UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-21010-CR-JEM

UNITED STATES OF AMERICA

v.

JOEL ESQUENAZI, et al.,

Defendant. /

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT ESQUENAZI'S CORRECTED AND AMENDED MOTION TO DISMISS INDICTMENT FOR FAILURE TO STATE A CRIMINAL OFFNESE AND FOR VAGUENESS

The United States of America, by and through the undersigned counsel, hereby opposes Defendant Esquenazi's Corrected and Amended Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness. DE 283.[1] Although styled as a "motion to dismiss," the defendants' submission is instead a premature request for a ruling on the sufficiency of the government's evidence concerning the status of officers of Telecommunications D'Haiti ("Haiti Teleco") as a foreign officials of a government instrumentality before the evidence regarding that issue has been presented to the jury. The defendants' arguments, which are premised on misstatements of both the law and the facts and are premature at best, will be moot after presentation of the government's case. Therefore the defendants' motion should be denied.

[1] Defendant Esquenazi's original motion, DE 273, was adopted by Defendant Rodriguez, DE 278, after Defendant Esquenazi withdrew it, DE 276. For purposes of this response in opposition, the government assumes Defendant Rodriguez adopts Defendant Esquenazi's current motion.

BACKGROUND

A. *The Foreign Corrupt Practices Act*

The defendants are charged with violations of Foreign Corrupt Practices Act ("FCPA"). 15 U.S.C. § 78dd-2. To sustain its burden of proof for the offense of violating the FCPA, as charged in the Indictment, the government must prove the following seven elements beyond a reasonable doubt.

First:	The defendant is a domestic concern, or an officer, director, employee, or agent of a domestic concern;
Second:	The defendant acted corruptly and willfully;
Third:	The defendant made use of the mails or any means or instrumentality of interstate commerce in furtherance of an unlawful act under the FCPA;
Fourth:	The defendant offered, paid, promised to pay, or authorized the payment of, money or of anything of value;
Fifth:	That the payment or gift was to a foreign official or to any person, while knowing that all or a portion of the payment or gift would be offered, given, or promised, directly or indirectly, to a foreign official;
Sixth:	That the payment was for one of four purposes: — to influence any act or decision of the foreign official in his official capacity; —to induce the foreign official to do or omit to do any act in violation of that official's lawful duty; — to induce that foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or — to secure any improper advantage; and

Seventh: That the payment was made to assist the defendant in obtaining or retaining business for, or with, or directing business to, any person.

See 15 U.S.C. § 78dd-2; *see also United States v. Bourke*, 1:05-CR-518 (S.D.N.Y. 2009) Jury Instruction at 23-29 (attached as Exhibit A); *United States v. Jefferson*, 1:07-CR-209 (E.D. Va. 2009) Jury Instructions at 63-74 (attached as Exhibit B).

A "foreign official" is defined in the FCPA as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-2(h)(2)(A).

B. *The Indictment*

On December 4, 2009, the Grand Jury returned a 29 page Indictment charging Defendants Esquenazi and Rodriguez in 21 counts. Specifically, the Indictment charges them with conspiracy to commit violations of the FCPA and wire fraud (Count 1), substantive violations of the FCPA (Counts 2-8), conspiracy to commit money laundering (Count 9), and substantive money laundering (Counts 10-21). The specified unlawful activities charged in the money laundering counts are violation of the FCPA, wire fraud, and violation of Haitian bribery laws.

The Indictment alleges that "Telecommunications D'Haiti" was "the Republic of Haiti's state-owned national telecommunications company" and was the "only provider of non-cellular telephone service to and from Haiti" during the period relevant to the Indictment. Ind. at 2. Further, it alleges that Defendant Antoine, who pleaded guilty on March 12, 2010, and Defendant Duperval at different times both served as Directors of International Relations at Haiti Teleco and that their responsibilities included negotiating contracts with international telecommunications companies.

Id. at 3, 5. The Indictment charges, among other things, that Defendants Esquenazi, Rodriguez, Grandison, and others conspired to pay and did, in fact, pay bribes to "foreign officials," namely Defendants Antoine and Duperval of Haiti Teleco, in exchange for business advantages to be bestowed upon Terra Telecommunications Company ("Terra"), a company owned by Defendants Esquenazi and Rodriguez. *Id.* at 7. These advantages included, but were not limited to, preferred telecommunications rates, reduced number of minutes for which payment was owed, which effectively reduced the per minute rate, and a variety of undue credits toward sums owed. *Id.* The Indictment further alleges that through these advantages, the defendants defrauded Haiti Teleco of revenue. *Id.* The Indictment goes on to set forth eighty-three overt acts taken in furtherance of this conspiracy and to charge Defendants Esquenazi, Rodriguez, and Grandison with substantive violations of the FCPA. *Id.* 20-21.

