is "postponed until the close of evidence, [Mr. Grubisich will] be linked for weeks to extensive testimony regarding the presumptively time-barred . . . conspiracy," which should not be his fate. Id. at 507.[12]

Statutes of limitations are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment." Toussie v. United States, 397 U.S. 112, 114 (1970). They are to be "liberally interpreted in favor of repose." Id. at 115 (quoting United States v. Scharton, 285 U.S. 518, 522 (1932)). No defendant should be required to sit through a lengthy trial to prove to a jury what is obvious to a court, namely that some of the conduct with which he is charged is time-barred.

In sum, Count One is duplicitous and should be dismissed or, at a minimum, severed into two and the Polypropylene Plant Scheme dismissed as untimely.

COUNT TWO SHOULD BE DISMISSED BECAUSE MR. GRUBISICH WITHDREW FROM THE BOOKS AND RECORDS CONSPIRACY IN 2008 AS A MATTER OF LAW

Count Two charges what is commonly called a Books and Records Conspiracy. Although the Indictment alleges that the conspiracy spanned from "January 2006 [to] April 2015," Ind. ¶ 45, the gravamen of the charge is that in 2007 and 2008, Mr. Grubisich, in his capacity as Braskem's CEO, signed written certifications to Braskem's financial statements, which were filed with the SEC and were false.[13] Specifically Mr. Grubisich and his co-conspirators allegedly failed to disclose that Braskem was falsely recording as "commissions" money that was sent to sham

[12] If the Polypropylene Plant Scheme were separated from the Naphtha Contract Scheme, evidence of the former would not be admissible at a trial of the latter. See Fed. R. Evid. 404(b)(proving propensity is an impermissible purpose).

[13] The financial statements were approved by Braskem's outside auditors and CFO before Mr. Grubisich signed them.

offshore entities for transmission to the DSO, a portion of which was supposedly used to make bribe payments on Braskem's behalf. Ind. ¶¶ 36-37.

The critical fact here is that Mr. Grubisich was removed as Braskem's CEO in June 2008, when Bernardo Gradin replaced him. The question then is whether a person can be charged with being a member of a conspiracy to falsify a company's books when he has left the company and ceased to have any responsibility for preparing those books more than a decade before an indictment is returned. Being the CEO of a publicly traded company is a daunting job, but it would be more so if a 2008 false certification could be charged in 2019, eleven years after the CEO has moved on.

In this Circuit, 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. See United States v. Berger, 224 F.3d 107, 118 (2d Cir. 2000) (citing United States v. Goldberg, 401 F.2d 644, 649 (2d Cir. 1968)). That is to say, after exiting the conspiracy, the defendant "must not take any subsequent acts to promote" it and must not profit from it. Id. Importantly, the cases do not require the defendant to "hir[e] a calligrapher to print formal notices of withdrawal to be served upon co-conspirators," United States v. Nerlinger, 862 F.2d 967, 974 (2d Cir. 1988), or to "turn in his co-conspirators or warn off possible victims," Berger, 224 F.3d at 119; see also United States v. Greenfield, 44 F.3d 1141, 1150 (2d Cir. 1995)(the point is "not to compel a conspirator to inform on his or her co-conspirators or to warn-off possible victims, admirable as those actions may be," but "to make sure that a withdrawal did occur and is not simply being invented ex post").

Among the leading cases in this Circuit is Nerlinger. There, the defendant worked at a commodities futures trading firm that was steeped in fraud. The principal objective of the

fraud was to bilk legitimate customers by assigning profitable trades to accounts controlled by the firm, and not to the customers. 862 F.2d at 979. Nerlinger's role was to "open and maintain an account at [the firm] into which the [head trader] could direct trades," in exchange for which he received a share of the profits. Id. at 974. In March 1983, Nerlinger resigned from the firm and closed his account, relinquishing any claim on future profits. Id. at 971.

On these facts, the Court of Appeals concluded that Nerlinger had withdrawn from the conspiracy when he moved on:

> Nerlinger's closing of the account does satisfy [the withdrawal] standard because it disabled him from further participation and made that disability known to [the head trader]. That is enough . . . . The government also argues that Nerlinger's closing of the account was ambiguous in light of Nerlinger's question to [the head trader] as to whether Nerlinger could maintain the account after resigning from [the firm]. According to the government, this inquiry reflected Nerlinger's interest in continuing to participate in the conspiracy. Even if it did, however, the closing of the account in the face of [the head trader's] invitation to continue it is an explicit withdrawal from the conspiracy.

