UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	S2 05 Cr. 518 (SAS)
FREDERIC BOURKE, JR.,	:	
Defendant.	:	

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL OR A NEW TRIAL

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

HARRY A. CHERNOFF
IRIS LAN
Assistant United States Attorneys
- Of Counsel -

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	S2 05 Cr. 518 (SAS)
FREDERIC BOURKE, JR.,	:	
Defendant.	:	

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL OR A NEW TRIAL

The Government respectfully submits this memorandum of law in opposition to the defendant's post-trial motions. Following a jury verdict convicting him on Counts One and Three of the Indictment, the defendant moves, under Federal Rules of Criminal Procedure 29 and 33, for a judgment of acquittal or a new trial, respectively. As discussed below, the defendant's arguments are legally and factually baseless, and should be denied.

STATEMENT OF FACTS

The evidence presented at trial established beyond any reasonable doubt that Frederic Bourke engaged in an illegal scheme to bribe government officials in Azerbaijan and subsequently made false statements about it to the Federal Bureau of Investigation (the "FBI"). Not only did the Government's evidence prove the two counts of conviction, but the defendant's own case further established his guilt. By his Rule 33 motion, Bourke now challenges the sufficiency of the evidence and rehashes a variety of legal issues that were briefed, argued, and

decided against him.

B. The Government's Case

1. Background of the Conspiracy

a. Bourke – Past Businesses

Frederic Bourke is a successful, experienced private investor. (Tr. 1918, 1006). His businesses include a partnership in a luxury handbag and luggage company, Dooney & Bourke, as well as various investments in scientific and medical research, construction companies, and nanotechnology. (Tr. 1902-03, 1425). In 1997, Bourke sought to enter into an investment partnership with a new friend and fellow investor, Viktor Kozeny. (Tr. 1537-38). The investment involved the scientific field of protein crystallization, about which both Bourke and Kozeny were enthusiastic. (Tr. 1536). Kozeny ultimately withdrew his pledge of $25 million from the project. (Tr. 1536-38). This withdrawal did not, however, discourage Bourke from pursuing future business ventures with Kozeny. (Tr. 1536-38).

b. Kozeny - "The Pirate of Prague" and Azerbaijani Privatization Process

Bourke learned about Viktor Kozeny's success and business strategies in part from a feature article in Fortune magazine published in December 1996. (Tr. 1930). Titled "The Pirate of Prague," this article described how Kozeny and a business partner, Michael Dingman — who was a friend of Bourke's through their affiliations with the Ford Motor Company — orchestrated a successful scheme in encouraging the state-owned industry privatization process in the Czech Republic. (GX 30). Relying on insider trading, purchase of state secrets from a government official, and fraud, the article describes Kozeny's unethical business practices, criminal charges filed against him, and the eventual settlement with the Czech government. (GX 30). Having

read the article and discussed it with his lawyers, Bourke was aware of Kozeny's illegal business practices and of the substantial profit Kozeny generated in this scheme. (Tr. 1924-25).

Kozeny sought to replicate his success in the Czech Republic in Azerbaijan. (Tr. 216). The privatization process in Azerbaijan resembled the process Kozeny was familiar with from the Czech Republic. In a similar way to the Czech process, the Azerbaijani government issued voucher booklets containing four coupons to each citizen at no cost. (Tr. 403-4). These coupons could be used to bid for shares of privatized enterprises at auction and were bearer instruments, not registered to particular owners and freely tradeable. (Tr. 405, 467, 999). Foreigners who wished to participate in the auction were required to purchase options in addition to vouchers (Tr. 305). Options were issued by the State Property Committee, the entity administering the privatization process (Tr. 176, 460-61). Foreigners were thus required to match every purchased voucher booklet, which contained four coupons, along with four options. (Tr. 462). Government witness Thomas Farrell testified that although a foreign investor would only have to buy sufficient options to match the number of voucher coupons, Kozeny nevertheless purchased options exceeding the required amount by several millions. (Tr. 467). Kozeny's stated rationale for doing so was that options might be used for additional transactions in the future (Tr. 467).

c. Bourke and Kozeny's Relationship

In the spring of 1997, Bourke accepted Kozeny's invitation for a tour around the world in search of investment opportunities. (Tr. 218-19). Traveling on Kozeny's private jet, some of the destinations that Bourke, Kozeny and others visited included Egypt, Hungary, Belarus, Ukraine, Russia, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Mongolia, and Japan in May 1997 (Tr. 218-19); Grenada and Guyana in June 1997 (Tr. 227-28); Azerbaijan, Kazakhstan, Uzbekistan,

Russia, Thailand, Korea, and the Philippines in January 1998 (Tr. 249-53); and the United Kingdom, Azerbaijan, Kazakhstan, United Arab Emirates, and Egypt in May 1998 (Tr. 253-57). In the course of these travels, Kozeny and Bourke became close. (Tr. 385, 516).

On the May 1997 trip to Baku, Azerbaijan, Kozeny and Bourke learned of the privatization process in Azerbaijan. (Tr. 222-23). The prospective investors discussed Azerbaijani privatization and the potential profits of this investment. (Tr. 224). Kozeny and Bourke seemed enthusiastic and optimistic that this investment could succeed, saying that once the process is complete, they could rename the country "Vikistan or Rickistan," after Viktor Kozeny or Rick Bourke. (Tr. 225). Shortly after this trip, Kozeny set up operations in Baku, Azerbaijan, recruiting employees and establishing relationships with government officials to ensure the success of his venture. (Tr. 226, 381; GX 803).

2. Origins of the Conspiracy

a. Voucher Purchasing

Kozeny set up two entities to facilitate the investment process. The Minaret Group was an investment bank set up in Baku, Azerbaijan, designed to meet the needs of investors in an emerging market. (Tr. 808-9). The Minaret Group offices included state-of-the-art equipment, a trading floor, and a secure, guarded vault where the vouchers were stored. (Tr. 1432, 1751). Oily Rock was the vehicle through which vouchers were purchased and the company that ultimately owned the vouchers, operating out of the same office space as the Minaret Group. (Tr. 244-45, 400-1). With these two entities established, Kozeny instructed Farrell and other employees to begin purchasing vouchers and options on behalf of Oily Rock and Minaret. (Tr. 390-1).

Since banks in Baku were not equipped to handle large foreign currency withdrawals, vouchers were purchased using U.S. currency typically flown in on private jet from Zurich or Moscow. (Tr. 233, 410, 475-76, 1013). Each cash delivery was in the millions of dollars with approximately $200 million in cash total flown into Baku, Azerbaijan. (Tr. 475-77). Kozeny's attorney in Zurich, Hans Bodmer, prepared confirmation receipts for these cash deliveries that were signed by Farrell upon arrival. (Tr. 1013-14; GX 859-62, 864-66).

Voucher purchasing proceeded according to plan until August 1997. Initially, this was done informally, in black markets on the street and public places. (Tr. 409). The number of vouchers purchased per day ranged from 5,000 to 15,000. (Tr. 410). At the same time, Kozeny sought to establish connections with local figures who would assist in purchasing vouchers in a more efficient manner. (Tr. 399, 412). A local contact arranged a meeting with the local government officials in exchange for $10,000. (Tr. 412). Kozeny and Farrell paid the requisite fee and attended this meeting in July 1997. (Tr. 414). Kozeny also met with the president of Azerbaijan, Heydar Aliyev, a meeting arranged through a personal contact of Kozeny who later joined the investment. (Tr. 418-20). In August 1997, Farrell and others encountered resistance in the voucher markets from local Chechens. (Tr. 417). To resolve this problem, Kozeny agreed to pay protection money to the Chechens. (Tr. 416-17). When several voucher purchasers were arrested and the Chechen "protection" proved ineffective, a local contact arranged a meeting with the president's son, Ilham Aliyev, who was the vice-president of, the state-owned oil company, "SOCAR." (Tr. 241, 869, 423-25). This meeting led to an introduction with two key Azerbaijani officials, Nadir Nasibov, the chairman of the State Property Committee ("SPC"), and Barat Nuriyev, his deputy. (Tr. 426-27). This was a welcome development for Kozeny, who knew

well that oil was Azerbaijan's greatest resource and that SOCAR was the crown jewel of Azerbaijan's state-owned oil companies.

b. Entry Fee

In his initial discussions with the Azerbaijani officials, Kozeny boldly indicated his interest in acquiring SOCAR at auction, an auction that would require a special presidential decree. Over the course of the next few days, Kozeny met frequently with Nasibov, and together they sketched out the initial corrupt investment scheme for the privatization process of SOCAR. (Tr. 429-32). Farrell, who was present at these meetings, testified that Nuriyev and Kozeny agreed that future purchases of vouchers would be made exclusively through Nuriyev and his designees, thereby doing away with the need to pay off the Chechens in the local street markets. Farrell also testified that Nuriyev informed Kozeny that it would require one million vouchers (*i.e.*, four million coupons, paired with four million options) to purchase SOCAR at auction. (Tr. 436). In addition, Farrell testified, Nuriyev "made it clear that there was also necessary to make some payments to the Azerbaijani" officials, including President Aliyev, as an sort of "entry fee." (Tr. 436-37). This entry fee was set at $12 million and, as Farrell testified, it was "the amount of money that Barat Nuriyev explained would be necessary to be passed to him on behalf of the president's family in order to further participate in privatization and to acquire SOCAR." (Tr. 450).

Kozeny agreed to pay this fee via wire transfers and cash payments, and arrangements were made for Farrell to deliver the payments directly to Nuriyev. (Tr. 437). On one such occasion, Farrell testified that he took the money from a safe, placed it in a duffel bag, and dropped it off in Nuriyev's office. (Tr. 451-52). The wire transfers were arranged through

Bodmer and his law firm in Zurich. (Tr. 455; GX 809). These payments were given code names for tracking purposes and were routed to accounts owned by Nasibov and Nuriyev. (Tr. 452, 1050-52).

c. The Two-Thirds/One-Third Split

The final part of the corrupt arrangement was a transfer of two-thirds of Oily Rock's vouchers and options to the Azerbaijani officials. (Tr. 432-33). Under this arrangement, the officials would be given two-thirds of the profits arising from the investment consortium's participation in the privatization of SOCAR and other valuable state assets without making any monetary investment. (Tr. 432-35, 1023). The potential profits of acquiring SOCAR were so high that Kozeny was willing to forego two-thirds of the investment in order to ensure that privatization of SOCAR would take place. (Tr. 435).

In September 1997, to execute this corrupt arrangement, Kozeny instructed Bodmer to set up a corporate structure with three parent companies – Cudina, Estoria, and Enkridge – and 45 holding companies. (Tr. 1024; GX 229). Voucher and options were distributed through these companies, and twenty eight of them would be allocated to the Azerbaijani officials. (Tr. 1026). To conceal this corrupt transfer, Kozeny and the officials entered into a sham credit arrangement accomplished through three credit facility agreements. (Tr. 1037-49; GX 212-14). Under these agreements, Jemur, a subsidiary Oily Rock entity, entered into three $100,000,000 loan agreements, one with each of the three parent companies. (Tr. 1039; GX 212-14). The loan terms required the full amount plus interest to be repaid by the earlier of June 30, 1998 or 30 days after the conversion of privatization vouchers into shares of a privatized enterprise. (Tr. 1040; GX 212-14). In addition, Kozeny also executed three separate side letter agreements, suspending

the payment of any interest on the loans. (Tr. 1044; GX 212-214). Thus, the sham credit facility agreements and the side letters provided the Azerbaijani officials with two-thirds of the profits from Kozeny's investment but did not require them to make a financial contribution to or assume any risk from the venture. (Tr. 1049).

3. Expansion of the Conspiracy

a. Bourke

In December 1997, Nuriyev notified Farrell that President Aliyev had increased the voucher requirement for the auction of SOCAR from one to two million vouchers. (Tr. 506). By then, Kozeny had apparently been willing to pursue the investment largely alone and had purchased nearly one million vouchers, or the initial quota set by the SPC. (Tr. 507-508). When Kozeny and Farrell began purchasing vouchers in July 1997, the going rate per voucher booklet was approximately $12. (Tr. 411). At the time Nuriyev informed Farrell of this change, the price of a booklet was approximately $100. (Tr. 508). After informing Kozeny of this change, Farrell testified that, despite this significant development, Kozeny remained optimistic and determined to go through with the investment, saying he would "come up with the money." (Tr. 508-9).

In December 1997, Kozeny began recruiting American investors for the purpose of joining the Azerbaijani privatization investment scheme. Several witness at trial testified about a lavish holiday party Kozeny held at his Aspen home for this purpose. (Tr. 247-48, 505-6, 898, 1057-59, 1430). Hans Bodmer, Tom McCloskey, an Aspen neighbor who had already invested in Oily Rock, and Bourke all attended this event. (Tr. 1430, 1061).

In January 1998, Kozeny took a group of potential investors, including Bourke and Robert Evans, a close friend of Bourke's, to Baku. (Tr. 249, 512). The tour included a visit to

the Minaret Group offices, including the vault where the vouchers were kept, as well as a visit with the State Property Committee to meet Barat Nuriyev. (Tr. 518, 1433, 1748). Carrie Wheeler, at the time an associate at TPG who was investigating the investment for one of the firm's clients, testified that "it seemed like the gist of the meeting was to communicate [to the potential] investors that Viktor [Kozeny] had a relationship with the government in some way, that" Barat Nuriyev and Kozeny "knew each other well." (Tr. 1754).

Bourke and Evans took another trip to Baku with Kozeny in February 1998. (Tr. 253-54). Bodmer, who had traveled to Baku separately at that time, testified that during this trip Bourke approached Bodmer and asked about the Azerbaijani interests in the investment. (Tr. 1065). Bodmer then told Bourke the nature of the corrupt arrangement and the corporate structures set up to carry it out. (Tr. 1065).[1] He also testified that he subsequently mentioned the conversation to an associate at his law firm, Rolf Schmid, at a routine debriefing in Zurich following Bodmer's return from Baku. (Tr. 1074). Schmid corroborated this testimony with his own and also memorialized Bodmer's debriefing of the conversation in a memorandum he prepared years later in the context of civil litigation in the United Kingdom among the investors. (Tr. 1367; GX

[1] At trial, Hans Bodmer testified that he had not been certain of the exact date of the conversation (Tr. 1078), but that he believed it had taken place on the occasion of Evans's visit to Azerbaijan, which Bodmer had recorded in his time records as February 6, 1998. Bodmer testified that he had been approached during the prior day by Bourke about the subject and then had met with Kozeny that evening to get permission to disclose the material to Bourke, which Bodmer did the next morning. However, other records not available to Bodmer established that Bodmer was mistaken about the timing of the conversation because Bourke and Kozeny had not been in Baku on the evening of February 5, 2009. The Government offered a summary chart and stipulated that Kozeny and the other investors were not in Baku on February 5, 1998. (Tr. 2501-2; GX 1100). Accordingly, it appears that Bodmer was either mistaken about consulting with Bourke and Kozeny on the day before the conversation with Bourke about the corrupt arrangement, or that this conversation took place in April 1998, when Bourke, Bodmer, and Kozeny, but not Evans, were all in Baku for a longer period of time.

