UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v.- :

05 Cr. 518 (SAS)

VIKTOR KOZENY et al., :

Defendants. :

- x

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO FREDERIC BOURKE'S MOTION TO DISMISS THE INDICTMENT AND FOR OTHER RELIEF

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The Government respectfully submits this memorandum of law in opposition to the pretrial motion filed by defendant Frederic Bourke, in which Bourke seeks: (1) to dismiss the Indictment against him under an affirmative defense set forth in the Foreign Corrupt Practices Act ("FCPA") because the bribes he and co-defendants paid were, he contends, extorted, and therefore "lawful under the written laws and regulations of the foreign official's . . . country," 15 U.S.C. § 78dd-2(c)(1); or, alternatively, (2) to hold a pretrial hearing pursuant to Federal Rule of Evidence 104 as to the scope of the evidence that may be offered in light of Bourke's proffered defenses of extortion and of having reported the bribes to Azeri authorities; and (3) to instruct the jury as to Bourke's view of Azerbaijan law governing extortion of bribes, as well as Bourke's reporting defense.

In support of his motion, Bourke attaches a declaration regarding Azeri law from Professor Paul B. Stephan of the University of Virginia School of Law. For purposes of this motion, the Government does not proffer its own expert on Azeri law because, even accepting the proffered expert opinions as correct, for the reasons set forth below, Bourke's motion should be denied.

FACTUAL BACKGROUND

Facts Alleged in the Indictment

Indictment 05 Cr. 518 (SAS) ("the Indictment") arises from a conspiracy to bribe senior government officials in the Republic of Azerbaijan in order to ensure the privatization of the State Oil Company of the Azerbaijan Republic ("SOCAR") and to ensure that the defendants would be able to participate in and profit from the privatization through the purchase of privatization vouchers. United States v. Kozeny, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007). The Indictment charges Bourke with conspiracy to violate the Foreign Corrupt Practices Act ("FCPA") and the Travel Act, five counts of violating the FCPA, two counts of violating the Travel Act, conspiracy to launder monetary instruments, and two counts of money laundering. The Indictment also charges Viktor Kozeny and David Pinkerton with these and a number of similar counts. The Indictment further charges Bourke with falsely stating to a Special Agent of the Federal Bureau of

Investigation that Bourke was unaware that Kozeny had made payments to Azeri government officials.

According to the Indictment, in or about May 1997, Kozeny and Bourke learned of the opportunity to invest in privatization vouchers in Azerbaijan while traveling through several republics of the former Soviet Union. (Indictment ¶ 24). To pursue this investment opportunity, Kozeny organized a corporation he named Oily Rock Group Ltd. ("Oily Rock") (Indictment ¶¶ 6, 7) and a corporation he named Minaret Group Ltd. ("Minaret") (Indictment ¶¶ 6, 8).

In July 1997, Kozeny and a co-conspirator, Thomas Farrell, delivered $10,000 in cash to an Azeri official to secure a meeting with another Azeri official concerning privatization. (Indictment ¶ 26). Also in July 1997, Kozeny and Farrell made over $1,000,000 in payments to a Chechen individual in Baku, Azerbaijan, to secure "protection" for vouchers and related options that Kozeny had purchased. (Indictment ¶ 27).

Kozeny employed several Russian nationals in Baku for the purpose of purchasing and safeguarding vouchers and options. (Indictment ¶ 28). These Russian "couriers" were supervised by Farrell. (Id.). In August 1997, one of the couriers, while making a purchase of vouchers, was arrested by Azeri authorities. (Id.). At the time of his arrest, the courier had on his person

approximately $1,000,000 in U.S. currency and $1,000,000 in purchased vouchers. (Id.).