Id. at 974-75; see also United States v. Steele, 685 F.2d 793, 803-04 (3d Cir. 1982)(defendant's resignation from company involved in bribery conspiracy constituted withdrawal where there was "no evidence that [he] participated in the conspiracy in any way following his resignation").

Judged by this standard, Mr. Grubisich's withdrawal is indisputable. There is no question that his alleged co-conspirators knew of his withdrawal. His removal was well publicized inside and outside the company and was reported to Brazilian regulators. His exit foreclosed his ability to supervise Braskem's accounts and to attest (truthfully or not) to their accuracy. What happened after he left was up to others, who knew what Braskem's books showed (or should have shown), which Mr. Grubisich did not. He never saw the financial statements or the certifications. Simply stated, after June 2008, Mr. Grubisich no longer lent his services to the Books and Records Conspiracy, if he ever did.

The government may claim that Mr. Grubisich remained in the conspiracy because he remained in the Odebrecht orbit -- that he served as CEO of ETH Bioenergia S.A. ("ETH"), an ethanol company in which Odebrecht had a stake, from 2008 to 2012; was a member of Braskem's Board of Trustees from 2010 to 2012; and entered into a consultancy agreement with Odebrecht in February 2012. See Ind. ¶ 1.[14] But the conspiracy here is to falsely certify Braskem's books, and none of his post-departure positions gave him any role in their preparation or certification. Moreover, Mr. Grubisich was not compensated by Braskem after June 2008. Cf. United States v. Eisen, 974 F.2d 246, 249 (2d Cir. 1992)(fact that defendant received a percentage of the recovery on all cases he had previously tried, even though he had left the law firm, negated withdrawal). Nor did he lie to law enforcement or anyone else about the accuracy of Braskem's books after he left the company. Cf. Berger, supra, 224 F.3d at 119 (defendant's "lies -- which occurred well within the five-year period preceding the filing of the indictment -- reestablished his link by helping to conceal the conspiracy from investigators"). Mr. Grubisich's departure from the CEO position "disabled him from further participation and made that disability known to [others, and] that is enough." Nerlinger, supra, 862 F.2d at 974.

* * *

Because the issue here is not merely withdrawal but repose, this Court should decide it on pre-trial motion. See United States v. Grimmet, 236 F.3d 452, 455-56 (8th Cir. 2001)("the issue here is . . . not the admissibility of incriminating co-conspirator hearsay [but a] criminal statute[] of limitations, [which is] 'to be liberally interpreted in favor of repose'")(quoting

[14] Mr. Grubisich was an alternate member of Braskem's Board (a substitute for an absent member) from April 2010 to January 2011, and attended as a full member from January 2011 to February 2012. The position was unpaid. Mr. Grubisich entered into a three-year consultancy agreement in February 2012 but was released from it four months later.

Toussie, supra, 397 U.S. at 115). Unless the government has some evidence that Mr. Grubisich either furthered the alleged conspiracy or profited from it within the limitations period, he should not be put to the expense and anguish of a lengthy trial on Count Two.

COUNT THREE SHOULD BE DISMISSED ON SEVERAL GROUNDS

Count Three alleges a conspiracy to violate 18 U.S.C. §1956(a)(2)(A), which prohibits the international transfer of funds to or from the United States to promote specified unlawful activity. Specifically, the statute prohibits:

> [the] transport[ation], transmi[ssion], or transfer[], or attempt[ed] . . . transport[ation], transmi[ssion], or transfer [of] a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . . with the intent to promote the carrying on of specified unlawful activity.

The promotional prong of the international money laundering statute (as compared to the concealment prong) is less commonly charged, and it is mischarged here. As shown below, Count Three is defective in four distinct ways.

A. Duplicity and Withdrawal

Count Three incorporates the allegations contained previously in the Indictment and alleges an international money laundering conspiracy from 2002 to December 2014. Ind. ¶¶ 47-48. The conspiracy is said to have promoted "felony violations of the FCPA," presumably the conduct alleged in Counts One and Two. See id. The same defects that doom Counts One and Two are fatal to Count Three.