181A). In this memorandum Schmid noted, "Ricky Bourke asked Hans Bodmer about the legal structure of Oily Rock and its subsidiaries, the ownership of vouchers and options by the holding companies, etc. Hans Bodmer remembers that – probably at the beginning of 1998 – he left together with Ricky Bourke the Hilton or Hyatt Hotel in Baku and went for a walk together with Ricky Bourke. During this walk he briefed Ricky Bourke in detail about the involvement of the Azeri interests." (GX 181A; Tr. 1385).

Bourke made his initial investment in Oily Rock without directing any of his many attorneys to conduct due diligence. Attorneys Arnold Levine, David Hempstead and Jay Colvin testified that he did not ask them to research the investment or the privatization process. (Tr. 1969, 2141, 2318-19). Yet, having received assurances that privatization was secured through a corrupt arrangement with the Azerbaijani officials, Bourke set up Blueport, an investment vehicle incorporated in the British Virgin Islands, and invested $7 million at the beginning of March 1998. (Tr. 1063, 1076, 1555-57; GX 526, 673-76). Bourke also recruited additional American investors, including his Evans and former Senator George Mitchell to invest in Oily Rock through Blueport. (Tr. 257, 2035; GX 546). Bourke believed Senator Mitchell's involvement in Oily Rock was highly beneficial, given Mitchell's reputation and prominence, and Bourke subsequently arranged for a directorship agreement that guaranteed Mitchell an annual income of $100,000, nanny and car service expenses, and a "gift" of 1% of Oily Rock stock in options. (Tr. 2137-38; GX 529, 555).

In April 1998, Bourke traveled back to Baku for the official opening of the Minaret offices. (Tr. 264, 813-14; GX 3A-B). Also in attendance at the opening were Kozeny, Mitchell, Bodmer, Farrell, Christine Rastas (a Minaret employee), Farrell, John Pulley (Kozeny's chief of

security), along with additional Oily Rock investors Richard Friedman, Aaron Fleck, Clayton Lewis, and Shafik Gabor. It was during this trip that a meeting was arranged for Mitchell with President Aliyev to discuss Oily Rock's investment, as well as a follow-up meeting at SOCAR with Ilham Aliyev, which Bourke attended. (Tr. 533-34). Mitchell reported back to Bourke and Kozeny that the president intended to go forward with privatization. (Tr. 534).

Nevertheless, Bourke sought further assurances that the corrupt arrangement was both in place and effective (Tr. 536). Farrell testified that during the time of the office opening, Bourke asked him what Barat Nuriyev was saying about privatization and whether "Viktor was giving enough to" the Azerbaijani officials. (Tr. 536). Farrell testified that this was the second time Bourke had asked him that question, the first conversation taking place a few weeks earlier when Bourke asked Farrell, "Has Viktor given them enough?" (Tr. 519-21). The Government offered evidence that Farrell, like Bodmer, initially had difficulty remembering the exact timing of the conversations and, in fact, that his recollection at trial with respect to the timing was different from what he had previously told prosecutors and investigators during his proffer sessions in 2002. (Tr. 519, 521-25, 2494-95). However, former Special Agent George Choundas, who interviewed Farrell in 2002, testified that the substance of the conversation never changed and that in 2002 Farrell had similarly recalled two conversations where Bourke asked if Kozeny was paying the Azerbaijani officials enough money. (Tr. 2496-97).

At the time of the office opening, several of the investors attended a special meeting of shareholders and appointed a board of directors. (Tr. 1101). Bourke, Kozeny, Fleck, Gabr, and others were appointed directors of Oily Rock Group, Ltd. (GX 208). For their directorship, these board members received a 1% participation fee in Oily Rock, Ltd. (Tr. 1111; GX 248).

The testimony of several witnesses established that Bourke's interest in the investment was motivated by his knowledge of the corrupt arrangement. In addition to Bodmer's testimony regarding the disclosure of the arrangement, and Farrell's testimony later conversations with Bourke to the same effect, the evidence showed that Bourke demonstrated an inexplicable, assured confidence in the success of the privatization even though most of the investors who were not part of the conspiracy viewed it as extremely risky.[2] For example, McCloskey testified that "this was a high risk/high return investment." (Tr. 1430). Amir Farman-Farma, a Minaret employee and expert in the region, testified that the investment was "highly risky." (Tr. 1476). The inherent risk in the investment related to the fact that the privatization of SOCAR required a presidential decree. (Tr. 203, 408-9). At the time Bourke made the investment and, as late as January 1999, no such decree was made nor had the president ever given a public statement about his intentions to privatize SOCAR. (Tr. 408-9, 1493; GX 153). Bourke's knowledge about the arrangement enabled him to be extremely confident in the likelihood that SOCAR would be privatized, boasting to one of his lawyers, Hempstead, that there was 90-95% chance that Bourke would make twenty times his original investment. (Tr. 1973). Bourke also assured another one of his attorneys, Levine, that this was an extraordinary opportunity to make billions of dollars in return. (Tr. 1553).

b. Other American Investors

Other Americans also joined the investment in Oily Rock. Tom McCloskey, who was introduced to Kozeny through a realtor, invested $5 million in October 1997. (Tr. 1426-28).

[2] An expert witness, Rajan Menon, also testified that it was highly unlikely that Azerbaijan would have opted to auction SOCAR for privatization vouchers given SOCAR's great economic and strategic importance to the Aliyev government. (Tr. 170-85).

Kozeny also recruited the institutional investors he met with earlier. (Tr. 1062). Omega and Pharos, hedge funds from New York, entered into a letter of intent with Minaret and Oily rock in March 1998. (Tr. 1062). Omega and Pharos partnered with Columbia University and AIG and invested approximately $150 million in Oily Rock. (Tr. 1063, 1127; GX 152).

4. The U.S. Advisory Companies and Related Entities

a. Bourke's Purpose in Establishing Advisory Companies

Shortly after the Minaret Office opening, Bourke made another investment trip to Baku. (Tr. 268, 603; GX 846). Upon his return, he contacted his attorneys to discuss the investment. (Tr. 2161-71). In a partially recorded teleconference admitted into evidence, Bourke gave strong indications that he knew that the arrangement with the Azeris and his own participation in this corrupt investment scheme violated the Foreign Corrupt Practices Act. (Tr. 2167-68; GX 4A, 4A-T-2). The participants in this call were Bourke, Colvin, Friedman, and William Benjamin, Friedman's attorney. (GX 4A, 4A-T-2). Three times during this call, Bourke brought up the subject of bribe payments and the related investor liability. (GX 4A, 4A-T-2). Both Colvin and Benjamin responded that association with any corrupt practices could expose the investors to FCPA liability. (GX 4A, 4A-T-2). Bourke and Friedman agreed that forming a separate company that is affiliated with Oily Rock and Minaret would provide sufficient distance to shield them from liability for corrupt payments made by Kozeny and his companies. (GX 4A-T-2). Bourke's knowledge of Kozeny's corrupt practices and his intentions in seeking to give an appearance of distance from Kozeny's companies became clearer from Colvin's testimony and notes from a subsequent conference call. (Tr. 2172; GX 555). During this call, Bourke, Colvin, Friedman, Clayton Lewis, and others again discussed the option of setting up an American

advisory board to appear removed from any illegal activity executed by Kozeny or his companies. (Tr. 2173-77). In notes he took during the conversation, Colvin wrote that Clayton Lewis — a member of the conspiracy who pled guilty, as the defense elicited from one of its witnesses (Tr. 2816-17) — asked whether setting up these advisory companies would appear as if the investors "intentionally did this as a shield." (Tr. 2176; GX 555). That this was a cover up of the investors' illegal activity, rather than a genuine concern, is made clear by Colvin's notation of how the conversation ended, writing in his notes "Dick [Friedman] — this conversation never happened." (GX 555).

b. The Share Capital Increase

With the June 30, 1998 maturity date of the credit facility agreements nearing, Kozeny and Bodmer informed Bourke that an additional 300,000,000 shares of Oily Rock would be issued and transferred to the Azerbaijani officials. (Tr. 1567-68). This change was authorized at a shareholder meeting on June 26, 1998 and increased the number of Oily Rock shares from 150,000,000 to 450,000,000. (Tr. 1157). Testimony from Bourke's attorney and a witness statement he submitted to a related litigation confirmed that he knew that the additional shares were authorized and issued to President Aliyev. (Tr. 1569; GX 516). Bourke discussed this dilution of interest with several people, including his attorneys. Colvin's notes from one of these conversations includes a concluding remark that the increase did, in fact, dilute the investors' interests and, therefore, indicated that the Azerbaijani officials who received the additional shares did not contribute full monetary value for them. (Tr. 2194-95; GX 543). In addition, Farman-Farma, who had become friendly with Bourke as Farman-Farma was exiting Kozeny's employ, testified that in his conversation with Bourke about the subject in December 1998, Farman-

Farma asked how Kozeny justified this dilution; Bourke replied, "Kozeny had claimed that the dilution was a necessary cost of doing business and that he had issued or sold shares to new partners who would maximize the chances of the deal going through, the privatization being a success." (Tr. 1485).

c. Advisory Companies and Related Entities Formed; Bourke Joins Board

Around the time of the share capital increase, the American advisors formed the advisory companies they had considered earlier. (GX 601). For their participation, the directors of the advisory companies received a 1% stock option. (Tr. 1146). Bourke joined the board of directors of Oily Rock US Advisors ("ORUSA") and Minaret US Advisors ("MGUSA") on July 1, 1998, and the companies were later incorporated in Delaware. (Tr. 1582-83; GX 217, 601). Oily Rock Investment Corporation, another related entity, was also formed in July 1998, and Bourke was named its president. (GX 563). Following his appointment to these positions, Bourke made an additional investment Oily Rock in the amount of $1 million, bringing his investment total through Blueport to $8 million. (Tr. 2056; GX 526).

d. Lobbying

As of July 1998, SOCAR had not yet been privatized and President Aliyev had not made a public statement of his intentions to do so. The directors of ORUSA and MGUSA turned their attention and allocated part of their to lobbying efforts in the United States on behalf of Azerbaijan. (Tr. 2249). The budget drawn for the advisory companies included substantial funding for lobbying activities to benefit the government of Azerbaijan. Both Bodmer and Levine testified that lobbying was a defined purpose of these companies. (Tr. 1146, 1603). The funds for the lobbying activities, however, came from Oily Rock, Kozeny's parent company. (Tr.

1146, 2256). A draft memorandum prepared by Friedman on behalf of Kozeny and distributed to Bourke, Lewis and Mitchell clarified the goal of these lobbying efforts. (GX 1014). Addressed to President Aliyev, Kozeny states that the group's goal was to lobby the U.S. Congress to lift Section 907of the Freedom Support Act which placed heavy restrictions on U.S. aid to Azerbaijan. (GX 1014). As early as June 1998, Kozeny was contemplating how such lobbying efforts could assist in encouraging the Azerbaijani officials to move forward with privatization. (Tr. 595). Although these expenditures were a gift to the government of Azerbaijan rather than its leaders personally, the motivation was clear: to bring about the privatization auction of SOCAR. As Kozeny stated with respect to the lobbying, "There will be no cost to your government." (GX 1014).

5. Continuation of the Conspiracy and Bribe Payments

a. Bribe Payments

In March 1998, per the request of Nuriyev and with the approval of Kozeny, Bodmer set up Swiss bank accounts for the Azerbaijani officials for purpose of transferring bribe money. (Tr. 447, 1112-6). The beneficiaries of these accounts included Nuriyev and his son, Nasibov and a relative, as well as President Aliyev's daughter. (Tr. 1114; GX 232). For this purpose, Bodmer obtained copies of the beneficiaries' passports. (GX 242, 243). From May to September 1998, nearly $7 million in bribe payments, named "Delta payments," were wired to these accounts. (Tr. 488, 1119; GX 261A through 261M). Farrell testified that on one occasion, Nuriyev requested that Farrell transfer $1 million to the account designated for the president's daughter for a shopping spree in London. (Tr. 457, 495).

b. Medical Visits, Visa Arrangements, and Admission Assistance

In addition to wire and cash bribe payments, the co-conspirators assisted in arranging and paying for medical care, travel, and lodging for both Nuriyev and Nasibov. Bourke was personally involved in three separate trips that the Azerbaijani officials made to the United States for medical reasons. (Tr. 259, 846; GX 901). In March 1998, Bourke arranged a medical referral for Nasibov to see a cardiologist at Columbia University Medical Center. (Tr. 972-80; GX 921a). In May 1998, Bourke arranged an appointment for Nuriyev with a urologist affiliated with Mount Sinai Hospital. (Tr. 846, 946-49). Bourke was listed as the emergency contact on Nuriyev's medical chart, and Bourke instructed Christine Rastas, who accompanied Nuriyev on the trip to New York, to keep Bourke updated on the doctor's visits. (Tr. 853; GX 406B, 406C). Payment for the doctor's visits and hospital charges were made by Rastas who was later reimbursed by one of Kozeny's companies. (Tr. 847-49; GX 403). Rastas also paid, and was later reimbursed, for Nuriyev's travel expenses, hotel accommodation at the St. Regis in New York, various dinners and tourists attractions they attended, as well as items he purchased in New York. (Tr. 850-55; GX 403, 404). The total cost of the trip, paid for by Kozeny, was approximately $10,000. (Tr. 869). In September 1998, Nuriyev took a second trip to New York for a scheduled surgery. Bourke remained the emergency contact and was listed as the patient's "Next of Kin" in his medical chart. (GX 912, 406B). Although Nuriyev later reimbursed Kozeny for his payments to the hospital and the surgical procedure, the Government offered proof that he did so from a bank account set up by Hans Bodmer for bribe payments. (Tr. 1115; GX 251).

Prior to his arrival in the United States in September 1998, Bourke and Farrell assisted Nuriyev in obtaining the proper visa so that he would be able to enter the country the following

month. (Tr. 588-59; GX 822). Bourke also assisted Nuriyev's son with admission to a graduate program at the University of Michigan. (Tr. 589-90; GX 821).

6. Final Stages of the Conspiracy

By the end of 1998, Kozeny had purportedly written off the investment, believing that privatization would not go forward as he had hoped. (Tr. 1449). Both Farman-Farma and McCloskey testified that Kozeny had told his investors that the vouchers were essentially valueless and that they could best be used as "wallpaper." (Tr. 1449, 1480). By January 1999, the Minaret Group fired most of its employees and cutting the pay of those who remained employed. (Tr. 1486).

Bourke, nevertheless, did not abandon hope and made additional efforts to influence the Azerbaijani officials to go through with the original plan. (Tr. 2322). In December 1998 and January 1999, Bourke met with Farman-Farma to discuss what steps to take regarding privatization. (Tr. 1485). At these meetings, Farman-Farma suggested some ideas on how the investors could influence the Azerbaijani officials to move toward with privatization and Bourke encouraged Farman-Farma to memorialize these ideas in a memorandum. (Tr. 1486). Farman-Farma produced such memorandum and faxed it to Bourke and Leon Cooperman of Omega. (Tr. 1487; GX 153). In January 1999, Bourke resigned from the boards of ORUSA and MGUSA. (Tr. 2075; GX 506). After his resignation, however, Bourke made another trip to meet with President Aliyev in Baku, arranged by Senator Mitchell, in an attempt to use allegations against Kozeny to pressure Aliyev to follow through with the privatization of SOCAR. (Tr. 2322).