C. *The Nature of Haiti Teleco*

At trial, the government intends to present evidence concerning many aspects of Haiti Teleco, including its ownership, control, nature, function, history, and eventual partial privatization after the period of the conspiracy. As will be discussed below, in deciding a motion to dismiss, all the government's allegations are assumed to be true, and, therefore, a full discussion of the government's evidence is inapposite. However, as the defendants misstate several facts, a brief description of Haiti Teleco at the times relevant to the Indictment may aid the Court.

At the times relevant to the Indictment, between 2001 and 2004, Haiti Teleco held a state-granted monopoly over land line telephone service in Haiti. During that time, Haiti Teleco was 97% state-owned by the Central Bank of Haiti, the Banque de la Republic of Haiti ("BRH"), which held 97% of Haiti Teleco's shares. No one knows who owned the remaining 3% of Haiti Teleco's shares,

as no records still exist concerning their ownership, yet no person or company has claimed them in institutional memory. Therefore, effectively and functionally, during this period, Haiti Teleco operated with 100% state-ownership.

Also during this period, Haiti Teleco was 100% state-controlled. From 2001 to 2004, the head of Haiti Teleco, the Director General, was appointed by decree by the President of Haiti and approved by the Haitian Prime Minister, Minister of Public Works, Transportation, and Communication, and the Minister of Economics and Finances. Defendants Antoine and Duperval, as Directors of International Relations, reported directly to the Director General and served at his pleasure. Haiti Teleco at this time was also controlled by a Board of Directors that was also appointed by the President of Haiti. Consequently, during the relevant time period, Haiti Teleco was 100% state-controlled.

In addition, Haiti Teleco's profits were an asset of the BRH during this period, a significant portion of which came from international telecommunications companies that contracted with Haiti Teleco. By law, BRH was required to use these funds for the benefit of the public treasury, for its reserves, or for other projects and investments approved by its Board, including further investment in and expansion of Haiti Teleco. Haiti Teleco thereby not only served Haiti by providing national land line telephone service—a service that would not necessarily be provided by the private market in a country as poor as Haiti—but it also was an important source of revenue and, more importantly, foreign reserves for the country.

ARGUMENT

A. *Standard for a Motion to Dismiss for Failure to State an Offense*

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

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

Hagner v. United States, 285 U.S. 427, 431 (1932). This well known rule is simple to apply. An indictment is sufficient if it: (1) states the elements of the offense sufficiently to apprise the defendant of the charges against which he or she must defend, and (2) provides a sufficient basis for the defendant to make a claim of double jeopardy. *See Hamling v. United States*, 418 U.S. 87, 117 (1974) ("An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense"); *United States v. Perkins*, 748 F.2d 1519, 1525 (11th Cir. 1984) (same). Nothing more is required.

"In ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the *face* of the indictment and, more specifically, the *language used* to charge the crimes." *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006) (emphasis in the original). It is well settled that a court may not make "a determination of facts that should have been developed at trial" and that a motion to dismiss should be denied when "the factual allegations in the indictment, when viewed in the light most favorable to the government, [are] sufficient to charge the offense as a

matter of law." *United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir. 1987); *see also Sharpe*, 438 F.3d at 1263. The Eleventh Circuit in *United States v. Critzer*, 951 F.2d 306 (11th Cir. 1992) put the matter crisply:

> There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of sufficiency of the evidence. Moreover, this court is constitutionally barred from ruling on a hypothetical question. The sufficiency of a criminal indictment is determined from its face. The indictment is sufficient if it charges in the language of the statute.

Id. at 307.

B. *The Indictment Properly Pleads the Conspiracy and FCPA Violations*

The defendants do not seriously contest that the Indictment fails on either prong of the *Hagner* test. The Indictment clearly states every element of the offense and the step-by-step description in the overt acts makes it impossible for the defendants to credibly claim either that they do not to know the offense against which they must defend or that they would later be unable to assert a claim of double jeopardy. Rather, the defendants seek to circumvent the trial process and have the Court determine, before the presentation of any evidence, that the government has not met its burden of proving that Haiti Teleco was a instrumentality of a foreign government as defined by the FCPA. As will be demonstrated in the government's case-in-chief, whether Haiti Teleco was an instrumentality of the Republic of Haiti is not a close case, a fact the defendants likely understand and therefore attempt to raise this issue before the evidence has been presented. Taken as true, the Indictment is more than sufficient to meet the *Hagner* standard and the precedent of this Circuit. Therefore, the motion should be denied.