Following the courier's arrest, Kozeny and Farrell had a series of meetings with officials of SOCAR and the State Property Committee ("SPC"), which administered the privatization process in Azerbaijan. (Indictment ¶ 29). In the course of these meetings, Kozeny reached the following corrupt agreement with the Azeri officials: (I) Kozeny would transfer two-thirds of the vouchers and options he controlled to the Azeri officials and would also transfer two-thirds of this profits that his investment consortium realized from the privatization of SOCAR and other Azeri State assets; (ii) Kozeny would pay an up-front entry fee as specified by an SPC official; (iii) Kozeny would acquire at least 1,000,000 vouchers and 4,000,000 options;[1] (iv) Kozeny would purchase vouchers from individuals designated by an SPC official, including a relative of the official; (v) Kozeny would be allowed to continue to acquire vouchers and options and would be permitted to acquire a controlling interest in SOCAR upon its privatization; and (vi) Kozeny would no longer have to make protection payments to the Chechens in Baku. (Indictment ¶ 29). The officials' indication that they would assure the

[1] Later, in December 1997, the SPC official advised Kozeny that he would be required to acquire a minimum of 2,000,000 vouchers, not 1,000,000, in order to bid on SOCAR and other Azeri state assets. (Indictment ¶ 32).

privatization of SOCAR was a significant development for Kozeny, because SOCAR was, by Azeri law, a strategic enterprise that could only be privatized upon a special decree of the president of Azerbaijan. (Indictment ¶¶ 4, 44).

After this corrupt deal had been struck, in or about March and July 1998, Bourke twice invested in Oily Rock through Blueport International, Ltd. ("Blueport") an investment vehicle which included Bourke's family and friends as investors and in which Bourke was the principal shareholder. (Indictment ¶ 17). Blueport invested approximately $8,000,000 in Oily Rock shares, approximately $5,300,000 of which were invested by Bourke personally. (Id.).

In April or May 1998, Bourke was invited to join Oily Rock's and Minaret's Boards of Directors and Executive Committees. (Indictment ¶¶ 48, 49). However, Bourke informed Kozeny that Bourke would only serve as a board member and officer of affiliated advisory and consulting companies to be created in the United States. (Indictment ¶ 50). Bourke believed that, by limiting his role to affiliated United States companies, he would be shielded from liability under the FCPA and would otherwise be insulated from any responsibility for corrupt payments made by Kozeny, Oily Rock and Minaret. (Indictment ¶ 50). In July 1998, these plans were implemented. (Indictment ¶¶ 50, 51).

In or about June 1998, Bourke was advised that Oily Rock would be issuing and transferring to Azeri officials another $300,000,000 worth of Oily Rock stock shares. (Indictment ¶ 53). In addition, from mid-May 1998 through June 1998, more than $11,000,000 were paid to Azeri officials (Indictment ¶ 56), in addition to lavish gifts of jewelry and other luxury items (Indictment ¶¶ 57, 58). Also, in March, May, and September 1998, Kozeny and Bourke arranged and paid for medical treatment in New York, and related travel expenses, for two Azeri officials in the SPC. (Indictment ¶¶ 61, 62).

During meetings with the Government in April and May 2002, Bourke falsely claimed that he was unaware that Kozeny had made payments to Azeri officials. (Indictment ¶ 80).

Bourke's Claim of Reporting the Bribes to the Azeri President

In February 1999, Bourke traveled from New York to Baku to meet with senior Azeri officials concerning his investment in privatization. (Indictment ¶ 67uu). Bourke asserts in his Memorandum of Law, dated April 7, 2008 ("Def. Mem.") that his purpose in traveling to Baku was to "present . . . personally to the President" of the Republic of Azerbaijan evidence concerning Kozeny's defrauding of Bourke, other co-investors, and the Azeri Treasury. (Def. Mem. at 5-6). While the defense does not actually contend that Bourke made explicit reference to the bribes he was purportedly "reporting" voluntarily, the Memorandum

of Law states that "[t]he information presented was sufficient to indicate that certain of the payments alleged in the Indictment had likely been made to Azeri officials." (Def. Mem. at 6) (emphasis added). With respect to this meeting with the Azeri president, Bourke does not cite the Indictment and does not submit any affidavit setting forth relevant facts.

DISCUSSION

The instant motion to dismiss the indictment is premised on Bourke's allegations that, prior to his own investment, Kozeny and Farrell were the victims of extortion, and thus were not criminally liable under Azeri law and therefore under the FCPA.[2] Based on this theory, as well as his claim that he reported the bribes to appropriate Azeri officials, Bourke seeks in the alternative a pretrial evidentiary hearing and certain jury charges.