7. Bourke Proffers

In late 2000, Kozeny's attorney's contacted the U.S. Attorney's Office to share

information regarding the bribery scheme, which had become an issue in the litigation in the United Kingdom among entities controlled by Kozeny, Cooperman, and others. (Tr. 2450-51). Bourke was advised that he was a subject of the investigation and he agreed to meet with the U.S. Attorney's Office and entered into a proffer agreement that he signed in April 26, 2002. (Tr. 2361, 2453; GX 101). During these proffer sessions, which took place over the course of four days, Special Agent George Choundas of the FBI took extensive notes and later produced a detailed, comprehensive FD-302 memorandum of those interviews and Bourke's statements based on those notes. (Tr. 2452-53). During these sessions, Bourke was asked specifically whether he knew that Kozeny had made various corrupt payments, transfers, and gifts to Azerbaijani government officials; Bourke falsely denied any such knowledge. (Tr. 2455).

B. The Defense Case

1. Senator George Mitchell

The defense called Senator George Mitchell, a friend of Bourke's who invested in Bourke's company Blueport International, served as a director for Oily Rock Group Limited and the Minaret Group, and met with Azebaijani government officials. Mitchell testified that he invested $200,000 with Bourke for the Azerbaijani privatization project in March 1998. (Tr. 1634). Mitchell testified he met with the President Aliyev and his son when Mitchell was in Baku for the Minaret office opening in late April 1998. (Tr.1642, 1644). Mitchell testified that both President Aliyev and his son told him that the Azeri government intended to go forward with the privatization process, but that with respect to SOCAR they would proceed carefully and privatize when the time was right. (Tr. 1643, 1645).

Mitchell testified that prior to his investment he asked directed staff at his law firm to research Kozeny. (Tr. 1632). He also read newspaper and magazine articles that were critical of Kozeny and his investment tactics in Czechoslovakia. (Tr. 1632). When Mitchell mentioned these allegations to Bourke, Bourke vouched for Kozeny by saying that "Kozeny had not been charged with or convicted of any wrongdoing." (Tr. 1632). In addition, Mitchell testified that in his April 1998 meeting with the U.S. ambassador to Azerbaijan, the ambassador warned Mitchell that he should not be involved with Kozeny because of his bad reputation. (Tr. 1640-41). Although he gave this advice to Bourke, Bourke responded as he previously had about the negative articles. (Tr. 1641).

Mitchell further testified that Bourke had never advised Mitchell that Bourke had developed concerns about Kozeny's potential violations of the FCPA, had consulted lawyers on the matter, and had restructured his and Mitchell's participation in the investment as a result. (Tr. 1704-06). Instead, Bourke told Mitchell that their board memberships and the company structures had been restructured due to unspecified information control issues. (Tr. 1637 ("[Bourke] said something to the effect that they felt they were not receiving adequate information on the operations of the company and that they wanted to therefore not proceed with the operating companies that existed but rather create advisory companies")).

2. David Brodsky

The defense called David Brodsky, a lawyer who represented Omega during its investigation of the options fraud and met with Bourke regarding this investigation. Brodsky testified that Bourke and Vincent worked together to investigate what had happened to Omega's investment in Azerbaijan. (Tr. 2339). Brodsky met with Bourke in January and March 1999, to

discuss the investigation and whether Omega should ask the Department of Justice ("DOJ") to conduct an investigation. (Tr. 2344). When he told Bourke he was not going to recommend that Omega contact the DOJ, Bourke became angry and started yelling. (Tr. 2345). Brodsky testified Bourke told him that Viktor Kozeny had "ripped everyone off" and that Kozeny could be dealt with by the prosecutors. (Tr. 2345). However, Stanley Twardy, who was Bourke's attorney at the time, had already testified on the Government's case that Bourke did not approach prosecutors at any level with his allegations or concerns. (Tr. 2413-14).

3. William Benjamin

William Benjamin, an international tax lawyer who represented Richard Friedman regarding his investment in Oily Rock in 1998, testified that he participated in a conference call in May 1998, before Friedman invested. (Tr. 2514). This call involved Friedman, other American investors, and their lawyers, and it discussed the risks of joining the board of Oily Rock Group. (Tr. 2514). Benjamin also testified that no one on the call made statements concerning knowledge of illegal activity in the investment. (Tr. 2516).

4. Robert Evans

Robert Evans, a boyhood friend of Bourke, testified about his trip to Azerbaijan and elsewhere with Bourke and Kozeny in 1998, as well as his later investment. (Tr. 2537). Evans testified that he and Bourke went to Baku on February 6, 1998, and met with Bodmer. (Tr. 2537). Bodmer told them that Bodmer and Viktor had met with President Aliyev, that President Aliyev was in favor of the Americans' investment in Azerbaijan, that he would support it, and that he was also "in on the deal." (Tr. 2537-38). Evans testified that he understood this to mean that the President was a co-investor and not that he was being bribed by Kozeny. (Tr.

2538). Evans also testified that he was with Bourke the entire six hours that he was in Azerbaijan on February 6, 1998, including the meeting, but it was impossible for Bourke to have met with Bodmer on February 5, 1998, in Azerbaijan because Bourke and Evans were in London on that day. (Tr. 2543). Evans was only in Azerbaijan twice, once in January 1998 and once on February 6, 1998, but not in April 1998 for the Minaret opening. (Tr. 2542-43). Evans also testified that he did not see or encounter Bodmer on his January trip to Azerbaijan. (Tr. 2543).

On cross-examination, Evans testified that while driving around Baku with Bourke and Kozeny before Evans invested, Kozeny told Bourke and Evans that "you don't get the full asset for your investment because of these local interests." (Tr. 2622). Evans testified that the investor group was going to get two-thirds of the privatized company and the rest was going to stay in Azerbaijan for "local partners." (Tr. 2622). The Azerbaijanis would retain a third of the company in which the American investors invested. (Tr. 2622).

5. Eric Vincent

Eric Vincent, an investment manager who worked for Omega, testified about his responsibility for Omega's investment in Azerbaijani privatization in the investment's later stages. Vincent testified that in October 1998 he had discovered problems with Omega's options purchases per a European Union audit report, which suggested Omega's options had not been purchased from the Azerbaijani government as contemplated. (Tr. 2703). When he relayed these concerns to Bourke, Bourke was upset, agreed to gather information to investigate Omega's investment and eventually assisted in the investigation and in gathering evidence to document their findings. (Tr. 2705, 2711-13). Vincent testified that Bourke told him he wanted to share the book with U.S. government authorities and with President Aliyev. (Tr. 2714). When

instructed that he could not present the book to the authorities because it was Omega's work product, however, Bourke was upset that Omega was not willing to present the book to the U.S. government. (Tr. 2714).

Vincent and Bourke also asked Senator Mitchell to send a letter to President Aliyev, requesting that the President meet with Bourke and Vincent. (Tr. 2716). When they subsequently met President Aliyev in Baku, Bourke told Aliyev that the investors had been defrauded, and he hoped Aliyev could help them recover those funds. (Tr. 2720). Vincent testified Aliyev's attitude was not warm and that Bourke feared for his safety after leaving the meeting. (Tr. 2720-21).

On cross-examination, Vincent testified that he never uncovered any evidence that Bourke had been defrauded. (Tr. 2752). Vincent also testified that "the book" was about Kozeny's options sales to Omega, not Bourke's investment. (Tr. 2750-51). Omega was always going to pay $25 for the options. (Tr. 2759). Vincent further testified that notwithstanding his limited role in the investment — both durationally and qualitatively, as compared to Bourke, Lewis, and others — he had missed a variety of "red flags" which should have indicated to him that Kozeny's investment was in contravention of the FCPA. (Tr. 2798-2802).

6. Katheryn Fleck

The defense called Katheryn Fleck, daughter of Aaron Fleck and a partner of Fleck Family Partnership, which invested in the Azeri privatization project. Fleck testified that in March 1998 she went to Azerbaijan to conduct due diligence and confirm the information she had gotten from Kozeny about the project. (Tr. 2823). After the trip, she and her father decided

to invest in the project on behalf of the Fleck Family Partnership. (Tr. 2324). Fleck testified that she was unaware of any bribes having been paid to Azerbaijani officials. (Tr. 2825).

7. Megan Harvey

Finally, the defense called Megan Harvey, Bourke's life partner, who had accompanied him on trips to Azerbaijan and invested in the project through Bourke's Blueport. (Tr. 2850). Harvey testified about her own interactions with Kozeny and about a variety of statements made by Bourke and others which purportedly showed Bourke's state of mind, that of an innocent investor. (Tr. 2850-99).

LEGAL STANDARDS

A. Rule 29

A defendant making an insufficiency claim under Rule 29(c) "bears a very heavy burden," *United States* v. *Desena,* 287 F.3d 170, 177 (2d Cir. 2002), and faces "an uphill battle." *United States* v. *Jones*, 30 F.3d 276, 281 (2d Cir. 1994); *see United States* v. *Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). In evaluating such a claim, the evidence must be viewed in the light most favorable to the prosecution, *see United States* v. *Gonzalez,* 110 F.3d 936, 940 (2d Cir. 1997), and a court must credit every inference that the jury might have drawn in favor of the Government. *See Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979); *United States* v. *Masotto,* 73 F.3d 1233, 1241 (2d Cir. 1996).

In considering the Government's proof for Rule 29 purposes, a court must "resolve all issues of credibility in favor of the jury's verdict," *Desena*, 287 F.3d at 177 (internal quotations omitted); *United States* v. *Abelis*, 146 F.3d 73, 80 (2d Cir. 1998). In a close case, where "either

of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *Autuori,* 212 F.3d at 114 (internal quotation marks and brackets omitted). In assessing the evidence in a given case, a reviewing court asks "not whether [it] believes that the evidence at trial established guilt beyond a reasonable doubt," *United States* v. *Brown,* 937 F.2d 32, 35 (2d Cir. 1991), but whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Autuori*, 212 F.3d at 114 (quoting *Jackson*, 443 U.S. at 319) (emphasis in original); *accord Desena*, 287 F.3d at 176; *United States* v. *Guadagna,* 183 F.3d 122, 129 (2d Cir. 1999); *United States* v. *Amato*, 15 F.3d 230, 235 (2d Cir. 1994). "In other words, the court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is 'nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" *Guadagna,* 183 F.3d at 130 (citation omitted); *see also United States* v. *Payton*, 159 F.3d 49, 55-56 (2d Cir. 1998) ("The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but *whether any rational trier of fact could so find*.") (citations omitted, emphasis in original). Moreover, a conviction must be sustained even if based entirely on circumstantial evidence: "[s]o long as, from inferences reasonably drawn, the jury could fairly have found beyond a reasonable doubt that the defendant engaged in the charged criminal conduct, a conviction based on circumstantial evidence must be sustained." *United States* v. *Sureff,* 15 F.3d 225, 228 (2d Cir. 1994).

The task of choosing among permissible inferences is for the fact-finder, the jury. *See*, *e.g., United States* v. *Salmonese*, 352 F.3d 608, 618 (2d Cir. 2003) (this Court was "mindful that the task of choosing among permissible competing inferences is for the jury, not a reviewing

court"); *United States* v. *Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) ("courts must be careful to avoid usurping the role of the jury when confronted with a motion for acquittal") (citing *Guadagna*, 183 F.3d at 129 ("Rule 29(c) does not provide the trial court with an opportunity to substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury.")). As the Supreme Court has underscored, this approach "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* v. *Virginia*, 443 U.S. at 319.

In assessing the proof at trial, the reviewing court must analyze every piece of evidence "not in isolation but in conjunction," *United States* v. *Diaz*, 176 F.3d 52, 89 (2d Cir. 1999), and must "resolv[e] all issues of credibility in the Government's favor." *Abelis*, 146 F.3d at 80. Moreover, in considering sufficiency challenges, this Court has stressed that "[t]he government's case need not exclude 'every possible hypothesis of innocence.'" *Sureff*, 15 F.3d at 229 (quoting *United States* v. *Friedman*, 998 F.2d 53, 59 (2d Cir. 1993)). A reviewing court "cannot reverse a conviction merely because the defendant's exculpatory account is plausible." *Friedman*, 998 F.2d at 56; *see also United States* v. *Plitman*, 194 F.3d 59, 67 (2d Cir. 1999) ("Even if there had been evidence regarding these [defense] theories in the record, the jury was free to reject it.").

B. Rule 33

In the alternative to his Rule 29 motion, Bourke moves for a new trial on a variety of errors he ascribes to the Court's jury charges and evidentiary rulings. Because Rule 33 "motions for a new trial are disfavored in the Second Circuit," *United States* v. *Gambino*, 59 F.3d 353, 364

(2d Cir. 1995), trial courts, after examining the totality of the evidence and considering objectively all of the facts and circumstances, should grant the motion only if the court finds "a real concern that an innocent person may have been convicted." *United States* v. *Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). In short, "[i]t is only when it appears that an injustice has been done that there is a need for a new trial 'in the interests of justice.'" *Id*.

A trial court must strike a balance between weighing the evidence and credibility of witnesses and not "wholly usurp[ing]" the role of the jury. *Autuori,* 212 F.3d at 120. Because the court generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, "[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." *Sanchez*, 969 F.2d at 1414.

The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. *See id*. (the trial court must be satisfied that "competent, satisfactory and sufficient evidence" in the record supports the jury verdict). The court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. The trial court must exercise the Rule 33 authority "sparingly" and in "the most extraordinary circumstances." *Id.*

ARGUMENT

I. THE COURT PROPERLY INSTRUCTED THE JURY ON CONSCIOUS AVOIDANCE.

Bourke challenges the Court's decision to instruct the jury on conscious avoidance. Bourke argues that there was an insufficient factual basis for the charge and that the Court erred because "(1) the Government expressly disclaimed reliance on [a conscious avoidance] theory at trial," relying instead on an actual knowledge theory; and "(2) the Government's evidence, at best, could establish only negligence," not conscious avoidance. (Def. Mem. 7). Contending that "the Government's evidence of actual knowledge was . . . weak," Bourke asserts that the purported error in giving the instruction was not harmless. (Def. Mem. 18). These arguments ignore the proof at trial that provided a more than sufficient factual basis for a conscious avoidance charge. The Government proved that Bourke was confronted with evidence of corrupt arrangements and deliberately disregarded it.

Furthermore, as the proof showed, there was also powerful evidence of Bourke's actual knowledge of the fraud. The jury's verdict unambiguously confirmed this conclusion, because, in finding Bourke guilty of false statements in addition to conspiracy, the jury necessarily concluded that Bourke had known about the bribes Kozeny had paid and had lied about that knowledge in his proffers, rather than simply consciously avoiding acquiring the guilty knowledge. Accordingly, any claimed error was harmless in light of the strong evidence of Bourke's actual knowledge, and his challenge to the Court's decision to instruct the jury on conscious avoidance should be rejected.

A. Applicable Law

A conscious-avoidance instruction is appropriately given "when a defendant claims to

lack some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance." *United States* v. *Reyes*, 302 F.3d 48, 54 (2d Cir. 2002) (internal quotation omitted). That is because "in addition to actual knowledge, a defendant can also be said to know a fact if he 'is aware of a high probability of its existence, unless he actually believes it does not exist.'" *Id.* (quoting *Leary* v. *United States*, 395 U.S. 6, n.93 (1969)).