As shown above, the Polypropylene Plant Scheme and the Naphtha Contract Scheme were two separate conspiracies, and therefore agreeing to transfer funds in support of those schemes involved two separate conspiracies as well. That means the money laundering activity related to the Polypropylene Plant Scheme, if there was any, is time barred and should not be a part of this case. (The Indictment does not allege that any money was "laundered" through

U.S. banks during Mr. Grubisich's tenure as CEO, and we have seen nothing in the discovery to suggest otherwise.) Likewise, Mr. Grubisich's withdrawal from the Books and Records Conspiracy in June 2008 (again assuming he ever joined it) means that he cannot be a member of a money laundering conspiracy to promote books and records violations after that date.

B. Mens Rea

The controlling legal principles here are well known. As a general rule, "courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense." Torres v. Lynch, 136 S. Ct. 1619, 1630 (2016). That is so, "even where the statute by its terms does not contain" such a requirement. United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994). A *mens rea* requirement is the "background rule" that applies "absent an express indication to the contrary." Torres, 136 U.S. at 1631; see also Staples v. United States, 511 U.S. 600, 608 n.3 (1994)(a defendant cannot be convicted of a crime unless he "know[s] the facts that make his conduct fit the definition of the offense").

The principal exception to this rule is that defendants are generally not required to have knowledge of jurisdictional facts. See United States v. Feola, 420 U.S. 671, 677 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"). Thus, a defendant need not know the nexus to interstate commerce to be convicted of wire fraud. United States v. Blassingame, 427 F.2d 329, 330-31 (2d Cir. 1970). Similarly, he need not know that the proceeding he is obstructing is federal (as opposed to state) to be convicted of a federal obstruction crime. United States v. Ardito, 782 F.2d 358, 361 (2d Cir. 1986). When a federal statute is silent as to the scienter requirement of a jurisdictional element, "the default rule flips: Courts assume that Congress wanted such an element to stand outside the otherwise applicable *mens rea* requirement." Torres, supra, 136 S. Ct. at 1631.

In determining whether a particular element is substantive or jurisdictional, courts ask whether the element "relate[s] to the 'harm or evil' the law seeks to prevent." Id. at 1624; see also United States v. Allen, 788 F.3d 61, 69 (2d Cir. 2015)(the *mens rea* presumption typically applies to elements that "ma[ke] the conduct dangerous or criminal"). By contrast, a jurisdictional element is one that merely "ties the substantive offense . . . to one of Congress's constitutional powers." Torres, 136 S. Ct at 1624. For an element to be jurisdictional, it must be "jurisdictional only." Feola, supra, 420 U.S. at 677 n.9. If an element has both substantive and jurisdictional aspects, it is a substantive element. See United States v. Cooper, 482 F.3d 658, 665 (4th Cir. 2007).

The question here is whether the transportation element of 18 U.S.C. §1956(a)(2)(A) is a substantive element, and the answer is obvious. The transportation element is more than a jurisdictional hook; it is the gist of the crime. Congress spoke to the point when it enacted the statute:

> Section 1956(a)(2) is designed to illegalize international money laundering transactions. It covers situations in which money is being laundered by transferring it into the United States as well as those in which money is being laundered by transferring it out of the United States. The inclusion of this section is intended to support . . . [U.S.] efforts to obtain international cooperation to halt the flow of drug money, and to prevent the United States from becoming a haven in which foreign drug traffickers can keep or invest their earnings.

S. Rep. No. 433, 99th Cong. 2d Sess. 11 (1986). To borrow the words of Torres, the international transfer of money -- either to conceal criminal activity or promote it -- is the very "'harm or evil' the law seeks to prevent." Torres, 136 S. Ct. at 1624; see also United States v. Hamilton, 931 F.2d 1046, 1052 (5th Cir. 1991)("section 1956(a)(2) . . . encompasses the international transportation of 'monetary instruments or funds' that would contribute to the growth and capitalization of the drug trade or other unlawful activities").