I. THE MOTION TO DISMISS THE INDICTMENT HAS BEEN WAIVED.

A motion "alleging a defect in the Indictment" must be made before trial. Fed. R. Crim. P. 12(b)(3). "The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions. . . ." Id.

[2] Bourke seems to misapprehend that his motion to dismiss the Indictment in no way addresses the false statements count charged against him, asserting without explanation that somehow the "false statement charges are premised entirely on the alleged FCPA violations." (Def. Mem. at 19).

12(c). "A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver." Id. 12(e); see United States v. Forrester, 60 F.3d 52, 59 (2d Cir. 1995).

The defendants' pretrial motions in this case were due on October 20, 2006, and were fully briefed on February 20, 2007. On June 21, 2007, this Court granted the defendants' motion to dismiss the Indictment. After the Court granted the Government's motion for reconsideration on July 16, 2007, the Government noticed its appeal, which was fully briefed on September 26, 2007, and argued in the Court of Appeals on October 18, 2007. Throughout this period, Bourke failed to file the instant motion, notwithstanding its potential to delay further a trial in this matter.

The defendant offers no explanation, let alone good cause, for his failure to file the instant motion to dismiss the Indictment for over a year after the deadline set by this Court. Instead, he points out that "a number" of the counts in the Indictment for were previously dismissed as time-barred and, as "the Government has taken an appeal of the prior dismissal orders," "Mr. Bourke seeks an alternate basis for dismissal of such offenses." (Def. Mem. at 3 n.2). Bourke has cited no reason why this "alternate basis for dismissal" of the Indictment

could not have been asserted along with Bourke's other motions. Moreover, the Court's prior orders did not dismiss the entire Indictment, so at no point was Bourke not facing a trial. In addition, even if it was the Government's appeal that somehow awakened Bourke's desire to file the instant motion, that appeal was noticed in July 2007, nine months before this motion was made. Whatever the strategic reasons may be that underlie Bourke's decision to refrain from making this motion until now, this challenge to the Indictment has been waived.

II. THE RESOLUTION OF BOURKE'S FACT-BASED AFFIRMATIVE DEFENSE IS FOR TRIAL, NOT FOR A PRETRIAL MOTION.

In addition to being untimely, the motion to dismiss is without merit, as it is premised on a defense, namely that the bribes were extorted, which requires trial of the matter and cannot be resolved on the face of the Indictment.[3]

A pretrial motion must be denied if it raises a defense that the court cannot "determine without a trial of the general issue." Fed. R. Crim. P. 12(b)(2); see United States v. Bodmer, 342 F. Supp. 2d 176, 180 (S.D.N.Y. 2004). The validity of a defense will be resolved on a pretrial motion only "if the trial

[3] In addition to contending that the bribes were extorted, Bourke contends that he "voluntarily reported" the bribes to the President of Azerbaijan some two years later, and is therefore "absolved of criminal liability for bribery" under Azeri law. (Def. Mem. at 5-6, 24). Because Bourke apparently recognizes that the Indictment in no way supports this contention, he does not base his motion to dismiss on his reporting defense.

of the general issue of guilt 'would be of no assistance in determining the validity of the defense.'" Id. (quoting United States v. Covington, 395 U.S. 57, 60-61 (1969); see, e.g., United States v. Knox, 396 U.S. 77, 84 (1969) (holding that a "duress" defense could not be considered on a pretrial motion to dismiss); United States v. Alfonso, 143 F.3d 772, 777 (2d Cir. 1998) (holding that a challenge to the sufficiency of the evidence satisfying a jurisdictional element of the crime charged could not be raised on a pretrial motion to dismiss); United States v. Doe, 63 F.3d 121, 125 (2d Cir. 1995) (holding that a pretrial motion to dismiss could not be based upon the defendant's assertion that he engaged in criminal transactions with public authority); United States v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11th Cir. 1987) (stating that when a jurisdictional element is "intermeshed with questions going to the merits, the issue should be determined at trial"); United States v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987) (concluding that the district court improperly dismissed the Indictment related to trafficking counterfeit watches because it made "a determination of facts" when it found that a purchaser of the counterfeit watch was unlikely to think it was the real thing); United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986) (holding that a pretrial claim must be deferred to trial if it is "substantially founded upon and intertwined with" evidence

concerning the alleged offense).