Thus, an instruction on conscious avoidance is proper: (i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction, and (ii) the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact. *United States* v. *Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (citation and quotation omitted); *see also United States* v. *Svoboda*, 347 F.3d 471, 477 (2d Cir. 2003). "Of course, 'the same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct.'" *Svoboda*, 347 F.3d at 480 (quoting *United States* v. *Lara-Velasquez*, 919 F.2d 946, 951-52 (5th Cir. 1990)). However, "the defendant must be shown to have decided not to learn the key fact, not merely to have failed to learn it through negligence." *United States* v. *Nektalov*, 461 F.3d 309, 315 (2d Cir. 2006).

Giving a conscious-avoidance charge in such cases "is a practical necessity given the ease with which a defendant could otherwise escape justice by deliberately refusing to confirm the existence of one or more facts that he believes to be true." *United States* v. *Reyes*, 302 F.3d at 54. Furthermore, a conscious-avoidance instruction "is not inappropriate merely because the

Government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain." *United States* v. *Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995); *see also United States* v. *Carlo*, 507 F.3d. 799, 802 (2d Cir. 2007).

Conscious avoidance charges are routinely given and approved on review in conspiracy cases when limited to the defendant's knowledge of the conspiracy's objectives. As the Second Circuit has observed, "[d]ecisions of this Court indicate that in a conspiracy case, a conscious avoidance instruction may be given to show a defendant had some knowledge of the unlawful aims and objectives, but not to establish knowing participation or membership in the scheme charged." *United States* v. *Gurary*, 860 F.2d 521, 527 (2d Cir. 1988); *see also United States* v. *DiTommaso*, 817 F.2d 201, 218-19 (2d Cir. 1987) ("'[T]here are two aspects of knowledge involved in a conspiracy: (1) knowing participation or membership in the scheme charged and (2) some knowledge of the unlawful aims and objectives of the scheme.'" Although a 'conscious avoidance' charge is improper with regard to the first aspect, that theory is entirely appropriate with regard to the issue of 'guilty knowledge'" (quoting *United States* v. *Heinemann*, 801 F.2d 86, 93 (2d Cir. 1986)). With respect to the first element of a conspiracy charge, membership, conscious avoidance will not support a finding that a defendant knowingly and intentionally participated in the joint undertaking, since "it is 'logically impossible for a defendant to intend and agree to join a conspiracy if he does not know that it exists.'" *United States* v. *Eltayib*, 88 F.3d 157, 170 (2d Cir. 1996) (quoting *United States* v. *Scotti*, 47 F.3d 1237, 1243 (2d Cir. 1995)); *see United States* v. *Tropeano*, 252 F.3d 635, 660 (2d Cir. 2001) ("a conscious avoidance theory may not be used to support a finding that the defendant intended to join or participate in

the conspiracy"). "Once [the] defendant's participation in the conspiracy has been established," however, "the prosecution can satisfy its burden of proof by showing that [the defendant] consciously avoided actual knowledge of the purposes and objectives of the conspiracy." *United States* v. *Reyes*, 302 F.3d 48, 53-54 (2d Cir. 2002) (citing *United States* v. *Eltayib*, 88 F.3d at 170)); *see United States* v. *Svoboda*, F.3d 471, 477-78 (2d Cir. 2003) ("a conscious avoidance doctrine may be invoked to satisfy the requirement that a defendant know of the unlawful aims of the conspiracy") (citing *United States* v. *Reyes*, 302 F.3d 48, 53-54); *United States* v. *Tropeano*, 252 F.3d at 660 ("our well-established caselaw" reflects "that a conscious avoidance theory may support a finding that a defendant knew of the objects of the conspiracy"); *accord United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195 (2d Cir. 1989). Thus, where "the defendant has become a member of a joint undertaking, he cannot avoid responsibility for its unlawful acts by closing his eyes to what is readily apparent." *United States* v. *Reed*, 790 F.2d 208, 211 (2d Cir. 1986); *see also Eltayib*, 88 F.3d at 170.

The conscious-avoidance instruction was particularly appropriate here because this *mens rea* is specifically set forth in the Foreign Corrupt Practices Act. The Supreme Court has repeatedly "declined to require a greater degree of intent for conspiratorial responsibility than for responsibility for the underlying substantive offense." *United States* v. *Feola*, 420 U.S. 671, 688 (1975) (collecting cases); *United States* v. *Eisenberg*, 596 F.2d, 522, 526 (2d Cir. 1978) ("It being clearly established that requisite knowledge was proved for conviction of the substantive offense, it now follows that the same knowledge is enough as well to establish the conspiracy to commit the substantive offense."); *United States* v. *Podell*, 519 F.2d 144 (2d Cir. 1975) ("[S]ince knowledge of illegality is not necessary for a substantive conviction under 18 U.S.C § 203, such

knowledge is also not necessary for a conspiracy conviction." (internal quotation marks omitted)). The Court's instruction in this regard accurately reflected the language of the FCPA itself, which states:

> (3)(A) A person's state of mind is 'knowing' with respect to conduct, a circumstance, or a result if —
>
> (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
>
> (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
> (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believe that such circumstance does not exist.

15 U.S.C. § 78dd-2. As the Second Circuit held in closely analyzing the FCPA's *mens rea* in a decision concerning the collateral estoppel effect of an FCPA guilty plea, "the federal conspiracy statute, 18 U.S.C. § 371, imposes no greater *mens rea* than that necessary to commit the substantive offense." *Stichting Ter Behartiging van de Belangen van Oudaandeelhouders in het Kapitall van Saybol International B.V.* v. *Schreiber*, 327 F.3d 173, 184 n.10 (2d Cir. 2003) ("*Stichting*").

B. Discussion

1. The Charge Was Appropriate and Balanced.

Without objection from the defense, the Court structured the charge so that the jury would be given all of the elements of the substantive offenses under the FCPA and the Travel Act so that the jury could determine whether the substantive violations were the objects of the conspiracy. Accordingly, the conscious-avoidance concept was introduced with reference to

the fifth element of a violation of the FCPA, "that the person knew that a . . . payment or gift would be offered, given, or promised, directly or indirectly, to any foreign official." (Tr. 3366). The Court then explained that:

> The FCPA provides that person's state of mind is knowing with respect to conduct, a circumstance, or a result if, and I'm quoting from the statute, the FCPA, if such person is aware that such person is engaging in such conduct; that such circumstances exist, or that such result is substantially certain to occur. That's the end of the quote. When knowledge of existence of a particular fact is an element of the offense, such knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.

(Tr. 3366-67). Thus, the conscious avoidance criteria were applied only to the question of knowledge. The Court then specifically cautioned the jury against applying a negligence standard to the defendant's conduct: "On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal." (Tr. 3367).

The Court did not repeat this language when discussing the knowledge requirements for a conspiracy conviction, and thus, even though a conscious-avoidance charge was highly appropriate, the jury was actually instructed, with respect to the elements of a conspiracy offense, that it had to find more. The Court framed the question as this: "Did he participate in [the conspiracy] with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective?" (Tr. 3372). "To satisfy its burden of proof as to this element, the government must prove beyond a reasonable doubt that the defendant knew that he was a

member of an operation or conspiracy that committed or was going to commit a crime. . . ." (Tr. 3372). The Court also instructed that

> the fact that the acts of a defendant, without knowledge, merely happens to further the purpose or objectives of the conspiracy does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy with the intention of aiding in the accomplishment of those unlawful ends.
>
> In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purpose of furthering the unlawful undertaking. He thereby becomes a knowing and willing participant in the unlawful agreement, that is to say, a conspirator.

(Tr. 3374-75). These instructions, combined with other, additional cautionary language, did more than enough to ensure that the jury did not hold Bourke to a negligence standard.

2. An Ample Factual Basis Supported a Conscious-Avoidance Charge

a. The Evidence Showed That Bourke at Minimum Deliberately Avoided Confirming the Existence of a Corrupt Scheme.

The District Court's decision to give a conscious-avoidance charge was entirely proper. The first factual predicate was plainly satisfied, as Bourke vigorously disputed his knowledge of the unlawful objectives of the conspiracy. (*See, e.g.*, Tr. 123:9-14 ("There was no way Kozeny was going to let anybody tell Mr. Bourke about any payments he was making to the Azeris.") (Bourke's opening statement)). With respect to the second predicate, there was ample factual basis for the jury to conclude that Bourke was aware of a high probability of the existence of corrupt arrangements, yet deliberately avoided confirming that fact. Numerous pieces of evidence demonstrated Bourke's awareness of a high probability that corrupt arrangements were involved. For example, Amir Farman-Farma testified that both he and Bourke were aware of the

high level of corruption in Azerbaijan generally. (*See* Tr. 1496 ("We were both aware by that time that Azerbaijan . . . was rated as one of the most corrupt countries in the world"); *see also* Tr. 1571 (Arnold Levine warned Bourke that Azerbaijan was like the "wild west")). The Government also introduced a tape recorded call, dated May 18, 1998, between Bourke, Friedman, and their attorneys, in which Bourke expressed his concern that Kozeny and his employees were paying bribes. (GX 4A-T-2 (Bourke: "I mean, they're talking about doing a deal in Iran . . . Maybe they . . . bribed them, . . . with ten million bucks. . . . I'm not saying that's what they're going to do, but suppose they do that."); *id.* ("What happens if . . . they bribe somebody in Kazakhstan and we're at dinner and . . . one of the guys [says] 'Well, you know, we paid some guy ten million bucks to get this now.' . . . I'm just saying to you in general . . . do you think business is done at arm's length in this part of the world?")). The Government also offered evidence about the fact that Bourke learned about Kozeny's prior involvement in privatization in the Czech Republic from a feature article in the December 1996 issue of Fortune magazine, which described Kozeny's reliance on illegal business practices, such as insider trading, purchase of state secrets from a government official, and fraud, to accomplish the goals of that scheme. (GX 30; Tr. 1924-25). This article put Bourke on notice of the high probability that Kozeny's latest scheme involving Azerbaijan also included corrupt arrangements, such as bribe payments or offers to pay bribes. Further, Farrell and Pulley, among other witnesses, testified about Bourke's involvement with Kozeny in the investment from the very beginning, in the spring of 1997, and about the closeness of Bourke's relationship with Kozeny. (*See, e.g.*, Tr. 218-57, 386, 516; *see also* GX 4A-T-2 (Bourke: "He's a great guy," referring to Kozeny)). From this evidence, a reasonable juror could conclude that Bourke was put on notice of a high probability

that the conspiracy involved corrupt arrangements.

The evidence further established that Bourke at minimum consciously and deliberately avoided confirming these facts by declining to have his attorneys conduct any due diligence. (More likely, given the evidence of his knowledge of the scheme, is that he wished to conceal the facts of illegality from his counsel.) Additionally, as discussed on the May 18, 1998 tape recorded call, Bourke and Friedman proposed the formation of separate companies affiliated with Oily Rock and Minaret, whose purpose was to shield Bourke and other American investors from liability from any corrupt payments. (*See* GX 4A-T-2 (proposing the formation of "Oily Rock Partners" after discussion of possible bribery by Kozeny)). In other words, instead of endeavoring to unearth the full extent of Kozeny's wrongdoing, Bourke and others made the decision to take other affirmative action, by forming separate companies in an attempt to avoid liability.

Bourke's conduct was particularly notable — and the conscious avoidance charge was particularly appropriate — because this case presented the rather unique circumstance in which a conspirator was actually advised by counsel in the very middle of the conspiracy's activities that he could not consciously avoid confirming the illegality of the scheme. As Bourke's counsel, Jay Colvin, somewhat reluctantly testified:

> Q: Mr. Colvin, does that refresh your recollection as to whether you told Mr. Bourke that he couldn't willfully disregard or consciously disregard or stick his head in the sand with respect to the FCPA?
>
> A: Yeah. I think we went over that concept. I mean I don't -- this wasn't intended to be a quote of what I told Mr. Bourke when I said that to [a Government prosecutor].
>
> Q: Okay. Putting aside the exact words you used, is it fair to

> say that the concept you were describing to him was that if he thought there might be bribes paid, he couldn't just look the other way?
>
> A: That's absolutely true. I think that's correct.

(Tr. 2149-50). Thus, to the extent that Bourke may have remained willfully ignorant of the full extent of the FCPA conspiracy, he did so with the heightened awareness that the law imposed on him a duty not to look the other way.

b. The Government Did Not Offer Evidence of Negligence.

Bourke claims that the evidence reflecting the fact that Bourke failed to conduct due diligence was "at most, evidence of negligence," showing that Bourke "should have tried harder to learn the truth," rather than consciously avoided learning it. (Def. Mem. 12).[3] This is not actually an attack on the jury charges, which cautioned several times against finding the defendant guilty because he was negligent. (*See supra* at Argument, Part I.B.1). Instead, it is a complaint, first, that this is what the Government argued and, second, that the testimony from Bourke's lawyers invited this conclusion. In fact, the Government's argument was a different one: not that Bourke was negligent for failing to assign his lawyers with the task of due diligence, but that he refrained from doing so, when he certainly had the wherewithal to do so, because he

[3] Similarly, Bourke claims that the Government advocated a negligence standard, instead of a conscious-avoidance standard, given the Government's statement that Bourke "could have learned" of Azerbaijan's corruption problem in its motion-in-limine. (Def. Mem. 13). But, as the Court already noted, the Government was not contending that Bourke was negligent in failing to investigate whether Kozeny for using bribery. *See United States* v. *Kozeny*, — F. Supp. 2d — , 2009 WL 1514369, at *3 (S.D.N.Y. May 29, 2009) (No. 05 Cr. 518 (SAS)). Rather, it argued, as it does now, that Bourke would have at least been aware of the high probability that bribes were being paid. *Id.*

did not want them to learn the true facts of his corrupt investment.[4] Accordingly, the Government made clear in its questioning of each lawyer that, had Bourke told them about bribery they would have resigned. And the Government highlighted this in rebuttal, in discussing why Friedman's lawyer, William Benjamin, was an irrelevant witness: "And you heard from several lawyers, you know how this works. If a client tells a lawyer I'm breaking the law, please help me, he's got to resign from the transaction." (Tr. 3324-25). This point was buttressed when Bourke's use of lawyers was contrasted with another investor's. The Government called James Rossman, who conducted due diligence for another large investor, David Bonderman, and uncovered the likely FCPA violations, to show, among other things, that Kozeny and Bodmer were not in fact hiding these facts from potential investors and their attorneys, as the defendant had contended in his opening statement.[5] Similarly, Rossman's client, Carrie Wheeler, who worked for Bonderman, testified that she learned several suspicious facts while traveling in Bourke's company on a Kozeny-led trip to Baku. These were not witnesses put on to show Bourke was negligent; they were called to show that Bourke's conduct was willful, as the Government argued in the letter which Bourke quotes: "The contrasting example of Wheeler and

---

[4] The Government argued: "[Bourke] didn't even hire a lawyer at that point or send anybody to Switzerland to do any kind of due diligence. And that's because he didn't need to. He either didn't want to know the whole story or he knew enough." (Tr. 3141).