The defendants attempt to avoid the *Hagner* standard by citing *United States v. Enmons*, 410 U.S. 396, 410-12 (1973), and *United States v. Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997), two

cases that turned on the courts' determination of the legal significance of the defendants' alleged actions. DE 283 at 14. However, those cases are inapposite, as they involve the rare instance when the defendants' Federal Rule of Criminal Procedure 12(b)(2)(B) motions could be premised on pure questions of law that required no facts to be put before the Court. *See Enmons*, 410 U.S. at 399-400 (holding that an indictment did not state a claim when it alleged that the defendants' actions were for the purpose of inducing an employer's agreement to legitimate collective-bargaining demands and the Hobbs Act requires a "wrongful" purpose); *Alkhabaz*, 104 F.3d at 1495 (holding that an indictment did not state a claim when it alleged that expressions of an intention to inflict bodily harm were emailed for the purpose of fostering "a friendship based on shared sexual fantasies" and the statute requires a "purpose of furthering some goal through the use of intimidation").

In contrast, as is most often the case, when the sufficiency of an indictment turns on questions of fact, motions premised on Rule 12(b)(2)(B) for failure to state a claim are routinely denied. *See Sharpe*, 438 F.3d at 1263-64 (reversing a district court's 12(b)(2)(B) dismissal because "the allegations in the indictment were sufficient to state the charged offenses as a matter of law" and the district court's decision erroneously "considered the overall sufficiency of the *evidence*") (emphasis in original); *United States v. Salman*, 378 F.3d 1266, 1267 (11th Cir. 2004) (reversing a district court's 12(b)(2)(B) dismissal because the district court looked "beyond the face of the indictment," and thereby "overlooked binding precedent from this court" when the question of whether the defendant was "illegally or unlawfully in the United States" was a question of fact); *Critzer*, 951 F.2d at 307 (reversing a district court's 12(b)(2)(B) dismissal because "the court looked beyond the face of the indictment" and the indictment, on its face, was sufficient); *Torkington*, 812 F.2d at 1350-54 (reversing a district court's 12(b)(2)(B) dismissal because the question of whether

Rolex watches were "counterfeit" was "a question of fact" to be determined by the jury after proper instruction).

Here, the government has properly alleged that the conspiracy to violate the FCPA and substantive FCPA violations involved foreign officials, namely Defendants Antoine and Duperval, former Directors of International Relations of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti. Therefore, given the clear and binding precedent in this Circuit, the defendants' motion to dismiss for failure to state a claim should be denied.[2]

C. *Interpretation of the Term Government Instrumentality*

The bulk of the defendants' Motion focuses on suggesting that the Court adopt an insupportably narrow interpretation of government instrumentality that is contradicted by the statute on its face, case law, legislative history, and international treaties. The defendants' proffered arguments are, in any event, arguments for jury instructions or for the Court after the government's case-in-chief pursuant to Federal Rule of Criminal Procedure 29. However, if the Court would like supplemental briefing on the meaning of "foreign official," the government is more than willing to elaborate on how the FCPA's plain text, its current interpretation by courts, its legislative history, and U.S. treaty obligations provide no support for the defendants' novel and confusing definition. These sources confirm that the definition of "foreign official" includes officials of state-owned and

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[2] The Court should be aware that the defendants' motion is remarkably similar to the Motion to Dismiss Superseding Indictment for Failure to State a Criminal Offense and for Vagueness filed in the District Court in the Eastern District of Pennsylvania in the case of *United States v. Nam Quoc Nguyen et. al*, which perhaps explains all the references to Third Circuit law and the fact that the first references to Eleventh Circuit law appear on page 16 of the defendants' motion. 08-CR-522, DE 110. It also explains footnote 3, which erroneously suggests that Haiti is a "Communist country," as the *Nguyen* case involved bribes to Vietnamese government officials. As should be done here, that motion was denied. *United States v. Nam Quoc Nguyen*, 08-CR-522, DE 144.

state-controlled companies. Further, it is not limited to the narrow and ambiguous restriction that it applies only to "officials *performing a public function*." DE 283 at 2. This tortured formulation finds no support, even in the sources the defendants themselves cite. The government stands prepared to brief and argue this issue again, should the defendants raise it, upon a Rule 29 motion or in the context of formulating jury instructions.