The defendant's authority is not to the contrary. As the defendant concedes, a "motion to dismiss an Indictment is appropriate for pretrial resolution [when] it is 'addressed only to the facial validity of the Indictment," United States v. Eichman, 756 F. Supp. 143, 145-46 (S.D.N.Y. 1991).'" (Def. Mem. at 18). For instance, in United States v. Grimmett, 150 F.3d 958, 961-62 (8th Cir. 1998), the court approved resolution of a an affirmative defense based on the statute of limitations because a "statute of limitations bar is generally considered 'capable of determination without the trial of the general issue' and may properly be raised before trial." Id. at 961 (citations omitted). On the other hand, the Grimmet court determined that an affirmative defense of withdrawal from a charged conspiracy cannot be raised in a motion to dismiss because it goes to facts that must be decided at trial. Id. at 961-62.[4]

Bourke's motion strains to adduce a defense from the face of the Indictment, when clearly the proffered defense will

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[4] The defendant also cites United States v. Durrani, 835 F. 2d 410, 420-21 (2d Cir. 1987), and United States v. Mayo, 705 F.2d 62, 74 (2d Cir. 1983), for the proposition that, once the defendant produces some evidence in support of an affirmative defense, the burden shifts to the Government to prove beyond a reasonable doubt that the defense does not apply. (Def. Mem. at 18). These cases, of course, address the burden of proof at trial and have no bearing whatsoever on the pretrial resolution of an affirmative defense. The Government has no burden to produce evidence at this stage.

require proof at trial. The Indictment nowhere says or suggests that the payments to the Azeri officials were extorted. Morever, Bourke omits any discussion of the first bribe paid to an Azeri official who offered to help Kozeny obtain assistance from the Azeri government. (See Indictment ¶ 26). This bribe was paid in or about July 1997 (id.), prior to the arrest of Kozeny's courier by Azeri authorities in or about August 1997 (id. ¶ 27), the incident on which the defense rests its argument. The Indictment does not, however, allege that this arrest in itself posed any extortionate threat to the Oily Rock courier or the co-conspirators. While the Indictment alleges that Kozeny thereafter had a series of high-level meetings with Azeri officials resulting in a corrupt arrangement, the Indictment does not allege that Kozeny was extorted, and leaves for the defense to prove at trial, should it wish to assert this affirmative defense, that the conduct during those meetings constituted extortion. The Indictment makes no such claim, either explicitly or implicitly. The Indictment does not address, for instance, who initiated the meetings; whether the bribes were proposed by the co-conspirators or the Azeris; whether the bribes went well above and beyond whatever "threat" the co-conspirators may have perceived from their courier's arrest; and what the co-conspirators were led to believe would be the consequences of proceeding without paying bribes.

Bourke's self-serving assumptions about what happened at these meetings, including about the gravity of the allegedly extortionate threats, do not convert the Indictment into a document that describes facts that amount to extortion. Moreover, the facts that are described suggest a contrary conclusion. For instance, as the defense concedes, Kozeny's agreement to pay the Chechens for protection (Indictment ¶ 27) preceded any alleged extortion by the Azeri officials (Indictment ¶ 29). A reasonable inference from the facts alleged in the Indictment is that, rather than acting under duress, Kozeny willingly agreed to bribe the Azeris in part to obtain relief from the protection payments and in part for other forms of extralegal assistance.