[5] As the Government contended, "[Defense counsel] told you that , quote, there was no way Kozeny was going to let anybody tell Mr. Bourke about any payments he was making to the Azeris. And she said there were three reasons for that: First she said, that many of the potential investors were consulting lawyers and that Kozeny knew than any mention of bribes would put an end to the investors' interest." (Tr. 3140). The Government then went on to discuss how Kozeny had in fact shared the supposedly secret information with Bonderman and Wheeler through Rossman. "So in fact the evidence showed that Kozeny did allow investors and their lawyers to find out what they wanted to find out." (Tr. 3141).

Rossman is highly probative of whether the defendant really wanted his counsel to get to the bottom of the numerous vagaries in the Oily Rock investment." (Gov't Letter of June 15, 2009, at 3 (Def. Mem. 14)). The Government's point was made crystal clear in rebuttal after the defense argued that at most the defendant was negligent; as the Government responded, "[defense counsel] says, well, you know what, Mr. Bourke just didn't do any due diligence. Maybe he should have, in hindsight. He should have hired some lawyers to do this. I think the answer to that is obvious. He should've, but he didn't because he didn't want a lawyer on record telling him you shouldn't do this investment, the way Jim Rossman was telling Mr. Bonderman. There was no due diligence at all." (Tr.3310).

Bourke now complains that the jury likely applied a negligence standard because of all of the testimony from attorneys, but if he believed that this was a specific danger with respect to this testimony, he could have requested a specific instruction to address it. Moreover, Bourke's complaint about the lawyers' testimony rings particularly hollow when he has acknowledged that he would have called all of the same lawyers on his case to build his quasi-reliance-on-counsel defense -- notwithstanding that this defense largely receded after the lawyers actually testified. Thus,

Bourke fails to show why negligence is the only conclusion that a reasonable juror could reach as to this piece of evidence, especially in light of Bourke's involvement in forming the separate shell companies. Rather, a reasonable juror could conclude that, although Bourke had an opportunity to conduct due diligence and discover the corruption, he chose not to, because he sought to consciously avoid learning the truth. *See, e.g.*, *United States* v. *Zapata*, 357 F. Supp. 2d 667, 671 (S.D.N.Y. 2005) (trial court denied defendant's motion to preclude conscious-

avoidance charge, because a rational juror could find that the defendant consciously avoided confirming an illegal fact by failing to ask any questions during an eight-week period about what she was participating in, even though she had the opportunity to do so). Indeed, Bourke's present claim is "little more than a challenge to the sufficiency of the evidence to support a conscious avoidance conviction," and in considering such a challenge, evidence is reviewed "'in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government.'" *Aina-Marshall*, 336 F.3d at 171 (quoting *United States* v. *Hernandez*, 85 F.3d 1023, 1030 (2d Cir. 1996)).

c. The Evidence of Actual Knowledge Did Not Preclude a Conscious Avoidance Charge.

In the face of the ample evidence on which to base the conscious-avoidance instruction, Bourke nevertheless argues that the conscious-avoidance instruction was improper for two reasons. Relying primarily on the Second Circuit's decision in *United States* v. *Ferrarini*, 219 F. 3d 145 (2d Cir. 2000), Bourke claims that there was insufficient evidence that he deliberately decided not to learn about the criminal conduct at issue. (Def. Mem. 7-11). As part of this argument, Bourke stresses that the Government at trial proceeded on an actual knowledge theory, rather than a conscious avoidance theory, and thus the instruction was improper. This claim lack merit, as it ignores the Second Circuit's decisions that post-date *Ferrarini* and rests on a mischaracterization of the evidence.

Bourke's reliance on *Ferrarini* is undercut by *United States* v. *Aina-Marshall*, 336 F.3d 167 (2d Cir. 2003). In *Aina-Marshall*, the defendant relied on *Ferrarini* to make the identical argument that Bourke advances here. *Id.* at 171-72. The Court's analysis constrained the reach of the dicta in *Ferrarini*:

> [A]ppellant . . . relies entirely upon our decision in *Ferrarini*. In particular, she argues that, under the standard set out in *Ferrarini*, there was no factual basis in the present case for finding that she deliberately avoided learning of the contents of the luggage . . . . This set of facts, she argues "is precisely like that theorized in *Ferrarini*" where the court stated (in a passage described by appellant's counsel at oral argument as dicta) that a conscious avoidance charge should not be given "where there was only equivocal evidence that the defendant had actual knowledge and where there was no evidence that the defendant deliberately avoided learning the truth." *Ferrarini*, 219 F.3d at 157. Whether this passage [in *Ferrarini*] even says what appellant construes it to mean is doubtful, but *Ferrarini* is in any event entirely distinguishable.
>
> In *Ferrarini*, the gravamen of the government's evidence showed the defendant's direct participation in acts that could not have been undertaken without guilty knowledge. A jury finding that the defendants lacked such knowledge . . . would have to have been accompanied by a finding that the defendants had not committed those acts and therefore had not participated in the charged conspiracy. A guilty verdict based on . . . conscious avoidance of the criminal goals of the conspiracy was thus not a reasonable option because the knowledge element of the government's case was not separable from the participation element.

Id. at 172.

Here, Bourke make the identical argument that the Second Circuit rejected in *Aina-Marshall*. As in *Aina- Marshall*, conscious avoidance was a reasonable option for the jury in this case based on the evidence presented at trial because the knowledge element was separable from the participation element. For instance, the jury could have concluded that, in the case of the medical treatment provided to Barat Nuriyev in New York City, Bourke may have participated by arranging Nuriyev's treatment without directly possessing the guilty knowledge that Kozeny was paying for his treatment. But based on the closeness of Bourke's relationship to Kozeny and other co-conspirators and his own understanding of the economies of the Azerbaijan investment,

as well as Bourke's previously expressed concerns about Kozeny's paying of bribes, as tape recorded prior to some of the medical treatments, the jury could have concluded that Bourke was aware of a high probability that Kozeny was making such payments but deliberately avoided confirming that fact. More broadly, the jury also had more than adequate evidence to reach the conclusion that, given the realities of the government in Azerbaijan, the economics of a transaction to privatize SOCAR into the hands of foreign investors, and Kozeny's established business methods, Bourke was well aware of the high probability, but avoided confirming, that Kozeny could not possibly have secured the highly favorable treatment he was receiving from Azerbaijani officials — who were foreign to him in every way when he and Bourke first visited Azerbaijan in 1997 — without paying significant bribes.

Thus, *Ferrarini* provides no support for Bourke's position and, as in *Aina-Marshall*, conscious avoidance was a reasonable option for the jury in this case based on the evidence presented at trial; the conscious avoidance charge was thus proper.

3. To the Extent the Charge Contained Error, It Was Harmless

Even if the Court were to find error in the decision to give a conscious avoidance instruction, that error was harmless and not a basis for reversal of Bourke's conviction or a new trial. The Second Circuit has repeatedly found that giving a conscious avoidance instruction is harmless where, as here, there was sufficient evidence of the defendant's actual knowledge to support the jury's verdict. In *United States* v. *Adeniji*, 31 F.3d 58 (2d Cir. 1994), for example, the Second Circuit found such an instruction harmless, holding:

> Given the fact that there was insufficient evidence to support a finding of conscious avoidance, it is apparent to us that the jury did not convict Adeniji on that theory. Instead, we presume that the jury convicted Adeniji on the basis of actual knowledge, an

alternative theory that was supported by the evidence.

Id. at 63 (citations omitted); *see also United States* v. *Kaplan*, 490 F.3d 110, 127-28 (2d Cir. 2007) ("error [in giving conscious avoidance charge] was harmless because there was overwhelming evidence of [the defendant's] actual knowledge"); *United States* v. *Ferrarini*, 219 F.3d at 157 (error in giving conscious avoidance charge was harmless because there was overwhelming evidence that the defendant actually knew of the fraudulent nature of the loans and the jury was properly instructed on actual knowledge).

The Government offered ample evidence of Bourke's actual knowledge that bribes were being paid or offered. Bourke claims that the "only direct evidence of actual knowledge put forward was the testimony of Government cooperators Bodmer and Farrell." (Def. Mem. 18). But aside from Bodmer and Farrell's testimony — which, separately and together, provided more than sufficient evidence related to actual knowledge — Amir Farman-Farman and Bob Evans also testified that Bourke had learned from Kozeny about bribery. (Tr. 1485 (Bourke told Farman-Farma that Kozeny informed him "that the dilution [of the shareholders' interests] was a necessary cost of doing business"); Tr. 2526 (Bourke and Bob Evans learned directly from Kozeny that they "would not get the full value of [their] investment . . . because of this split with local interests")).

Of course, Bourke also ignores the vast circumstantial evidence of direct knowledge. The jury was also entitled to conclude from evidence like Bourke's tape-recorded statements that, despite how he framed his words, he had actual knowledge by that point of the corrupt scheme underway in Azerbaijan. Indeed, the jury did not have to rely at all on direct evidence of actual knowledge, but could rely on all of the powerful circumstantial evidence of Bourke's actual

knowledge, like his closeness to Kozeny, his frequent trips to Baku, his independent relationship with Nuriyev, his leadership role in recruiting other investors, and his assessment of the high probability of the success of his investment and his calculation of his astronomical likely returns.

Finally, the conscious avoidance instruction, even if given in error, was also harmless because it was not a prominent feature of the Government's arguments to the jury, as the defendant points out. While the Government did reference the proof of Bourke's conscious avoidance, the Government's primary argument was that Bourke, of course, "knew about the conspiracy and he joined it willfully, intentionally, and unlawfully." (Tr. 3278). As argued in summation, evidence of Bourke's actual knowledge included the testimony of Bodmer, Farrell, Farman-Farma, and Evans, as well as Bourke's own words, as reflected on the May 18, 1998 tape recorded call, Government Exhibit 4A-T-2. Rather than relying on the conscious avoidance *mens rea,* the jury necessarily concluded that Bourke had actual knowledge of the corrupt scheme when it convicted him on Count III, making false statements.

In short, the Court's decision to give a conscious avoidance charge was correct because there was sufficient evidence to satisfy the factual predicate requirement in light of the overwhelmingly suspicious evidence provided to Bourke, and his efforts not to confirm what should have been obvious, and because the Government is permitted under the law for the jury to be instructed on alternative theories of knowledge.

II. THERE WAS NO ERROR IN THE COURT'S INSTRUCTION ON THE DEFENDANT'S *MENS REA*.

The defendant next asserts that there was error in the Court's instruction on the requisite *mens rea* for a conviction on the FCPA conspiracy count because it did not mirror the *mens rea* instruction for a substantive offense. Rather than instructing the jury that the defendant had to have joined the conspiracy "willfully" and "corruptly," the defendant complains, the Court instructed the jury that the defendant must have "willfully" joined in an "unlawful" agreement. This is a meaningless distinction, and is, undoubtedly because it could hardly make a difference to the case, an objection that the defendant failed to explain or preserve.

"[T]he word 'corruptly' in the FCPA signifies . . . a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position. But there is nothing in the word or any thing else in the FCPA that indicates that the government must establish that the defendant in fact knew that his or her conduct violated the FCPA to be guilty." *Stichting*, 327 F.3d at 183.

Not only did the Court, in explaining the elements of the object of the conspiracy, give a similar instruction, but the requirement that the defendant acted "corruptly" was adequately encompassed by the Court's charge on the conspiracy *mens rea*. As the Court instructed, among other things:

> In deciding whether the defendant was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly and willfully joined the conspiracy. Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective?
>
> . . . Before the defendant can be found to have been a conspirator, you must first find that he knowingly joined in the unlawful agreement or plan. To satisfy its burden of proof as to this

> element, the Government must prove beyond a reasonable doubt that the defendant knew that he was a member of an operation or conspiracy that committed or was going to commit a crime . . . . What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy with the intention of aiding in the accomplishment of those unlawful ends.
>
> In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised, or assisted in it for the purpose of furthering the illegal undertaking. He thereby becomes a knowing and willing participant in the unlawful agreement . . . .

(Tr. 3372-75). Given this extensive instruction on *mens rea*, it is difficult to see how the defendant can complain that the instruction "omitted the crucial 'intent to do something that the law forbids' and 'bad purpose to disobey or disregard the law' language," or that the *mens rea* was in any other way "water[ed]-down." (Def. Mem. 21). The defendant does not in his motion explain what else could have been connoted had the Court used the specific word "corruptly," or how whatever additional meaning he would ascribe to this word would have altered the jury's conclusion that the defendant conspired to violate the FCPA and the Travel Act.

Not only does the defendant fail here to explain the highly abstract distinction he attempts to make, but he failed to explain the distinction in any of the several conferences on the jury charge. Addressing the intent requirement for Count One, rather than citing any basis or authority for his additional request, defense counsel first stated with reference to the Court's draft that "it may well be that all of this captures what's required." (Tr. 2946). Defense counsel then went on to request a "clear statement that the intent required for the conspiracy includes, and must include the intent required for the underlying substantive offense. In this case we're talking

about the FCPA and it's willfully --." (Tr. 2946). At that point, the Court interjected that this was a standard conspiracy charge and expressed doubt that any additional language was necessary." (Tr. 2946). Without explaining why the word "corruptly" should be included, and without even articulating the word, counsel moved on to other objections.

"No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." Fed. R. Crim. P. 30. The objection must direct the trial court's attention "to the precise contention" concerning the charge that the party later relies upon to challenge the outcome at trial. *United States* v. *Lanza*, 790 F.2d 1015, 1021 (2d Cir. 1986); *see, e.g.*, *United States* v. *Tannenbaum*, 934 F.2d 8, 14 (2d Cir. 1991) (objections to district court's instructions must "state 'distinctly the matter to which [the defendant] objects and the grounds of the objection'" (quoting Fed. R. Crim. P. 30)); *United States* v. *Crowley*, 318 F.3d 401, 412 (2d Cir. 2003) (same). Even if a timely objection is made and there is error in the jury charge, reversal is not warranted if the trial court's error was harmless. *See United States* v. *Amuso*, 21 F.3d 1251, 1260-61 (2d Cir. 1994); *Ianniello* v. *United States*, 10 F.3d 59, 64 (2d Cir. 1993); *United States* v. *Torres*, 845 F.2d 1165, 1171 (2d Cir. 1988). When a defendant does not make a specific and timely objection to a district court's legal instructions, those instructions are subject to review only for plain error. *See United States* v. *Middlemiss*, 217 F.3d 112, 121 (2d Cir. 2000).

Even if the word "corruptly" were absolutely required in the charge, counsel simply did not say enough to both lodge the objection and explain its grounds. And even if counsel felt too rushed at the June 30, 2009 conference to explain his objection adequately after the Court

indicated initial skepticism, counsel did nothing in the eight days that followed before the charge was given — during which the parties continued to argue the charge in several additional conferences and letters — to clarify or explain the objection that the defense now claims "undermined" his defense. Moreover, given that the Court gave the instruction on "corrupt" *mens rea* in the Court's explanation of the elements of the substantive offense, the defense could have, alternatively, objected to the portion of the instruction that explained to the jury that it need not find all of the elements of the substantive offense. Not only was there no error and no adequate objection, but Bourke cannot contend that the addition of this word would have made any difference to the jury's assessment of his defense, which turned of course on whether he knew about bribes at all, not what his state of mind might have been as to the payments assuming he did know about them. Assuming that Bourke knew about payments to the Azerbaijani officials made in the course of the conspiracy, he could not possibly have thought those payments were anything but "corrupt" and "unlawful."