D. *The FCPA Is Not Unconstitutionally Vague*

The defendants next claim that the term "foreign official" is unconstitutionally vague. DE 283 at 16. A statute is void-for-vagueness if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 1845 (2008). The standard used in examining a statute for unconstitutional vagueness is whether a person of average intelligence would reasonably understand that his conduct is proscribed. *United States v. Mazurie*, 419 U.S. 544, 553 (1975). In general, only if a statute contains terms requiring "untethered, subjective judgments" can a void-for-vagueness claim be articulated. *See Holder v. Humanitarian Law Project*, __ U.S. __ , 130 S.Ct. 2705, 2720 (2010). The term government instrumentality requires no such subjective assessment and instead turns on standard, legal terms ubiquitous in U.S. law.[3] The question in this case is whether the FCPA's prohibition of bribes to officials of foreign government instrumentalities gave fair warning that bribes to officials of Haiti's state-owned national telecommunications company were proscribed. They unquestionably were.

[3] The government knows of only one other case in the FCPA's thirty-three year history in which defendants have challenged the term "foreign official" as void-for-vagueness. *United States v. Nam Quoc Nguyen et. al*, 08-CR-522, DE 110. That claim was summarily rejected without written opinion. *United States v. Nam Quoc Nguyen*, 08-CR-522, DE 144.

As discussed above, the evidence will show that Haiti Teleco was a state-owned, state-controlled entity that operated with a government granted monopoly in Haiti. The evidence will also show that the defendants knew that Haiti Teleco was part of the Haitian government. The defendants could not be (and were, in fact, not)[4] confused or uncertain about whether the bribes they paid were to foreign officials.[5] Their conduct falls squarely and surely within the FCPA's prohibitions, about which this Court will instruct the jury.

The defendants cannot possibly make out an as applied challenge for constitutional vagueness, so they attempt to challenge the FCPA's definition of foreign official facially. *See* DE 283 at 17 (asking the Court to define, writ large, how "much government 'control' over a particular entity is enough to make that entity an 'instrumentality'"). However, it is well established that a defendant cannot bring a facial challenge to a statute claiming it is void-for-vagueness when it is constitutionally applied to the defendant. *See United States v. Raines*, 362 U.S. 17, 22 (1960) (holding that a defendant "to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"); *United States v. Di Pietro*, 615

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[4] Indeed, in an email on which both Defendants Esquenazi and Rodriguez were copied, Terra Telecommunications' general counsel sought insurance for a proposed venture with Haiti and offered to "get a letter from the TELECO President to the effect that TELECO is an instrumentality of the Haitian government." Apparently, when it was to the defendants' advantage, they were more than happy to trade on their knowledge that Haiti Teleco was a government instrumentality.

[5] Additionally, the defendants invoke the rule of lenity in support of their vagueness argument. However, the "rule of lenity . . . applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994). As the statute is not ambiguous as applied to the defendants, the rule of lenity does not apply.

F.3d 1369 (11th Cir. 2010) (same, quoting *Raines*, 362 U.S. at 22). Therefore, even if the defendants were able to invent a hypothetical scenario where a defendant would not have fair notice of the statute's jurisdictional reach, it would have no impact on this Court's decision about the defendants' vagueness claim.

E. The Money Laundering Counts of the Indictment Are Independent of the FCPA

Without further elaboration, the defendants claim that as "[t]he underlying specified unlawful activity for the money laundering counts in this indictment is the alleged violation of the FCPA, then, naturally, if the Court grants this motion consequently all of the money laundering counts in the indictment must also be dismissed." DE 283 at 17. As the money laundering counts are premised on three different kinds of specified unlawful activity—FCPA violations, *wire fraud*, and *violation of Haitian bribery law*—in addition to being without merit, the defendants' argument makes no sense.

CONCLUSION

Whereas the Indictment clearly meets all the requirements for sufficiency of pleading the offenses charged, the government respectfully submits that the defendants' Motion to Dismiss should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court and defense counsel using CM/ECF on November 17, 2010.