Moreover, the Indictment does not allege that Bourke (or any of his co-conspirators) knew that the payments were "lawful under the written laws and regulations of the foreign officials' country," 15 U.S.C. 78dd-2(c)(1), because, as he now claims, they were the product of extortion. To the contrary, the Indictment alleges that Bourke took steps to limit his liability for the bribes under the FCPA by agreeing to join only American affiliates of Oily Rock and Minaret. (Indictment ¶¶ 50, 51). If Bourke purports to believe that his participation in the bribery scheme was legal because of the alleged extortion, this was a belief he developed long after the events in question. And even

if he knew, Bourke fails to explain how his contributions to the bribery of Azeri officials could be lawful based on the alleged extortion, not of Bourke, but of someone else, i.e., Kozeny, given that Bourke was not present at the initial meetings with the Azeri officials, had not invested his or his friends' and family's money in Kozeny's venture at the time of the alleged extortion, and is not alleged to have joined the conspiracy at the time of these meetings.

III. THE DEFENDANT IS NOT ENTITLED TO A PRETRIAL HEARING UNDER FEDERAL RULE OF EVIDENCE 104.

Bourke contends in the alternative that he should be entitled to a pretrial hearing under Federal Rule of Evidence 104 to determine whether the affirmative defenses he may offer would preclude the Government from offering statements in furtherance of a conspiracy under Rule 801(d)(2)(E).

It is well-settled that the Government need only establish the admissibility of co-conspirator statements by a preponderance of the evidence. See, e.g., Bourjaily v. United States, 483 U.S. 171, 175-76. As the defendant concedes (Def. Mem. at 21), rather than holding a pretrial hearing, trial courts in the Second Circuit typically admit co-conspirator statements, subject to determination at the close of the evidence that the Government has satisfied the requirements for their admission, on peril of a mistrial. See, e.g., United States v. Geaney, 417

F.2d 1116, 1120 (2nd Cir. 1969); United States v. Saneaux, 365 F. Supp 2d. 493 (S.D.N.Y. 2005) (Def. Mem. at 19, 20, 21, 22 n. 7) (following Geaney and deferring to trial ruling on co-conspirator statements); accord United States v. Ortiz, 966 F.2d 707, 715 (1st Cir. 1992); United States v. Banks, 964 F.2d 687, 690 (7th Cir. 1992); United States v. Blevins, 960 F.2d 1252, 1256 (4th Cir. 1992); United States v. Van Hemelryck, 945 F.2d 1493, 1498 (11th Cir. 1991); United States v. Barrett, 933 F.2d 355, 358 (6th Cir. 1991); United States v. Cardell, 855 F.2d 656, 669 (10th Cir. 1989).

There is good reason for this practice. The alternative approach would require, in essence, trying the case twice. The evidence and the witnesses that will establish a conspiracy are in large measure the evidence and the witnesses that will establish the defendant's guilt.

No different practice should be adopted here. Bourke contends that he has a defense which challenges the very existence of the conspiracy, but it is hardly uncommon for defendants in a conspiracy case to mount a defense which challenges a conspiracy's existence. The fact that Bourke has proffered (without actually committing to) affirmative defenses which arise out of his reading of Azeri law does not make this a special case. If, by the close of trial, the Government has failed to establish even by a preponderance of the evidence that

the charged conspiracy existed, the jury will be directed to disregard the statements conditionally admitted, and the parties will undoubtedly address whether the case should, as a result, go to the jury at all. Bourke's request for a pretrial hearing pursuant to Rule 104 is simply a creative way to seek a pretrial ruling on his affirmative defenses by the Court, to which he is not entitled. The proper course is for Bourke to try his affirmative defenses to the jury, and accordingly, this branch of his motion should also be denied.

IV. BOURKE'S REQUESTS TO CHARGE THE JURY ON HIS AFFIRMATIVE DEFENSES SHOULD BE DEFERRED.

Bourke offers two requests to charge the jury, with respect to the extortion defense and the reporting defense. As an initial matter, it must be observed that Bourke's requests are so lopsided that giving his jury instructions would be tantamount to directing a verdict. See, e.g., Def. Mem. at 23 ("If an official demanded a bribe and conditioned doing something within his discretion on the receipt of that bribe, that would constitute extortion.").