III. THE COURT PROPERLY INSTRUCTED THE JURY ON GOOD FAITH.

Bourke contends that the Court erred by not giving the jury a good-faith instruction in connection with each of the three counts. (Def. Mem. 22-26). He further asserts that this purported error was "compounded by the Court's error in instructing the jury that it could find Mr. Bourke guilty based on a conscious avoidance theory." (Def. Mem. 25). Bourke's contentions are without merit. A good faith instruction was not appropriate in this case, but in any event, the relevant jury instruction effectively communicated the essence of a good faith

defense in its discussion of the elements of knowledge and willfulness.[6]

The Second Circuit has long adhered to the view that a district court is not required to give a separate "good faith defense" instruction, so long as the trial court properly instructs the jury on the Government's burden to prove the element of willfulness, which necessarily captures the essence of a good faith defense. *See United States* v. *Doyle*, 130 F.3d at 540-41; *United States* v. *McElroy*, 910 F.2d 1016, 1025- 26 (2d Cir. 1990). Good faith is a defense to a limited set of crimes that require proof of an unusually culpable mental state. *See United States* v. *Nolan*, 136 F.3d 265, 270 (2d Cir. 1998) (stating that because embezzlement is a specific intent offense, good faith is a complete defense). Similarly, good faith is a defense to the somewhat different category of specific offense crimes, such as tax offenses, that require the even more culpable mental state of knowledge of unlawfulness. *See Cheek* v. *United States*, 498 U.S. 192, 202-03 (1991) (holding that good faith belief that one is not violating the law constitutes a defense to income tax offenses, which require that the Government prove that the defendant knew his conduct was unlawful); *see also Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (same, as to anti-structuring statutes contained at 31 U.S.C. §§ 5322(a) and 5324(a)(3)). These statutes, which require a heightened form of willfulness, eschew the general rule that ignorance of the law or a mistake of the law is no defense to criminal prosecution. 498 U.S. at 200-01. Instead, *Cheek* held

---

[6] A defendant challenging a jury instruction must establish both that he requested a charge that "accurately represented the law in every respect" and that the charge delivered was erroneous and caused him prejudice. *United States* v. *Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *United States* v. *Orena*, 32 F.3d 704, 713 (2d Cir. 1994); *United States* v. *Pujana-Mena*, 949 F.2d 24, 27 (2d Cir. 1991). A conviction will not be overturned for refusal to give a requested charge "unless that instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States* v. *Doyle*, 130 F.3d 523, 540 (2d Cir. 1997) (quoting *United States* v. *Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996)).

that in criminal tax cases, willfulness "requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 201. Thus, in such cases, the Government must show the defendant was willful in his violation of a known legal duty, "which cannot be true if the jury credits a good-faith misunderstanding and belief submission." *Id.* at 202.

The case did not require a separate jury instruction on the good faith defense negating willfulness, given that the charges here do not fall under the category of a limited set of crimes that require proof of an unusually culpable mental state. Bourke cites four cases in which a good-faith instruction was applied, apparently in an attempt to show how the instruction has been applied in a "variety of cases." (Def. Mem. 23). But each of those cases fall under the limited category of crimes requiring proof of specific intent, in which courts have given separate good faith instructions. *See United States* v. *Goldstein*, 442 F.3d 777 (2d Cir. 2006) (crime requiring "intent to defraud"); *United States* v. *Chen*, 393 F.3d 139 (2d Cir. 2004) (crime requiring "intent to injure or defraud"); *United States* v. *Rossmando*, 144 F.3d 197 (2d Cir. 1998) (crime requiring "intent to defraud"); *United States* v. *Pabisz*, 936 F.2d 80 (2d Cir. 1991) (tax crime requiring specific intent). As such, Bourke's reliance on those cases fails.

Bourke also wrongly asserts that the Court "fail[ed] to . . . effectively present Mr. Bourke's good faith defense in the jury charge," citing to the Court's instruction to the jury regarding the "willfully and corruptly" element of a violation of FCPA, the object of Count One. (Def. Mem. 24). In focusing on that aspect of the charge, Bourke misses the Court's instruction regarding a defendant's participation in a conspiracy, which provides that:

> An act is done "knowingly" and "willfully" if it is done deliberately and voluntarily, that is, the defendant's act or acts

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

(Final Jury Instructions at 33-34). This definition was repeated for Counts Two and Three by reference to the instruction provided in Count One, including the specific page numbers on which the relevant aspect of the instruction is detailed. (*See* Final Jury Instruction at 40-41 (For Count Two: "The second element that the Government must prove beyond a reasonable doubt to establish the offense of conspiracy to launder money is that the defendant knowingly, willfully, and voluntarily became a member of that conspiracy. You should apply the instructions I gave in Count One here (see pages 32-36)"); *id.* at 44 (For Count Three: "The fourth element that the Government must prove beyond a reasonable doubt as to Count Three is that the defendant acted 'knowingly' and 'willfully.' I have already defined these terms for you in my instructions regarding Count One (see pages 33-34)")). In other words, the language of the Court's instruction, indicating that the Government's burden could not be proved by showing that the conduct was undertaken due to inadvertence, mistake, or some other innocent explanation, fully encompassed the possibility of that Bourke "was acting properly in connection with the matters alleged in [Counts One and Two], even if he was mistaken in that belief, and even if others were injured by his conduct" (Bourke's Request To Charge No. 73), as well as the possibility that Bourke believed in the "accuracy" of the false statements that he made in violation of Count Three (Bourke's Request To Charge No. 74). Thus, contrary to Bourke's claim, the good faith instruction requested by him was "effectively presented elsewhere in the charge." *Doyle*, 130 F.3d at 540.

For all of these reasons, the Court's denial of a stand-alone good faith charge was proper.

IV. THE COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT MUST UNANIMOUSLY AGREE ON AT LEAST ONE OVERT ACT COMMITTED IN FURTHERANCE OF THE CONSPIRACY.

Bourke contends that the Court erred in refusing to instruct the jury that it must unanimously agree on at least one overt act committed in furtherance of the conspiracy and that therefore he is entitled to a new trial. (Def. Mem. 26-27). However, Bourke fails to cite to any cases in support of his claim that have squarely considered the question, and the relevant case law weighs against his favor.

Although this is apparently an issue of first impression in the Second Circuit, two other circuits — the Fifth and the Seventh Circuits — have held that jury need not agree unanimously on a particular overt act committed in furtherance of a conspiracy in order to convict. *See United States* v. *Griggs*, 569 F.3d 341, 343 (7th Cir. 2009) (a trial court is not "required (or indeed permitted) to tell the jury that," to convict a defendant of a conspiracy, "it had to agree unanimously on an overt act that at least one of the conspirators had committed."); *United States v. Sutherland*, 656 F.2d 1181, 1202 (5th Cir. 1981) ("We are convinced that in this case the jury need not specifically have considered and agreed as to which of a large number of potential overt acts of bribery were established by the government."); *see also United States* v. *Castellano*, 610 F. Supp. 1359, 1408 (S.D.N.Y. 1985) ("So long as the jury unanimously finds that a conspiracy was proved, including some overt act, no requirement exists that it unanimously agree to any of the other particulars charged.").

As the Seventh Circuit reasoned, "[t]he law distinguishes between the elements of a crime, as to which the jury must be unanimous, and the means by which the crime is committed." *United States* v. *Griggs*, 569 F.3d at 343 (citing *Richardson* v. *United States*, 526 U.S. 813, 817-

19 (1999)). In other words, jurors must agree unanimously on what crime a defendant commits, and in the context of a conspiracy charge, they must agree "that he had taken a step toward accomplishing the goal of the conspiracy, had gone beyond mere words." *Id.* at 344. But the fact the jurors "may have disagreed on what step [a defendant] took was inconsequential, especially since they didn't have to find that the step itself was a crime, or even base conviction on an overt act." *Id.* (internal citations omitted).

The cases cited by Bourke do not support his claim that a district court must instruct the jury that it must unanimously agree on an overt act committed in furtherance of the conspiracy, especially given that none of the cases actually address this issue. (These criticisms of Bourke's citations were made in the Government's briefing on this issue during trial, but rather than addressing them now, Bourke simply reprints his prior submission; accordingly, for convenience's sake, the Government will also repeat its briefing.) Bourke's reliance on *United States* v. *Jake*, 281 F.3d 123, 127-28 (3d Cir. 2002), and *United States v. Flood*, No. 2:07-CR-00485-DB, 2009 WL 1743667, at *12 (D. Utah, June 17, 2009), whose jury charges Bourke quotes, fails, as the trial court expressed no approval for such a charge one way or the other.[7] Similarly, his reliance on two Eleventh Circuit cases — *United States v. Adkinson*, 135 F.3d 1363, 1377 (11th Cir. 1998), and *United States* v. *Bobo*, 344 F.3d 1076, 1085 (11th Cir. 2003) —

[7] In *Jake*, the trial court gave the charge, without explanation, following which a new trial motion was granted because the defendant contended that the trial court had failed to inform the jury that an overt act had to be found within the statute of limitations. The Government appealed, and the Court of Appeals found that the objection had not been preserved and reinstated the conviction. In *Flood*, the district court gave the charge at the defense's request. There is no indication in the opinion that the Government challenged it, the Court did not approve it, and it was not an issue in the decision. It was only discussed to the extent that it was marginally relevant to the Court's decision on a question of whether the indictment was duplicitous.

are also unavailing. Neither of the counts at issue in those cases were conspiracy counts, and in neither of those cases did the Eleventh hold that unanimity as to overt acts was required. Rather, in both cases, the Court of Appeals addressed errors regarding how overt acts were alleged to describe a scheme to defraud in a substantive count.[8]

Bourke has some difficulty articulating how this requirement, even if it existed, could have affected the jury verdict, given that there were so many overt acts carried out by the members of the conspiracy that were never in dispute. He points to the necessity that the jury have found that an overt act was committed after July 22, 1998, but even with that restriction, there was no shortage of undisputed overt acts — including Nuriyev's August 1998 trip to New York to meet Bourke's doctors, Bourke's November 1998 trip to London to meet Nuriyev, and Bourke's October 1998 and January 1999 trips to Baku — upon which the jury could have easily agreed, without having to agree whether the overt acts were in themselves illegal acts.

As appealing as this concept might be to the many defendants who face conspiracy counts

---

[8] For example, in *Adkinson*, one of the objects of a five-object conspiracy, bank fraud, had been dismissed, and the indictment had accordingly been redacted to delete several portions of the conspiracy count relevant to the bank fraud conspiracy. The Court of Appeals considered the question of whether the redacted indictment that had gone to the jury adequately alleged substantive bank fraud in a separate count, and concluded that the indictment failed to allege that a bank fraud had been executed. *United States* v. *Adkinson*, 135 F.3d at 1375. The Government contended that the flawed bank fraud count could be clarified with reference to some of the remaining 227 overt acts in the redacted indictment. The Court of Appeals rejected this argument because there could be no assurance that the jurors had had the same bank fraud scheme in mind when they convicted the defendant of substantive bank fraud, and that assurance could not be supplied by reference to 227 overt acts relating to the four other objects charged in the indictment. *Id.* at 1375. Accordingly, the Eleventh Circuit vacated the substantive bank fraud conviction. Thus, the sentence which is partially included in the defendant's parenthetical below reads in full: "Therefore, even if the overt acts could supply the missing scheme [charged in the substantive bank fraud count], the failure of the jury to agree on which of the 227 overt acts constituted the scheme would violate these defendants' right to a unanimous verdict." *Id.* at 1377.

with multiple overt acts, the paucity of decisions on this question would frankly seem to indicate that the vast majority of defendants do not even attempt to advance this argument.

V. NO INSTRUCTION ON AZERI LAW CONCERNING A "MERE OFFER" WAS NECESSARY.

Following lengthy briefing and a hearing on Azeri law, the Court, in ruling on Bourke's motion for reconsideration that "if Bourke produces evidence at trial from which the jury can find that a 'mere offer' was made, the Court will then decide how to instruct the jury." *United States* v. *Kozeny*, No. 05 Cr. 518 (SAS), 2008 WL 5329960, at *1 (S.D.N.Y. Dec. 15, 2008). Bourke contends that he was entitled to an instruction that he contends was "taken in substance" from the Government's Azeri law expert, although the Government's expert disagreed with Bourke's expert analysis on the question. The issue seemed to recede once Bourke was no longer facing a substantive offense following the return a superseding indictment, but Bourke nonetheless requested a charge which the Court was initially inclined to give, and it was included in the earlier drafts of the Court's jury charge.

Regardless of the correct interpretation under Azeri law, however, Bourke was in no way entitled to the charge because he never made any argument that a "mere offer" was all that was made. Refusal to give a requested defense charge is not error "unless that instruction . . . represents a theory of defense with basis in the record that would lead to acquittal." *Doyle*, 130 at 540. At minimum, the charge did not represent a viable theory of defense with basis in the record. The indictment charged a conspiracy to violate the FCPA; while numerous overt acts were actually carried out by members of the conspiracy, there is no requirement that "certain of the unlawful bribes alleged by the Government as predicates of the conspiracy," as the defense

describes them, "have been consummated." (Def. Mem. 29). Even accepting the defendant's views on "mere offers," to prove this conspiracy, the Government merely had to show that there was an unlawful agreement to pay bribes, and — although there was plenty of proof on each of these points — did not even have to show that the bribes were offered, accepted, or transferred.

Of course, the defendant did not argue to the jury, nor should he have, the ludicrous notion that this may have merely been a conspiracy just to offer a bribe; had the bribes been accepted, that theory would go, the members of the conspiracy would have refused to pay them because that was not contemplated in their illegal agreement. This was the basis on which the Government contended that the charge should be removed, and the Court waited until after summations — confirming that the defendant was *not* arguing that these were mere offers, or that the conspiracy was merely to offer — to rule that the charge would not be given. (Tr. 3344). At that point, the defense had no objection on this point (although the defense did renew an objection on another point), nor did the defense ever address this argument in the lengthy submissions and conferences that preceded the charge. Accordingly, not only was the requested charge meritless, it was forfeited.

VI. THERE WAS MORE THAN SUFFICIENT EVIDENCE TO FIND BEYOND A REASONABLE DOUBT THAT BOURKE HAD ACTUAL KNOWLEDGE OF THE OBJECTS OF THE CONSPIRACY.

Bourke contends that there was insufficient evidence to find beyond a reasonable doubt that Bourke had actual knowledge of bribery,[9] given that "[t]he Government's actual knowledge

[9] Bourke erects a somewhat higher hurdle than the Government need overcome: the question is not whether Bourke had actual knowledge of bribery, but whether he had actual knowledge of the unlawful objects of the conspiracy, to violate the FCPA and the Travel Act.

case largely on the testimony of . . . Bodmer and Farrell, that they had actually discussed bribes with Mr. Bourke" and that Bodmer and Farrell's testimony about their initial bribe-related conversations with Bourke was "demonstrably false." (Def. Mem. 29, 33). Specifically, Bourke asserts that, in light of issues surrounding testimony about the respective timing of those initial conversations, "Bodmer's February conversation with Mr. Bourke never happened" (Def. Mem. 31), and the "first conversation with Farrell physically could not have taken place" (Def. Mem. 33).