If the transportation element of 18 U.S.C. §1956(a)(2)(A) is substantive, then it follows that a transportation from or to a place in the United States must be made "knowingly" and that the *mens rea* element must be pleaded in the indictment and proven at trial. For it is a venerable principle that an indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." United States v. Carll, 105 U.S. 611, 612 (1881). Moreover, "when . . . one element of the offense is implicit in the statute, rather than explicit, and the indictment tracks the language of the statute and fails to allege the implicit element explicitly, the indictment fails to allege an offense." United States v. Foley, 73 F.3d 484, 488 (2d Cir. 1996). Thus, to take an example from Foley, an indictment that "fail[s] to allege that the defendant knew an uttered document was forged failed to charge a crime[,] although [the] statute did not make the knowledge element explicit." Id. (emphasis added)(citing Carll, 105 U.S. at 613). What is implicit must be pleaded explicitly. See 1 C. Wright & Miller, Fed. Practice and Procedure: Crim. §125 (4th ed. 2015)("[i]f the statute itself does not state an essential element of the offense or includes it only by implication, a pleading that merely repeats the statutory language will be insufficient -- the missing element must be directly alleged").

This principle is of critical importance if the Fifth Amendment's Grand Jury Clause is to have meaning. Only if the indictment contains all the elements of the offense can a court know that the grand jury got it right -- that the grand jury found reasonable cause to believe that the accused's acts and state of mind fulfilled all the elements of the crime. See United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979)("[t]o allow a prosecutor or court to make a subsequent guess as to what was in the minds of the grand jur[ors] . . . would deprive the defendant of a basic

protection that the grand jury was designed to secure, because a defendant could then be [called to trial] on the basis of facts not found by, and perhaps not even presented to, the grand jury").[15]

Here, the Indictment fails to plead that Mr. Grubisich knew that any funds would be moving to or from the United States. Nor is there anything in the nature of the specified unlawful activity (the conspiracies charged in Counts One and Two) that makes such knowledge implicit in what is alleged, even assuming that pleading by implication were allowable. A Colombian drug dealer who sells his wares in New York and wire transfers the proceeds back home knows that our financial system is being used to promote illegal activity. By contrast, a Brazilian business executive who agrees to bribe a Brazilian official to gain favorable terms on a contract entered into in Brazil for a made-in-Brazil raw material has no reason to believe that the use of a U.S. bank is an inherent part of the scheme.

Notably, the Indictment mentions only two payments that could plausibly have promoted FCPA violations: (i) a $1 million payment on August 26, 2011 "which was routed through correspondent bank accounts in New York, New York, for the benefit of Foreign Official 1 [Costa] and others, in exchange for Foreign Official 1's assistance in securing . . . the naphtha contract", Ind. ¶ 43(f); and (ii) a $1,005,800 payment on September 9, 2011, "routed through correspondent bank accounts in New York, New York," to Costa for the same purpose, Ind. ¶ 43(g).[16] The Indictment alleges that the payments were made by "members of the conspiracy"

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[15] That Count Three charges a conspiracy does not alter the analysis. To sustain a judgment of conviction on a conspiracy charge, "the Government must prove at least the degree of criminal intent necessary for the substantive offense." Feola, 420 U.S. at 686. Thus, where knowledge of a particular fact is an element of the substantive offense, it is also an element of the conspiracy. United States v. Pinckney, 85 F.3d 4, 8 (2d Cir. 1996).

[16] The Indictment also alleges that in April 2014 members of the conspiracy caused two transfers -- one for $1.6 million and the other for $1.4 million -- to be paid from U.S. banks to the sham offshore entities. Ind. ¶¶ 46(h), (i). But these could not have been promotional payments.

without any indication that Mr. Grubisich, who had left as Braskem's CEO three years earlier, knew that the payments were being made or that a U.S. bank would be used to route them.[17] Thus, these payments provide no inferential support for the proposition that Mr. Grubisich agreed to an international money laundering scheme knowing that funds would flow through this country.

In sum, under 18 U.S.C. §1956(a)(2)(A), a knowing transportation into or out of the United States is required, and none is pleaded (or could be proven) here. Accordingly, Count Three is defective and should be dismissed.

C. Extraterritorial Jurisdiction

Count Three is also defective because it is an impermissible extraterritorial application of the money laundering statute. In enacting the money laundering statute, Congress made plain that "it was not [its] intention to impose a duty on foreign citizens operating wholly outside of the United States to become aware of U.S. laws." S. Rep. No. 433 at 14. To limit the extraterritorial application of the money laundering statute, Congress took the unusual step of including an extraterritoriality provision in the law. See United States v. Hawit, 2017 WL 663542 at *8 (E.D.N.Y. 2017)("unlike the wire fraud statute, the federal money laundering statute contains a provision specifying the circumstances in which it can be applied extraterritorially"). That provision, Section 1956(f), reads as follows:

> (f) There is extraterritorial jurisdiction over the conduct prohibited by this section if --

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Janene died in 2010 and Costa was fully paid in 2011 before retiring in 2012, which means the Polypropylene Plant Scheme and the Naphtha Contract Scheme were long over by 2014.