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Exhibit A

United States v. Bourke
1:05-CR-518 (S.D.N.Y. 2009)
Jury Instructions

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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I. INTRODUCTORY REMARKS

A. Function of Court and Jury

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Burden of Proof and Presumption of Innocence

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

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

D. Reasonable Doubt

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

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

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

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

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

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

E. Inferences

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

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

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

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

F. Direct and Circumstantial Evidence

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

Direct evidence is evidence that, if believed, tends to show a fact without need for any other amplification. For instance, when a witness testifies to what he saw, heard, and observed, and what he knew of his own knowledge, about things that came to him by virtue of his own senses, that is direct evidence. Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts that reasonably follow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is a fact or series of facts in evidence that, if believed, has a logical tendency to lead the mind to a conclusion that another fact exists – even though there is no direct evidence to that effect.

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

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

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

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

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

Circumstantial evidence is as valuable as direct evidence. The law

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

G. Credibility of Witnesses

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

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

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

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

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

If you find that any witness has willfully testified falsely as to any material fact, you have the right to reject the testimony of that witness in its entirety. On the other hand, even if you find that a witness has testified falsely about one matter, you may reject as false that portion of his testimony and accept as true any other portion of his testimony that commends itself to your belief or that you may find corroborated by other evidence in the case.

H. Defendant's Right Not To Testify

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

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

I. Stipulations of Fact

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

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

J. Government Treated Like Any Other Party

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

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

K. Accomplice Testimony

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

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

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

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

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

motivation color his testimony?

L. Informal Immunity of Government Witnesses

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

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

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

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

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

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

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

N. Accomplice Testimony – Not Proper to Consider Guilty Plea

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

O. Bias and Hostility

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

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

P. Preparation of Witnesses

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

Although you may consider that fact when you are evaluating a

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

Q. Impeachment by Prior Inconsistent Statements

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

R. Expert Testimony

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

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

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

S. Indictment Is Not Evidence

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

T. Redaction of Evidentiary Items

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

U. Charts and Summaries

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

V. Persons Not on Trial

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

W. Particular Investigative Techniques Not Required

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

X. Sympathy; Oath as Jurors

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

Y. Punishment Is Not to Be Considered by the Jury

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

Z. Improper Considerations

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

AA. Note Taking by Jurors

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

II. APPLICABLE LAW

A. The Indictment

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

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

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

B. Summary of the Offenses

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

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

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

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

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

1. The Indictment and the Statute

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

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

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each [person is guilty of a crime].

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

> From in or about May 1997, up to and including in or about 1999, in the Southern District of New York and elsewhere, Viktor Kozeny, FREDERIC BOURKE, JR., the defendant, Clayton Lewis, Hans Bodmer, Thomas Farrell, and others known and unknown to the Grand Jury, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together and with each other to commit offenses against the United States; to wit, violations of (a) the FCPA, Title 15, United States Code, Section 78dd-2; and (b) the Travel Act, Title 18, United States Code, Section 1952(a)(3)(A).

2. Elements of a Conspiracy

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

a. First Element of a Conspiracy – Existence of a

Conspiracy

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

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

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

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

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

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

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

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

b. Object of the Conspiracy – Violation of the FCPA

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

> (A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist [the person or company making the payment] in obtaining or retaining business for or with, or directing business to, any person.

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

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

i. First Element – Domestic Concern

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

ii. Second Element – Interstate Commerce

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

iii. Third Element – Corruptly and Willfully

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

intended to act "corruptly" and "willfully."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.

On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually

believed that the transaction was legal.

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

vi. Sixth Element – Purpose of the Payment

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

(1) to influence any act or decision of a foreign public official in his official capacity;

(2) to induce a foreign public official to do or omit to do any act in violation of that official's lawful duty; or

(3) to induce that foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

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

vii. Seventh Element – Business Nexus

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

viii. Solicitation of a Bribe Not a Defense

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

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

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

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

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

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

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

i. First Element – Travel or Use of a Facility

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

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

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

ii. Second Element – Required Knowledge

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

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

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

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

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

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

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

iii. Third Element – Activity

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

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

The second element that the Government must prove beyond a

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

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

"Unlawfully," "Intentionally," and "Knowingly"

Before the defendant can be found to have been a conspirator, you must first find that he knowingly joined in the unlawful agreement or plan. To satisfy its burden of proof as to this element, the Government must prove beyond a reasonable doubt that the defendant knew that he was a member of an operation or conspiracy that committed or was going to commit a crime, and that his action of joining such an operation or conspiracy was not due to carelessness, negligence, or mistake.