It should first be noted that Bourke erects a higher hurdle than the Government need overcome: the question is not whether Bourke had actual knowledge of bribery, but whether he had actual knowledge of the unlawful objects of the conspiracy to violate the FCPA and the Travel Act. "In view of the inherent secrecy of a conspiracy," the Second Circuit has "set forth additional standards for assessing the sufficiency of evidence concerning the crime." *United States* v. *Amato*, 15 F.3d 230, 235 (2d Cir. 1994). With respect to conspiracy convictions, in particular, the deference accorded the jury's verdict is "especially important"

> because a conspiracy, by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel.

United States v. *Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992) (internal quotation marks omitted). All that is required is "some evidence from which it can be reasonably inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States* v. *Sanchez-Solis*, 882 F.2d 693, 696 (2d Cir. 1989); *see United States* v. *Tejada*, 956 F.2d 1256 (2d Cir. 1992); *United States* v. *Romero*, 897 F.2d 47 (2d Cir. 1990).

The jury's verdict may be based entirely on circumstantial evidence. *See United States* v. *Martinez*, 54 F.3d 1040, 1042 (2d Cir. 1995); *United States* v. *D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994); *Sureff*, 15 F.3d at 228. Specifically with respect to a defendant's knowledge of a conspiracy and his participation in it with the requisite intent, this Court has held that these elements may be proven entirely through circumstantial evidence. *See United States* v. *Samaria*, 239 F.3d 228, 234 (2d Cir. 2001) ("A defendant's participation in a criminal conspiracy may be established entirely by circumstantial evidence."); *see, e.g., United States* v. *Reyes*, 302 F.3d 48, 53 (2d Cir. 2002); *United States* v. *DeSimone*, 119 F.3d 48, 53 (2d Cir. 2002); *United States* v. *Gordon*, 987 F.3d 902, 906-07 (2d Cir. 1993); *United States* v. *Miranda-Ortiz*, 926 F.2d 172, 176 (2d Cir. 1991); *United States* v. *Villegas*, 899 F.2d 1324, 1338-39 (2d Cir. 1990); *United States* v. *Tutino*, 883 F.2d 1125, 1129 (2d Cir. 1989). "[W]here the existence of a conspiracy has been proved, evidence sufficient to link another defendant with it need not be overwhelming, and it may be circumstantial in nature[.]" *United States* v. *Ceballos*, 340 F.3d 115, 124 (2d Cir. 2003) (quoting *United States* v. *Desena,* 260 F.3d 150, 154 (2d Cir. 2001)); *see also Samaria*, 239 F.3d at 234.

In order to prove a conspiracy, all that is required is "some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *Sanchez-Solis*, 882 F.2d at 696; *see United States* v. *Flaharty*, 295 F.3d 182, 200 (2d Cir. 2002) (quoting *United States* v. *Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984)). Thus, in order to be a "convicted member of a conspiracy, a defendant need not know every objective of the conspiracy," every "detail" about the conspiracy, or "the identity of every co-conspirator." *United States* v. *Gleason*, 616

F.2d 2, 16 (2d Cir. 1979). As the Supreme Court has explained in discussing general principles of conspiracy law, an individual can join a conspiracy "in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by facilitating only some of the acts leading to the substantive offense." *Salinas* v. *United States*, 522 U.S. 52, 65 (1997). "[T]he government need not show that [the defendant] knew all of the details of the conspiracy, so long as he knew its general nature and extent." *United States* v. *Rosa*, 17 F.3d 1531, 1543 (2d Cir. 1994).

In any event, Bourke's argument that he had lacked actual knowledge of bribery fails on its own terms. Bourke's argument is unreasonable. As the Government explained in summation, neither Bodmer nor Farrell were ever certain regarding the timing of their initial first conversations with Bourke. (Tr. 1073 (Bodmer testified that when he first spoke with the Government "regarding the date, I knew that it has been in early spring '98," as opposed to February); Tr. 2494-95 (Former Agent Choundas testified about the different dates and locations mentioned in prior proffers of Farrell)). However, Bourke does not — for he cannot — explain why the only resolution for this uncertainty is that the initial conversations did not take place at all. The more reasonable explanation is that the both witnesses testified to the best of their recollections of their respective sets of conversations, taking place over a decade ago. Such testimony is not "patently incredible" so that it should be rejected by the court, as Bourke requests. (Def. Mem. 30 (quoting *United States* v. *Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992)). And viewed in the light most favorable to the Government, Bodmer and Farrell's testimony about their respective conversations with Bourke are more than sufficient to provide a basis for a reasonable juror to find that Bourke had actual knowledge that bribes were being paid

or offered.

In addition to Bodmer and Farrell's testimony, Farman-Farma and Evans testified that Bourke had learned from Kozeny about aspects of the corrupt arrangement. (*See supra* at Argument, Part I.B.2.a (citing Tr. 1485 (Farman-Farma testimony); Tr. 2526 (Evans testimony)). Similarly, a reasonable juror could infer from the May 18, 1998 recorded phone call that Bourke had actual knowledge. (*See supra* at Argument, Part I.B.3 (quoting GX 4A-T-2); *see also* GX 4A-T-2 (Friedman: "What if we stay on the board of Minaret but get off Oily Rocks? . . . . we have a document that Minaret does not, uh, have any kind of, uh, relationship with any foreign people, it doesn't split the money, blah-blah-blah, it advises Oily Rocks . . . .")). Such evidence, independent from Bodmer and Farrell's testimony, provide significant evidence of actual knowledge.

Accordingly, Bourke is not entitled to a new trial on the basis of his contention that there was insufficient evidence regarding his actual knowledge of the conspiracy.

VII. THE COURT PROPERLY BARRED THE TESTIMONY OF BRUCE DRESNER.

Bourke argues that the Court erred in barring the testimony of Bruce Dresner, who served as Columbia University's Vice President for Investments in 1998, and, in that capacity, spoke with Clayton Lewis and Lee Cooperman from Omega and thereafter prepared a memorandum to Columbia's Finance and Steering Committees in the spring of 1998 recommending that Columbia invest $15 million. Bourke contends that Dresner's testimony would have been relevant: (1) because Dresner would have testified about Columbia's due diligence, which "was relevant as a benchmark to measure the reasonableness of Mr. Bourke's own investigations"; and

(2) because "Dresner's testimony (and accompanying exhibits) would have [helped] rebut the Government's argument that Mr. Bourke's statements on the tape recorded portion of the May 18, 1998 conference call are evidence of guilty knowledge," given that Columbia's committees purportedly expressed "identical concerns." (Def. Mem. 35-36).

The Court properly precluded the Dresner's testimony because it was irrelevant, and the Court properly excluded memoranda drafted by him on the basis that those documents were hearsay. (Tr. 2699-2701). As the Court stated, Dresner's state of mind "has nothing to do with the defendant on trial." (Tr. 2700). Unlike other defense witnesses and Government witness Carrie Wheeler of TPG, who were present in Baku with the defendant to consider an investment in Oily Rock and therefore possessed relevant information regarding his knowledge, Dresner had no contact with the defendant or Viktor Kozeny, and was considering investing in Omega, not Oily Rock. Dresner never traveled to Azerbaijan to investigate the investment opportunity, relying instead on the recommendation of a third party – *i.e.*, Omega. Indeed, his reliance on information received from Omega makes Dresner's testimony based entirely hearsay, on top of being irrelevant.[10]

Similarly, in addition to being irrelevant, the memoranda that Dresner prepared to recommend this investment to the trustees were hearsay based on hearsay. Those documents were not business records made as part of a practice to record regularly conducted business, but

---

[10] Bourke contends that the Court unfairly permitted the Government to call Rossman and Wheeler to contrast their due diligence with Bourke's, but did not permit him to contrast his due diligence with Columbia's. The comparisons are not equivalent. As contended above, Rossman and Wheeler were called to show that Kozeny was not concealing evidence of the corrupt arrangements from potential investors in Oily Rock like Bourke, *see supra* 38-39 and n.5; Columbia University was a potential investor in Omega, not Oily Rock.

were instead opinion analyses of the investment offered for the truth, *i.e.*, that the investment was a wise one. Accordingly, as the Court found, those documents do not fall under an exception to Fed. R. Evid. 803(6). (Tr. 2697).

Nor would Dresner's testimony have been particularly helpful to Bourke. Bourke was able to introduce through several witnesses that Columbia University had invested in the same project, and there was no suggestion in any testimony or argument that Columbia University was aware of bribes. Had Dresner actually testified, it would have instead revealed that, not only were they not similarly situated, but Columbia had less information about the investment than Bourke did. Accordingly, the Court's decision to exclude Dresner's testimony and memoranda do not warrant a new trial.

VIII. THE REDACTED PORTIONS OF GOVERNMENT 181 WERE INADMISSIBLE.

The defendant next rehashes his argument, and make some new ones, concerning the redactions of Government Exhibit 181, the draft memorandum of Government witness Rolf Schmid.

The defendant's six-page discussion begins from a flawed premise, as he describes the 2001 memo as containing prior inconsistent statements of Bodmer's. The memo did not contain prior statements of Bodmer's, it contained prior statements of Schmid's, and the redacted portion was properly admitted as a prior consistent statement of Schmid, who had first testified at trial as to a prior consistent statement of Bodmer's: that Bodmer had told Schmid in 1998 that Bodmer had related to Bourke in a walk around their hotel the nature of the corporate structure and financial transactions with the Azerbaijani interests.

The defendant apparently skips over this point because it is exactly how his argument foundered at trial. At trial, the Court allowed the defense "to ask the question [of Schmid] that would lay the foundation [for impeachment], in other words, is he going to say that Mr. Bodmer reviewed this and affirmed it and told him everything in it was accurate and that sort of thing. If [the defense] can lay that foundation, we'll discuss it again." (Tr. 1348). The testimony laid no such foundation. On voir dire on the exhibit, the defense inquired, "In preparing it, did you obtain information orally, verbally from Hans Bodmer?" Answer: "No, I didn't." (Tr. 1382). On direct examination, Schmid testified that "these responses were based on [his] personal understanding and recollection." (Tr. 1384). He further testified that his recollection about Bodmer's briefing of the defendant was based on his "own recollections" in 2001 of a 1998 discussion with Bodmer and on "the files that were available." (Tr. 1387). On cross examination, Schmid further testified that after he distributed his draft memorandum, he did not recall receiving any comments from Bodmer (Tr. 1400) (nor were any comments contained in any document the parties have); he further testified that he had no conversations with Bodmer in the last year about the memorandum (Tr. 1400). Schmid was then pressed as to whether his discussion of the credit facilities – which in the redacted portion of the memorandum, Schmid, a junior associate at the firm at the time of the relevant events, disavowed any knowledge of a corrupt arrangement – contained "more detail about this credit facility and Mr. Bodmer's recollection." (Tr. 1402) . Schmid then repeated again that "In this memo I described what I found in the file and what was my own recollection, but I don't have in this memo what other

people's recollection is." (Tr. 1403).[11]

Bourke contends, again, that the rest of the memo should have been admitted under the rule of completeness, Federal Rule of Evidence 106. The memo, however, did not contain one complete statement on any subject; it contained Schmid's draft answers to a series of interrogatories posed by attorneys in the London litigation. Bourke contends, however, that the rest of the memo showed that, as the defendant puts it vaguely, the credit facilities "were not, in fact, viewed as mechanisms of bribery by the Swiss lawyers." (Def. Mem. 37). Whatever that means, it was clear from the testimony of the two Swiss lawyers that the one who was the member of the conspiracy, Bodmer, viewed the credit facilities as a mechanism of bribery, and the one who was not a member, Schmid, did not. While Schmid wrote in the draft answer that, in the plural, "it was our understanding that the credit facility agreements should be the basis for the arm's length transactions," Government Exhibit 181 at 5, this was based on Schmid's limited understanding of the transactions, derived principally from his review of the documents in the

---

[11] The defendant claims that Schmid contradicted himself on this question of whether he received "verbal information" from Bodmer when Schmid gave sworn testimony on this point before a Liechtenstein tribunal. (Def. Mem. 41 n. 9). That is incorrect: as he testified, Schmid *did* receive "verbal information" from Bodmer: he received it in 1998 when Bodmer briefed him on the trip to Baku where he had talked with Bourke; he did not receive it in 2001 when he drafted his memo. Defense counsel himself did not apparently think this was a contradiction at trial, because after several cross-examination questions which appeared intended to confuse the issue of receiving oral information at the time of the events with the issue of receiving oral information at the time of the drafting of the memo (Tr. 1400), defense counsel asked "[D]o you recall telling the Liechtenstein authority in that deposition whether you got any of this information orally from Hans Bodmer?" and Schmid answered, "No." (Tr. 1400). Defense counsel then asked, "So, is it your testimony that the entire content of this memorandum is simply based on your review of documents and your recollection of events?" and Schmid answered, "Yes. That's the way I remember it, yes." (Tr. 1400). Having received those answers, defense counsel did not offer the Liechtenstein testimony either to impeach Schmid or to refresh his recollection.

course of his legal work.[12] Bodmer testified that he did not share his understanding and view of the transactions with Schmid (Tr. 1074-75), and Schmid did not contradict that testimony. Instead, Schmid testified on cross-examination that he was unaware whether his own "recollection" comported with Bodmer's. (Tr. 1403).

Accordingly, the defendant is entirely wrong when he argues that the memo contained prior inconsistent statements of Bodmer's reflecting his view that the credit facilities were arm's length and not part of a corrupt arrangement.[13] Had Bodmer said that to Schmid or to anyone, utterly contradicting his guilty plea allocution, the Government would have disclosed this significant *Giglio* material, but no such statement was made.

Nor did the defendant even try to suggest that Bodmer had made such a statement to him or anyone else, as such a defense would have failed badly. Had the defense theory been that Bodmer's walk with Bourke had encompassed a conversation in which Bodmer explained the questionable arrangements with the Azerbaijani officials, but had insisted that they were nonetheless arm's length, the defense would have been hard pressed to explain why Bourke did

---

[12] Schmid's view that the transactions were "arm's length" may seems surprising since the documents, on their face, do not seem so, given the absence of collateral or interest payments for the loans, but Schmid's legal opinion as to the legitimacy of the transactions as portrayed in the documents was no more relevant than any other lawyer's who could have reviewed them and concluded that they were arm's length and therefore not a form of bribery. Because this interpretation seems so weak, it is not surprising that the defendant did not seek to call a legal expert on this question or to otherwise so contend.

[13] The defendant also contends that the Schmid memo contradicted Bodmer by stating that Bodmer did not have specific knowledge of "corrupt payments." (Def. Mem. 39). Although the question is moot because the memo does not contain Bodmer's statements, it should be noted that, depending on the definition of "payments," Bodmer did not necessarily have such knowledge. Bodmer testified that he knew about the corrupt corporate arrangements — the two-thirds/one-third split, the interest-free credit facilities — but he never testified that he was told about the cash payments and other payments as part of the so-called "entry fee."

not reveal the conversations during his proffers and contend that, while he was aware of the arrangements, he had been told by Kozeny's lawyer that the arrangements were not corrupt. Instead, because Bourke knew that the arrangements were so clearly violations of the FCPA, Bourke did not reveal to the FBI that he had had these conversations at all. For this reason in particular, it would not have been very effective for defense counsel to concede that the conversations had occurred but to try to characterize them differently, so instead Bourke went with the anticipated defense, that the conversations did not occur. While Bourke made some headway with this defense, given Bodmer's confusion about the timing of the conversations, the fact that it did not apparently succeed in the end does not mean that Bourke would have been better served in trying to demonstrate that, because Bodmer's associate viewed the transactions as arm's length, this was likely how Bodmer described the deal to Bourke in Baku.