[17] The discovery includes a statement given to Brazilian authorities by Carlos Fadigas, who became CEO of Braskem in December 2010. According to the statement, after Fadigas became CEO, Costa told him that "Bernardo [Gradin, Mr. Grubisich's successor] owed [Costa] money." DOJ_ODB_3144010 at 15. Thereafter two payments were then made to Costa in August and September 2011 through the DSO. Id. Mr. Grubisich is not mentioned in Fadigas' account.

> (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
>
> (2) the transaction or series of related transactions involved funds or monetary instruments of a value exceeding $10,000.

18 U.S.C. §1956(f). The section limits extraterritorial application to its terms. See Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 265 (2010)("when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms").

Count Three charges Mr. Grubisich under 18 U.S.C. §1956(h), with a conspiracy to violate 18 U.S.C. §1956(a)(2)(A). Conspiracy, of course, is an inchoate crime, the gravamen of which is an agreement. Thus, a defendant need only have agreed with others knowingly to launder funds to or from the United States to commit the crime. There is no requirement of an overt act in furtherance of the conspiracy as there is for many conspiracy crimes. See Whitfield v. United States, 543 U.S. 209, 214 (2005)("[b]ecause the text of §1956(h) does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction").

What that means is that the "conduct prohibited" by §1956(h), to use the words of §1956(f), is the conspiratorial agreement itself. In this case, none of that conduct "occurred, in [whole or] part, in the United States." The money laundering conspiracy was hatched by Brazilians in Brazil. No one who "agreed" was a U.S. citizen or in the United States. The same is true of the underlying conspiracies -- the Polypropylene Plant Scheme, the Naphtha Contract Scheme and the Books and Records Conspiracy -- which the money laundering is alleged to have promoted. Any agreement was made in Brazil, not here. Accordingly, Count Three fails to meet the requirements that Congress established in section (f) and is therefore impermissibly extraterritorial.

We recognize that some cases have upheld money laundering conspiracy charges against extraterritorial challenges where the agreement was made outside the United States. See, e.g., Hawit, supra, 2017 WL 663542 at *8-9; United States v. Garcia, 533 F.App'x 967, 982 (11th Cir. 2013); United States v. Ologeanu, 2020 WL 1676802 at *9-10 (E.D. Ky. 2020). But none of those cases considered the argument advanced here. Each found extraterritorial application because a transaction entered into pursuant to the conspiratorial agreement involved this country's banking system. Section 1956(f), however, distinguishes between prohibited conduct and prohibited transactions (which must involve funds exceeding $10,000) and requires that a non-citizen defendant's prohibited conduct occur in part in this country. See RJR Nabisco, Inc. v. European Cmty. 136 S. Ct 2090, 2101 (2016)("[t]he scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute's foreign application, and not on the statute's 'focus'")(emphasis added). Because the conduct described in Count Three is an agreement completed by Brazilians in Brazil, it cannot be prosecuted here. See United States v. Nichols, 169 F.3d 1255, 1274 (10th Cir. 1999)(conspiracy "is complete at the time of the agreement") quoting LaFave & Scott, Criminal Law §6.4(c) at 530 (2d ed. 1986).

D. Due Process

In Part B above, we argued that §1956(a)(2)(A) requires proof that a defendant knowingly transported funds to or from the United States. Assuming for a moment that there is no such *mens rea* requirement, then Count Three is defective for another reason. Under the Due Process Clause, a federal criminal statute cannot be applied to a defendant unless there is "a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." United States v. Ramzi Yousef, 327 F.3d 56, 111 (2d Cir. 2003). A court can only "assert jurisdiction . . . a defendant who should reasonably anticipate being haled into court in this country." United States v. Bout, 2011 WL 2693720 at *2 (S.D.N.Y.