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

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

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

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

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

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

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

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

Moreover, the fact that the acts of a defendant, without knowledge, merely happens to further the purposes or objectives of the conspiracy does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

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

e. Third Element of a Conspiracy – Overt Acts

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

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

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

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

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

D. Money Laundering Conspiracy

1. The Indictment and the Statute

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

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

2. Elements

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

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

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

b. Object of the Conspiracy

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

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity [is guilty of a crime.]

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

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

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

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

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

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

the funds or monetary instrument to be transported.

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

ii. Second Element – Intent To Promote Specified Unlawful Activity

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

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

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

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

32-36).

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

E. False Statements

1. The Indictment and the Statute

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

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

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

The relevant statute is Section 1001(a) of Title 18 of the United States Code, which provides in pertinent part that:

> Whoever, in any matter within the jurisdiction of the executive . . . branch of the Government of the United States, knowingly and willfully —
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry [is guilty of a crime].

2. Elements

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

a. First Element – Statement or Representation

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

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

b. Second Element – Materiality

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

c. Third Element – Falsity

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

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

answer was false under any reasonable interpretation of the question.

d. Fourth Element – Knowing and Willful Conduct

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

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

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

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

F. Venue

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

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

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

G. Variance in Amounts and Dates

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

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

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

III. CONCLUDING REMARKS

A. Verdict Sheet

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

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

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

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

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

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

C. Consider Each Count Separately

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

D. Duty to Consult and Need for Unanimity

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

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

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

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

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

E. Closing Comment

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

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

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

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

Thank you for your time and attentiveness.

Exhibit B

United States v. Jefferson
1:07-CR-209 (E.D. Va. 2009)
FCPA Jury Instructions

Now, Count 1 of the indictment, as you will recall, charges that one of the objects of the conspiracy was to violate Title 15 of the US Code, Section 78, the Foreign Corrupt Practices Act, which makes it a federal crime to offer to pay, to pay, to promise to pay, or to authorize the payment of money or anything of value to a foreign official for the purpose of influencing any act or decision of such foreign official in his official capacity or securing any improper value -- improper advantage.

Count 11 -- and that's where we are up to now -- charges a substantive violation of the Foreign Corrupt Practices Act as described below.

Count 11 charges that: From in or about

April 2005, through on or about August 3rd, 2005, in the Eastern District of Virginia, the defendant willfully used or caused to be used the mails and means and instrumentalities of interstate commerce corruptly, in furtherance of an offer to pay, promise to pay, or authorization of the payment of money, or anything of value, namely: One, an up-front monetary payment, including an immediate payment of $100,000 in cash; and two, a later payment that would consist of a share of the Nigerian joint venture's profits, both to the then-vice-president of Nigeria, Atiku Abubakar, to influence the Vice-President Abubakar's acts and decisions in his official capacity, and to secure an improper advantage, among other things.

In so -- excuse me. In so doing, Count 11 alleges that on or about July 30th, 2005, Defendant Jefferson drove his car with $100,000 in cash from Arlington, Virginia, in the Eastern District of Virginia, to Washington, DC, and on the same day drove his car from Alexandria, Virginia, in the Eastern District of Virginia, to the Rayburn Office -- House Office Building in Washington, DC, to prepare a package to be delivered to the then-Vice-President Abubakar.

Now, Section 78(dd)(2)(A) of Title 15, which codifies the Foreign Corrupt Practices violation, prohibits payments to any foreign official for purposes of influencing

any act or decision of such foreign official in his official capacity, number one; number two, inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or -- it's in the disjunctive -- or securing any proper advantage; or B, inducing such foreign official to use his influence with a foreign government or instrumentality thereof to effect or influence any act or decision of such government or instrumentality in order to assist the person or company making the payment in obtaining or retaining business for or with, or directing business to any person.

So in order to sustain its burden of proof for this offense, that is, the offense of violating the Foreign Corrupt Practices Act as charged in the indictment, the government has to prove the following seven elements beyond a reasonable doubt:

First, the government has to prove that the defendant is a domestic concern; that is, or an officer, director, employee or agent of a domestic concern, or a stockholder thereof, acting on behalf of such domestic concern -- all of these comments -- or concepts I'll define for you shortly;

Second, that the defendant acted corruptly and willfully, as I have previously defined these terms for you;

Third, that the defendant made use of the mails

or any means or instrumentality of interstate commerce in furtherance of an unlawful act under this statute;

Fourth, that the defendant offered, paid, promises to pay or authorized the payment of money or anything of value;

Five, that the payment or gift was to a foreign official or any person while knowing that all or a portion of the payment or gift would be offered, given, promised, directly or indirectly, to a foreign public official -- let me read that one again.