Finally, the defense makes a new argument for the admissibility of the rest of the Schmid memo: to assess the credibility of Schmid himself. For this argument, the defendant contradicts himself, even on the same page, and contends that Schmid's statements portraying the credit facilities as arm's length were actually false, but that they were made "to minimize the firm's culpability" in the London litigation and to shift blame to Bourke and others like Eric Vincent. (Def. Mem. 42). While it may be true that Schmid was concerned about his firm's liability, the point is irrelevant: at best, it could impeach Schmid's statement that the transactions were arm's-length, which was not and should have not been admitted. But it difficult to see how "shifting blame" to Bourke, who was never a party to the London litigation, was to be accomplished by revealing that Bourke was aware of Bodmer's view of Kozeny's arrangements with the Azerbaijani officials. While that information may have had an important effect on the outcome

of Bourke's criminal trial, it would have had little impact on the London litigation, where the question was whether Omega Advisors, the plaintiffs, or their representatives like Eric Vincent, knew about the corrupt arrangements, not whether Bourke did. But, of course, if the defense had been allowed to prove that Schmid was covering up his own understanding of the corrupt nature of the transactions to protect his employer, then the defense would have successfully impeached the statement that the defense wished to offer to show that the transactions were not corrupt.

In any event, the value of Schmid as a witness for the Government was likely not great, given that the jury never asked for a read back of his testimony. The defendant's contention that the Schmid memo was a "critical piece of evidence" (Def. Mem. 42) for its case in impeaching Bodmer, however, is belied by the fact that the defense obviously had no plan to call Schmid from Switzerland as a witness or to otherwise get the memo into evidence. Certainly the exclusion of the unredacted memo did not likely affect the outcome of the trial.

IX. *REDACTED.*

REDACTED

REDACTED

REDACTED

REDACTED

X. THERE WAS NO VIABLE "LAWFUL UNDER AZERI LAW" DEFENSE.

The Court devoted substantial time in hearing and deciding Bourke's motion for certain instructions under his expert's flawed interpretation of Azeri law, and his motion for reconsideration of the Court's decision. The Government will not here reargue those legal points, as Bourke attempts, but respectfully requests that its prior submissions be incorporated here by reference.

Among the Court's rulings was the following: "If Bourke provides an evidentiary foundation for the claim that he was the victim of 'true extortion," I will instruct the jury on what

constitutes a situation of 'true extortion' such that Bourke would not be found to have possessed the 'corrupt' intent that the Government must prove he possessed beyond a reasonable doubt." *United States* v. *Kozeny*, 582 F. Supp. 2d 535, 540 (S.D.N.Y. 2008). Of course, Bourke made no effort to mount such a defense, given that he could not contend that he and his co-conspirators had been extorted while also denying any knowledge of the bribes, a position necessitated by his plea of not guilty to the false statements charge. Instead, Bourke now claims that the evidence in fact showed that the bribes were extorted from the co-conspirators he never joined — Kozeny and Farrell — and that this should have resulted in the exclusion of significant portions of testimony concerning the payments to the Azerbaijani officials.

This argument — which was neither made nor preserved while the purportedly objectionable testimony was coming in — is far-fetched. Farrell never testified that he or Kozeny or anyone else felt they were being extorted, whatever that term may have meant to him without reference to American or Azeri law. One reason he did not so testify was because the defense, tellingly, never asked him the question. Instead, the defense here tries to construct a theory by which Farrell was "shaken down" with reference to dialogue with the Aliyevs and their representatives that began after Kozeny's courier was arrested. The defendant ignores the testimony that Kozeny had already instructed Farrell to make contacts with government officials by paying bribes and that prior to the arrest, Kozeny and Farrell had paid a $10,000 bribe to secure a meeting with a government official.[19] Moreover, Kozeny showed little concern about

[19] Farrell testified that he had been told by Kozeny to "meet some friends, as he said, make some contacts in the Azeri government" (Tr. 412) and that Farrell had set up such a meeting at a cost of $10,000. Farrell was asked, "Did [Kozeny] express any concern about the demand for $10,000?" and he answered, "No, he did not." (Tr. 413).

the arrest, but instead viewed the incident as an opportunity to meet the government officials he had been yearning to meet.[20] The defense then mischaracterizes the two-thirds/one-third split of Oily Rock's vouchers as having been "demanded . . . in return for releasing the arrested courier." Rather, as Farrell testified, the split was initially Kozeny's proposal, and it was offered to secure the privatization of SOCAR.[21] In the course of the several meetings, Farrell testified, while the details of this multi-billion dollar deal were being worked out, the courier was released, but Farrell recalled little about the release because it was a minor detail.[22] There is no evidence to suggest that the courier would not have been released if the corrupt deal had not been struck. Later, when the minimum voucher requirement was doubled from one million to two million, which Bourke characterizes as another step in the shake-down, Barat Nuriyev actually told Farrell that Nuriyev would help Kozeny and Bourke unwind their position, which Farrell described in terms that were just the opposite of how one would describe a "shake-down."[23]

---

[20] Farrell testified that Kozeny was initially upset about news of the arrest, but "very soon thereafter, Uncle Ali had called and said that a meeting with Ilham [Aliyev] had been arranged. So Viktor was very happy, very quickly once he heard that." (Tr. 425).

[21] Farrell testfied: "Viktor came out at some point and said that he would like to work with them and be partners with them in purchasing vouchers and using those vouchers to obtain SOCAR. . . . [H]e would purchase with his own money vouchers and the Azeris would get 50 percent of what he was purchasing." (Tr. 432).

[22] Asked whether anyone at the initial meetings with the State Property Committee discussed the employee's arrest, Farrell answered: "Very briefly." (Tr. 431).

[23] Farrell testified that after Nuriyev conveyed the new two-million-voucher requirement, "he seemed almost embarrassed that he was having to tell me this, he said, Tom, tell Viktor that if this — he doesn't agree to this and he feels uncomfortable going forward with this new requirement, that he, Barat, would actually try to help him try and get out of the investment that he has. In other words, he would help us try and sell off the voucher position and more or less leave and try and recoup whatever he could get for the vouchers. Of course, it had been difficult to do, but the offer I felt was sincere. I may be wrong, but I felt it was sincere." (Tr. 507).

Moreover, even if Bourke had attempted to show that Kozeny and Farrell had been extorted — even under the incorrect standard propounded by the defendant's Azeri law expert — Bourke is wrong that any evidence at trial should have been excluded as supposedly pre-dating the FCPA conspiracy. Assuming the extreme hypothetical that the actions of Kozeny and Farrell were lawful because they had been the victims of extortion under Azeri law, their "lawful conduct" would in no way have excused Bourke because Bourke was not extorted, nobody had told him that anyone had been extorted, and he made his investments after the purported extortion had occurred. In theory, or under Bourke's theory, Bourke (and several other American investors) could have nonetheless have joined an illegal conspiracy to violate the FCPA even though Kozeny — its originator and promoter — was not guilty because he had been extorted. Even in this somewhat absurd scenario, Farrell's non-hearsay testimony about what he himself did to put in place the joint venture with the Azerbaijani privatization officials, and why he did it, would have been admissible at minimum to show the background of the conspiracy that Bourke joined. Bourke contends that testimony of Kozeny's "shady dealings" was highly prejudicial to him, but that was so only to the extent that Bourke knew about those dealings when he joined the conspiracy post-"extortion." At the time that these dealings were first taking place in the summer and fall of 1997, as Bourke repeatedly emphasized, he was nowhere around Baku, and the jury could easily distinguish between what Farrell and Bodmer themselves actually did and what they told Bourke about later. That being said, the Government was certainly entitled to put on evidence as to what Farrell and Bodmer had done to the extent that it informed what and why they were giving Bourke information about their activities later: for instance, if Farrell were not permitted to explain how he had given the Azerbaijani officials money on Kozeny's behalf —

some of Farrell's "shady dealings" which could not in any case be characterized as hearsay — his entirely admissible testimony about Bourke asking him whether Kozeny was giving "them" enough money would have made no sense to the jury

Of course, Bourke did not make the ridiculous argument that he joined the conspiracy because he thought that the FCPA violations that Kozeny and Farrell had committed were cancelled out by the extortion committed by Azerbaijani officials. Instead, at trial, he actually embraced all of the evidence of Farrell's payments to the Azerbaijani officials at Kozeny's behest to demonstrate that Kozeny and the officials were actually involved in a different conspiracy: one to defraud the American investors by inflating the price of privatization options and then re-selling Kozeny's options to the American investors.[24] Though unsuccessful, this was a better defense than trying to show that the entire scheme to transfer hundreds of millions of dollars in advance payments and later profits was generated by Kozeny's strong wish to gain the release of a low-level employee whose very name nobody could recall. Not only was it a more plausible defense, but it was one which Bourke had effectively chosen long ago with his attacks on Kozeny in the London litigation and elsewhere, as he purportedly attempted to expose Kozeny's corruption and options fraud, in which he purportedly viewed the Azerbaijani government officials and their citizens as victims rather than extortionists.

Bourke could not credibly contend before the jury on the one hand that Kozeny, Nuriyev, Bodmer and Farrell were all liars who were involved in a conspiracy to carry out the options fraud on Bourke and the other innocent American investors, while contending that, at the same time, Kozeny and Farrell deserved sympathy for having been the victims of extortion by the

[24] In fact, Bourke is still making this argument on this motion. (*See* Def. Mem. 51).

dangerous and corrupt Azerbaijani officials. But even if the Bourke had actually attempted to show that Kozeny and Farrell had been extorted, and had actually objected to the testimony to which he now points, that testimony was in no way prejudicial to Bourke and was instead relevant and admissible.

XI. THERE WAS MORE THAN SUFFICIENT EVIDENCE TO CONVICT BOURKE OF MAKING FALSE STATEMENTS.

Bourke argues that there was insufficient evidence to convict Bourke of Count Three, charging Bourke with making false statements. (Def. Mem. 50-52). Bourke relies on the Second Circuit's holding that "a defendant may not be convicted under § 1001 on the basis of a statement that is, although misleading, literally true." *United States* v. *Mandanici*, 729 F.2d 914, 921 (2d Cir. 1984) (citing *Bronston v. United States*, 409 U.S. 352 (1973) (holding that federal perjury statute, 18 U.S.C. § 1621, does not reach a witness's answer that is literally true but unresponsive)). But it is well established that "[w]hether a statement was literally true is generally an issue for the jury to decide." *United States v. Carey*, 152 F. Supp. 2d 415, 424 (S.D.N.Y. 2001) (citing *United States v. Lighte*, 782 F.2d 367, 372, 374 (2d Cir. 1986)). While "the court may make this determination in limited circumstances where 'there can be *no doubt* that [the defendant's] answers were literally true under *any conceivable interpretation* of the questions,'" *id.* (emphases added) (quoting *Lighte*, 782 F.2d at 374), the defense cannot demonstrate here that there is "no doubt" that Mr. Bourke's statements were literally true under "any conceivable interpretation of the questions."[25]

[25] Further, "[t]he consideration of this defense [that a statement was literally true], whether by the court or the jury, is not made in a vacuum; it must take into account the context of

Bourke cites to three examples of statements he claims are "literally true." But a reasonable juror could have found each of those statements to be materially false. The first example, (Def. Mem. 50-51 (Bourke "stated his belief that Kozeny was 'paying off' Azeri SPC officials 'to lie to us and change the options certificates'")), could be construed as a misleading, self-serving statement to divert attention away from Bourke's knowledge about bribe payments for the investment scheme in particular. Moreover, Bourke disavowed any actual knowledge of such payoffs; he just claimed it was his belief. (Tr. 2456 (Agent Choundas: "[Bourke] said he had no evidence, no knowledge of [payoffs] whatsoever.")).

The second example, (Def. Mem. 51 (Bourke "simply denied knowledge that Kozeny had paid for those trips")), could be similarly construed as materially false. Contrary to Bourke's claim that this was "something the evidence does not establish that Bourke knew," a reasonable juror could have inferred that, based on the relationship between Kozeny and Bourke, as well as Bourke's involvement in arranging the medical appointment, that Bourke did in fact have such knowledge, given that Kozeny did in fact pay for the trips and associated costs..

Finally, a reasonable juror could have found that the third example, (Def. Mem. 51 (Bourke "stated that his 'personal interpretation' was that the additional shares [from the share capital increase] would ultimately just benefit Kozeny")), was materially false. Although Bourke

---

the testimony as a whole. *Id.* (citing *United States v. Schafrick*, 871 F.2d 300, 303-04 (2d Cir. 1989)). In *Mandanici*, for example, the Second Circuit noted that "[w]hile a defendant may not be convicted under § 1001 on the basis of a statement that is, although misleading, literally true," the "factual premise for application of this principle here is absent." *Mandanici*, 729 F.2d at 921. Specifically, the Second Circuit found that the defendant's statement that certain contract work "would be completed in the future" was not literally true, where "there was ample proof from which the jury could find that Mandanici had no intention of ever completing the agreed-upon work." *Id.* In the instant case as well, the factual premise for the application of the principle in *Mandanici* is absent.

apparently claims that his additional statement that "Viktor was trying to mislead us into thinking that it was being issued to President" made the statement literally true, a reasonable juror could have concluded that Bourke's statement about his "personal interpretation" was merely an attempt to minimize his knowledge of the corrupt arrangement, particularly given that it contradicted a sworn affidavit he had given in the London litigation in which Bourke stated that Kozeny had told Bourke that the shares were being issued to the president, and further stated, without mentioning any disbelief of Kozeny's claim, that Bourke had objected to this. (GX 516).

In any event, even if a reasonable juror could not find these three particular statements to be materially false, there were other false statements, which the jury could have relied upon in order to convict. As Agent Choundas's testimony reflected, along with the rest of the trial evidence, the defendant falsely stated during four proffer sessions that he was not aware that Kozeny had made corrupt payments, transfers and gifts to Azeri officials, when in fact, Bourke did know. For example, Agent Choundas testified that Bourke stated, among other things, that, when asked if he learned of any personal favors or gifts or exchanges among Kozeny and government officials that seemed suspicious, Bourke replied, "I was unaware. I'm still unaware of any transfers of anything." (Tr. 2359). Similarly, when asked if Bourke had any reason to suspect, by the time of the opening in April 1998, that Kozeny had paid bribes or made corrupt payments to Azeri government officials, Bourke replied, "No." These statements are squarely contradicted by Bodmer and Farrell's testimony. (Tr. 2458).

CONCLUSION

For the reasons set forth above, the defendant's motions pursuant to Rule 29 and Rule 33 should be denied.

Dated: New York, New York
August 31, 2009

Respectfully submitted,

PREET BHARARA
United States Attorney

/s/
By: _____
Harry A. Chernoff
Iris Lan
Assistant United States Attorneys
(212) 637-2481/2263