In any event, the question of jury charges should be deferred until the close of the evidence, when the Court and the parties will know whether the evidence supports any particular charge. Rule 30 states that requests to charge "must be made at the close of the evidence or at any earlier time that the court

reasonably sets." Fed. R. Crim. P. 30(a). Then, "[t]he court must inform the parties before closing arguments how it intends to rule on the requested instructions." Id. 30(b). While the Court certainly has the authority to require requests for jury charges in advance of trial and to rule on them in advance as well, deferring such a ruling until the trial is substantially complete advances the interests of fairness and efficiency. Jury charges are of course meant to conform where appropriate to the proof presented at trial.

Moreover, at this stage it is not at all clear that the defendant will even proceed on these affirmative defenses, let alone how he will prove them. Certainly, the Government has not revealed how it will rebut them, nor should the Government be so required in advance of trial. It is fair to assume, however, that there will be a substantial clash with respect to the arguments made on the defenses Bourke proffers: for instance, Bourke attempts to characterize his "reporting" to the president of Azerbaijan as blowing the whistle on the conspiracy, when actually Bourke was expressing his dissatisfaction to someone Bourke believed was a beneficiary of the bribes Kozeny had paid and promised. The Government further expects that the evidence will show that, rather than fearing extortion upon the arrest of his courier, Kozeny welcomed the opportunity to deal directly with the high-level Azeri officials, to reach a wide-ranging

agreement locking in anticipated hundreds of millions in profits, and to relieve himself of the specter of the Chechens. Knowing that the fix Kozeny negotiated was in, Bourke then eagerly joined in the investment. However this emerges at trial, once the proof is in, appropriate charges as to the affirmative defenses can be tailored. Now, the Court would be forced to guess as to what charge is supported by the proof.

If indeed the defendant mounts at trial the affirmative defense he describes in his motion, which, to be clear, would seem to entail acknowledging the making and promising of corrupt payments to Azeri foreign officials (and whether he will do so is not at all clear from this motion[5]), the Government may wish to consult its own Azeri law expert in considering alternatives to the defendant's requests to charge, and perhaps elicit testimony from such an expert.[6] Certainly the Government will also wish at

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[5] Indeed, Bourke appeared to be signaling in prior motion papers his intention to mount the conflicting defense that he was unaware of the bribes. See, e.g., Bourke's Memorandum of Law in Support of Motion for Reassignment of Related Pending Actions, dated Nov. 15, 2005, at 6 ("Unlike the typical criminal trial, here there is overwhelming evidence that affirmatively proves that rather than having been a participant in Kozeny's multi-million dollar criminal enterprise, Mr. Bourke was one of Kozeny's many innocent victims. . . . This evidence will address the dispositive issue at trial - Mr. Bourke's state of mind - and will completely rebut the Government's contention that Mr. Bourke knowingly participated in a conspiracy to commit bribery.").

[6] The parties' agreement on a motion schedule contemplated that the Government would answer the motion without consulting its own expert in Azeri law because: (a) the Government believes that the motion can be resolved against the

minimum to cross-examine the defendant's proffered expert. Until that process is complete, the Court should not resolve how it will charge the jury on this issue.

Given that the defendant is not actually committed to the defense he proffers, and because the defendant offers no rationale for an advisory opinion as to jury instructions at this stage in the proceedings, his requests to charge the jury should be held in abeyance at this time.

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defendant without reaching the questions of Azeri law at this stage, and therefore the Government need not dispute the proffered expert opinions; and (b) retaining a Government expert in Azeri law who may well be unnecessary would also prolong the motion schedule. Accordingly, the Government requests that it be permitted to present its own expert should any of this motion or related questions turn on an interpretation of Azeri law.

CONCLUSION

For the foregoing reasons, the motion should be denied.

Dated: New York, New York
June 2, 2008

Respectfully submitted,

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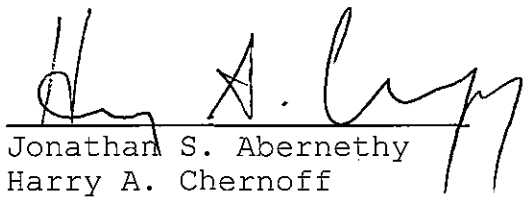
By: 

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