That the payment or gift was to a foreign public official, or to any person, while knowing that all or a portion of the payment or gift would be offered, given or promised, directly or indirectly, to a foreign official -- foreign public official;

Six, that the payment was for one of four purposes: To influence any act or decision of the foreign public official in his official capacity; second, to influence the foreign public official to do any act in violation of that official's public duty; or three, to induce that foreign public -- that foreign official to use his influence with a foreign government or instrumentality thereof to effect or influence any act or decision of such government or instrumentality, or to secure any improper advantage.

The seventh element that the government must prove beyond a reasonable doubt is that the payment was made to assist the defendant in obtaining or retaining business for or with or directing business to any person.

If the government fails to prove any of these essential elements beyond a reasonable doubt, then you must find the defendant not guilty of Count 11.

Now, for purposes of the Foreign Corrupt Practices Act, a domestic concern is any individual who is a citizen, national or resident of the United States, and any corporation, partnership, association, joint stock company, business trust, unincorporated organization or sole proprietorship which has its principal place of business in the United States or which is organized under the laws of a state of the United States or a territory, possession or commonwealth of the United States.

Now, in this case the indictment charges that the Defendant Jefferson was both a domestic concern and an agent of the domestic concern, because he is alleged to have been a citizen of the United States and an agent of the ANJ Group, LLC, Global Energy and Environmental Services, LLC, and the Multimedia Broadband Services, Inc., which are each further alleged to be domestic concerns.

The indictment also charges that Jennifer Douglas Abubakar, wife of the then-Nigerian vice-president,

Atiku Abubakar, was a domestic concern because she is alleged to have been a citizen of the United States.

The term "interstate commerce" means trade or conducting business or travel between one state in the United States and another state, or the District of Columbia, or between any foreign country and a state or the District of Columbia. And such term includes the intrastate use of a telephone or other interstate means of communication or, B, any other interstate instrumentality.

If such mechanisms as trade, transportation or communications are utilized by a person and goods passing between various states, they are instrumentalities of interstate commerce.

I instruct you as a matter of law, the driving of an automobile or traveling in such an automobile from the District of Columbia to the Commonwealth of Virginia, or vice versa, constitutes the use of a means or instrumentality of interstate commerce.

So if you find those things occurred, you may find that this element have been proved.

Now, as I previously told you, one of the elements that the government must prove beyond a reasonable doubt for you to convict the defendant of violating the Foreign Corrupt Practices Act is if the defendant offered, paid, promise to pay or authorized the payment of money or

of anything of value.

It is not required that the payment actually be made. A promise to pay and the authorization of payment by a domestic concern are each also prohibited by the Foreign Corrupt Practices Act.

Indeed, a domestic concern or an officer or director or shareholder of a domestic concern that engages in bribery of a foreign official, indirectly through any other person or entity, is liable under the Foreign Corrupt Practices Act just as if the person had engaged in the bribery directly.

Thus, if you find that the defendant is a domestic concern, that is, a US citizen, or that he was an officer, director, employee, agent or shareholder of a domestic concern, and that he authorized another person to pay a bribe, that authorization alone is sufficient for you to find this element has been proven.

To repeat, it is not necessary that the payment actually take place. Instead, it is the offer or the authorization that completes the crime.

You may find this element is satisfied if you find that the defendant promised or authorized an unlawful payment, even if you believe that the payment as not actually made. It is sufficient to satisfy this element if Defendant Jefferson believed that the bribe would be paid,

and that he promised or authorized the bribe to be paid.

Provided all the other elements are present, an offer to pay, payment, promise to pay, or authorization of payment is unlawful under the Foreign Corrupt Practices Act if it is made to any person, while knowing that all or any portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any foreign official.

For the purpose of this section, a person's state of mind is knowing with respect to conduct, a circumstance, or a result, if such person is aware that the recipient of the payment or gift is engaging in such conduct; that is, the unlawful offering, giving, promise or payment; that such circumstance exists; or that the result is substantially certain to occur; or if such person has a firm belief that such circumstance exists; or that such result will substantially -- is substantially certain to occur.

A person is deemed to have such knowledge if the evidence shows that he was aware of a high probability of the existence of such circumstance, unless he actually believes that such circumstance does not exist.