2011)(quoting United States v. Al Kassar, 582 F.Supp. 2d 488, 494 (S.D.N.Y. 2008)). This requirement "serves the same purpose as the 'minimum contacts' test in personal jurisdiction." United States v. Perlaza, 439 F.3d 1149, 1168 (9th Cir. 2006)(quoting United States v. Moreno-Morillo, 334 F.3d 819, 830 n.8 (9th Cir. 2003). Such a jurisdictional nexus exists over a non-citizen acting outside the United States only where the defendant "aim[ed] . . . to cause harm inside the United States or to U.S. citizens or interests," United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011), or was at least "aware that the charged conduct would have such an effect." United States v. Jamal Yousef, 2010 WL 3377499 at *4 (S.D.N.Y. 2010).

The decision in United States v. Sidorenko, 102 F.Supp. 3d 1124 (N.D. Cal. 2015)(Breyer, J.), is instructive. There, defendant Siciliano, a Venezuelan national, worked for a United Nations agency headquartered in Canada that was responsible for standardizing machine-readable passports. 102 F.Supp. at 1126. The United States made annual contributions to the agency exceeding $10,000 per year. Id. Siciliano, the indictment alleged, received money and other things of value from defendants Sidorenko and Vassiliev, both Ukrainians, in return for taking actions that would benefit their Ukrainian companies. Id. The three men were charged with violating 18 U.S.C. §666 for giving and accepting bribes in connection with an organization that receives at least $10,000 of federal funding in any one year.

On these facts, the court held that haling the defendants to this country for trial violated due process. The money that the United States sent to the U.N. agency, the court concluded, "probably increases the contacts that the United States has with [the agency] but it is difficult to see how it results in adequate contacts with Siciliano, who neither lived in, worked in, nor directed any of his alleged conduct at the United States, let alone Sidorenko or Vassiliev, who did not even work for [the agency]." 102 F.Supp. 3d at 1133. Finding that it would be "both

arbitrary and fundamentally unfair to assert jurisdiction" over the defendants, the court dismissed the Section 666 charges against them. Id.

The same principle should apply here. Consider this hypothetical. A Brazilian executive bribes a South African official to gain a mining contract in South Africa. The bribe is paid by wire transfer but because of an unexpected failing in the SWIFT system, it is routed through Miami, rather than sent directly from Brazil to South Africa as would be the norm. Assuming that the money laundering statute does not require knowledge that the transmission would touch the United States, can the defendant be prosecuted here consistent with due process? The answer is plainly "no." The defendant did not aim to cause harm in this country, and a prosecution here would be fundamentally unfair. Simply stated, the defendant's conduct was wrongful, but he could not have "reasonably anticipate[d] being haled into court in this country" on an international money laundering charge. Bout, supra, 2011 WL 2693720 at *2.

Our hypothetical defendant and Mr. Grubisich are positioned much the same (assuming that Mr. Grubisich participated in a bribery scheme). The Indictment alleges that he agreed to bribe Costa and Janene by funneling money to them through offshore companies and the DSO. It gives no reason to believe that he knew or could reasonably have anticipated that the funds would be transmitted to or from this country.[18] Like the defendants in Sidorenko, he "neither lived in, worked in, nor directed any of his alleged conduct at the United States." It is therefore fundamentally unfair to prosecute him here. To use the court's words in Sidorenko, "the minimum

[18] As noted above, the discovery does not include any information suggesting that U.S. bank accounts were used in furtherance of any of the offenses during Mr. Grubisich's tenure as Braskem's CEO. Moreover, the government has not responded to repeated requests for such information, if it exists.

contacts requirement would be meaningless" if the fact that a transmission unforeseeably touched this country was enough to give Count Three life. 103 F.Supp. 3d at 1133.

Moreover, it bears emphasis that for a prosecution to comport with due process, a defendant must have "fair warning" that his conduct could subject him to criminal liability. See Al Kassar, supra, 660 F.3d at 119. Mr. Grubisich had no such warning. Promotional money laundering, which does not require that a transaction involve the proceeds of crime, is a peculiarly American offense. (The Indictment does not suggest that the money allegedly transferred here was in any way "dirty.") Under the leading international treaties, money laundering is consistently described as conduct that involved the proceeds of crime.[19] The same is true of Brazilian law. All of the conduct prohibited by Brazil's money laundering statute involves the proceeds of crime. See Federal Law 9613/1998 art. 1. Prosecuting a Brazilian executive (under a statute that carries a potential 20-year sentence) for the transmission of lawfully obtained funds that, unbeknownst to him, moved into or out of the United States would stretch the bounds of fair warning beyond its breaking point. See United States v. Van Der End, 943 F.3d 98, 106 (2d Cir. 2019)(the "ultimate question of arbitrariness or unfairness" of an extraterritorial prosecution "hinges in part on the notion of fair warning")(internal quotation marks omitted).

For all these reasons, Count Three is flawed and should be dismissed.

THE GOVERNMENT SHOULD BE COMPELLED TO PRODUCE A BILL OF PARTICULARS CLARIFYING THE INDICTMENT

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[19] See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances arts. 3(1)(b), (c)(i), Dec. 20, 1988, 1582 U.N.T.S. 95; United Nations Convention Against Transnational Organized Crime art. 6(1), Dec. 12, 2000, 2225 U.N.T.S. 209; the United Nations Convention Against Corruption art. 23(1), Dec. 9, 2003, 2349 U.N.T.S. 41. See also UN Office on Drugs and Crime & International Monetary Fund, Model Legislation on Money Laundering and Financing Terrorism 1 (Dec. 1, 2005)(defining "money laundering" as "the process by which a person conceals or disguises the identity or the origin of illegally obtained proceeds so that they appear to have originated from legitimate sources").

A. Introduction

The Indictment characterizes this case as a "massive bribery scheme" spanning twelve years, from 2002 to 2014, and "result[ing] in the diversion of approximately $250 million of Braskem's funds." Ind. ¶ 17. In stark contrast, it identifies only two bribery schemes in which Mr. Grubisich allegedly participated: (i) the Polypropylene Plant Scheme involving payment of approximately $4.3 million in bribes, Ind. ¶¶ 27-29; and (ii) the Naphtha Contract Scheme involving payment of approximately $12 million in bribes. Ind. ¶¶30-33. Taken together, the two schemes account for $16.3 million of the $250 million allegedly diverted.

Apart from the Polypropylene Plant Scheme and the Naphtha Contract Scheme, the Indictment says little about what else was a part of the "massive bribery scheme" and whether any of it is part of this case. It does not identify any other project, contract, or decision influenced by bribes in which Mr. Grubisich was allegedly involved. Nor does it identify any foreign officials, other than Foreign Officials 1 (Costa) and 2 (Janene), who received bribe payments, despite frequent references to "others" who allegedly did so. Finally, the Indictment makes no attempt to identify any connection between several fund transfers allegedly made as part of the conspiracy and the various conspiracy schemes.

To prepare his defense, Mr. Grubisich must be given notice of the scope of the bribery conspiracy with which he is charged. At a minimum, he must know if the government is accusing him of participating in any bribery schemes other than the Polypropylene Plant Scheme and the Naphtha Contract Scheme.[20] Similarly, Mr. Grubisich cannot adequately defend this case without knowing who the "others" are who allegedly were bribed, or what certain transfers of

[20] Those allegations relate primarily to Count One, but also implicate Counts Two and Three, which are largely derivative of the allegations in Count One.

funds identified as overt acts -- most of which were made years after his departure from Braskem -- have to do with the charges. The government should be ordered to file a bill of particulars clarifying and supplementing the Indictment's allegations.[21]

B. Legal Standard

"Rule 7(f) of the Federal Rules of Criminal Procedure permits a defendant to seek a bill of particulars in order to identify with sufficient particularity the nature of the charge pending against him, thereby enabling [the] defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987). The production of a large volume of documents is not a substitute for the particularization that a bill of particulars provides. See United States v. Bin Laden, 92 F.Supp. 2d 225, 234 (S.D.N.Y. 2000)("[i]t is no solution to rely solely on the quantity of information disclosed by the government; sometimes, the large volume of material disclosed is precisely what necessitates a bill of particulars"). The Indictment here is lengthy, but it raises more questions than it answers about the nature of the charges.