The element of knowledge may be satisfied by inferences that you may draw if you find that the defendant deliberately closed his eyes what would -- to what otherwise

would have been obvious to him, when knowledge of the existence of a particular fact is an element of the offense.

I'm sorry. Let me begin again.

The element of knowledge may be satisfied by inferences you may draw if you find that the defendant deliberately closed his eyes to what otherwise would have been obvious to him. When knowledge of the existence of a particular fact is an element of the offense, such as -- such knowledge may be established if a person is aware of a high probability of its existence, and then fails to take action to determine whether it is true or not.

If the evidence shows you that the defendant actually believed the transaction was legal, he cannot be convicted, nor can he be convicted of being stupid or negligent or mistaken. More is required than that. But if a defendant's knowledge of a fact may be inferred from willful necessary -- I'm sorry. But a defendant's knowledge of a fact may be inferred from willful blindness to the knowledge or information indicating that there was a high probability that there was something forbidden or illegal about the contemplated transaction and payment.

It's the jury's function to determine whether or not the defendant deliberately closed his eyes to inferences and conclusions that may be drawn from the evidence with respect to this charge.

Now the term "foreign official" means any officer or employee of a foreign government, or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.

In this case the indictment charges that the then-vice-president of Nigeria, Atiku Abubakar, was a foreign official.

An instrumentality of a foreign government includes a government-owned or government-controlled company, such as commercial carriers, airlines, railroads, utilities, and telecommunications companies: Internet/telephone/television.

The indictment in this case charges that the Nigerian Telecommunications, Limited, also known as Nitel, was a Nigerian government-controlled company.

The Foreign Corrupt Practices Act offers -- prohibit offers, payments, promises to pay or authorization of payments made by a domestic concern in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to any person or company.

It is therefore not necessary for the government to prove that the domestic concern itself obtained or retained any business whatsoever as a result of

the unlawful offer, payment, or -- unlawful offer, payment, promise or gift.

Moreover, the act's prohibition of corrupt payments to assist in obtaining or retaining business is not limited to the obtaining or renewal of contracts or other businesses, but also includes a prohibition against corrupt payments related to the execution or performance of contracts, or the carrying out of existing business, such as payment to a foreign official for the purpose of obtaining more favorable tax treatment.

In order to sustain its burden of proof for the crime of violating the Foreign Corrupt Practices Act as charged in Count 11 of the indictment, the government must prove that the defendant made use of a means or instrumentality of interstate commerce corruptly, in furtherance of an offer, payment, promise to pay or authorization of the payment of money or something of value to a foreign official.

And you are instructed that is an action is in furtherance of something if it will assist in accomplishing that objective or is intended to promote that objective.

Now, in Count 11, the indictment charges the defendant with using the means of interstate commerce corruptly in furtherance of an offer, payment, or promise to pay something of value to Atiku Abubakar, then the Nigerian

vice-president, in two ways: First, on July 30th, 2005, when the defendant drove his car with $100,000 in cash from Arlington, Virginia, to the District of Columbia; and second, on July 30th, when he traveled from Alexandria, Virginia, to his Washington, DC, office to prepare a package to be delivered to the Nigerian vice-president.

The government is not required to prove that the defendant violated the Foreign Corrupt Practices Act in both ways that are alleged. But each juror must agree with all the other jurors that the crime was committed in the same way.

That is, if you unanimously find that the government has proved beyond a reasonable doubt either that the government [sic] used the means of interstate commerce corruptly in furtherance of an offer, payment or promise to pay something of value to Atiku Abubakar by driving his car with $100,000 in cash from Arlington, Virginia, to the District of Columbia on July 30th, 2005, or that the defendant used the means of interstate commerce corruptly in furtherance of an offer to pay -- offer, payment, or promise to pay something of value to Atiku Abubakar by traveling from Alexandria to his office in Washington, DC, to prepare a package to be delivered to the Nigerian vice-president on July 30th, then you may find the defendant guilty of Count 11.

On the other hand, if you find that the defendant -- if you find that the government has not proved beyond a reasonable doubt that either the defendant's driving of his car with $100,000 in cash from Arlington to the District on July 30th, or his travel from Alexandria to his Washington office on that date to prepare a package to be delivered to the Nigerian vice-president was in furtherance of an offer to pay, or payment, or something of value -- or payment of something of value to that foreign official, then you must find the defendant not guilty of Count 11.