C. Particulars Requested

1. Bribery Conspiracies

According to the Indictment, the Polypropylene Plant Scheme began in 2006 and ended with the payment of $4.3 million in bribes in 2007 or 2008. Ind. ¶¶ 28-29. The Naphtha Contract Scheme began in 2008 and ended in 2011, when the last installment of a $12 million bribe was allegedly made. Ind. ¶¶ 30-32. Costa and Janene, the only two public officials identified in the Indictment, left their roles in 2010 and 2012, respectively. Ind. ¶¶ 14, 15. The Indictment,

[21] The government has declined to answer our requests for the information described in this motion, which was first sought on February 18, 2020. See Exhibit A.

however, obliquely hints at the existence of other, unidentified corrupt conduct. It alleges, for example, that Mr. Grubisich "approved bribe negotiations and bribe payments . . . *including* payments made to ensure that Braskem could retain a contract for a significant petrochemical project in Brazil, and to ensure that Braskem could obtain favorable pricing in contract negotiations with Petrobras." Ind. ¶ 20 (emphasis added). If Count One includes any bribery schemes other than the Polypropylene Plant Scheme and the Naphtha Contract Scheme, then the government should tell us. See United States v. Murgio, 209 F.Supp. 3d 698, 723 (S.D.N.Y. 2016)("[i]f the Government plans to introduce evidence of a bribe that is not already mentioned in the Indictment, then a bill of particulars as to such bribe(s) is appropriate to enable [defendant] to prepare for trial and prevent surprise")(internal quotation marks omitted).

If the government intends to argue that Mr. Grubisich conspired to influence foreign officials other than Costa and Janene in connection with the Polypropylene Plant Scheme and the Naphtha Contract Scheme, we request that the Court require it to identify: (i) the foreign officials who received the bribe(s); (ii) the individuals involved in paying the bribes; (iii) the specific acts, omissions, or decisions sought to be influenced; (iv) the payments made in exchange for such influence; (v) the bank accounts used to transfer funds to the public officials; and (vi) the dates of the relevant events. Without that information, we are shooting in the dark.

2. Transfers of Funds

The Indictment alleges several transfers of funds, but fails to identify what connection, if any, most of them have to the crimes with which Mr. Grubisich is charged. Moreover, most of these transfers were allegedly made years after Mr. Grubisich left as Braskem's CEO, raising the possibility that the government has alleged overt acts that are not appropriately considered when determining the relevant statute of limitations period. See Grunewald, supra, 353 U.S. at 397 ("the crucial question in determining whether the statute of limitations has run is the

scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy"). Additionally, the purpose, timing, and location of certain transfers are highly relevant to several deficiencies that we have asserted with respect to Count Three, including the impermissible extraterritorial application of 18 U.S.C. §1956 and the failure to allege the requisite knowledge element. For example, the only payments alleged to have originated within the United States are two payments made on April 28 and 30, 2014, Ind. ¶¶ 43(h), 46(h),(i). How those payments are linked to the bribery schemes charged in the Indictment is nowhere unexplained.

More specifically, the Overt Acts in Count One include five payments allegedly made from or through the DSO system: Overt Acts ¶¶ 43(c), (e), (f), (g) and (h). And the Overt Acts in Count Two include four other payments: Overt Acts ¶¶ 46(b), (d), (f) and (h). But there is no indication how Overt Acts ¶¶ 43(e) and (h) relate to either the Polypropylene Plant Scheme or the Naphtha Contract Scheme, if they do. Likewise, there is no indication whether Overt Acts ¶ 43(c), ¶ 43(e), ¶ 43(i), ¶ 46(b), ¶ 46(d) and ¶ 46(f) involved any U.S. bank.

Accordingly we request that the government be ordered to identify, where it is not self-evident: (i) the bribery scheme (the Polypropylene Plant Scheme, the Naphtha Contract Scheme or some other scheme) that each transfer of funds identified in Counts One and Two relates to; (ii) the foreign officials, if any, who received the monies; and (iii) the routing of the payment, including the U.S. bank, if any, through which the funds were transferred. We also request the same information about the release of funds referenced in paragraph 40. Finally, we request that the government identify any other money transactions made in furtherance of the money laundering conspiracy and indicate which, if any, were routed through the United States.

Trial by ambush has long ceased to exist in the federal system. The particulars that we seek are not "evidentiary detail," but core facts needed for the "preparation of [Mr. Grubisich's] defense, and the avoidance of prejudicial surprise." LaFave, et al., Criminal Procedure, §19.2(f)(4th ed. 2015). Their disclosure is necessary for a fair trial if this case survives these pre-trial motions.

Conclusion

For these reasons, the Indictment should be dismissed.

Dated: June 22, 2020
New York, New York

Respectfully submitted,

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