09-4704-cr(L)

09-5149-cr(XAP)

To Be Argued By:
HARRY A. CHERNOFF

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-4704-cr(L), 09-5149-cr(XAP)

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

—v.—

VIKTOR KOZENY, DAVID PINKERTON,

Defendants,

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA (REDACTED)

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

HARRY A. CHERNOFF,
IRIS LAN,
ANDREW L. FISH,
Assistant United States Attorneys,
ROBERTSON PARK,
Assistant Chief, Fraud Section,
United States Department of Justice,
Of Counsel.

FREDERIC BOURKE JR.,

Defendant-Appellant-Cross-Appellee,

LANDLOCKED SHIPPING COMPANY, DR. JITKA CHVATIK,

Petitioners.

TABLE OF CONTENTS

PAGE

PAGE

PAGE

PAGE

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

PAGE

PAGE

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-4704-cr(L), 09-5149(XAP)

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

-v.-

VIKTOR KOZENY, DAVID PINKERTON,

Defendants,

FREDERIC BOURKE JR.,

Defendant-Appellant-Cross-Appellee,

LANDLOCKED SHIPPING COMPANY, DR. JITKA CHVATIK,

Petitioners.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Frederick Bourke Jr. appeals from a judgment of conviction entered on November 12, 2009, in the United States District Court for the Southern District of New

York, following a trial before the Honorable Shira A. Scheindlin, United States District Judge, and a jury.*

Indictment S2 05 Cr. 518 (SAS) was filed on May 26, 2009, in three counts. Count One charged Bourke with conspiring to violate the Foreign Corrupt Practices Act (the "FCPA") and the Travel Act, in violation of Title 18, United States Code, Section 371. Count Two charged Bourke with money laundering conspiracy, in violation of Title 18, United States Code, Section 1956(h). Count Three charged Bourke with making false statements, in violation of Title 18, United States Code, Section 1001.

Trial commenced June 1, 2009, and ended on July 10, 2009, when the jury convicted Bourke on Counts One and Three and acquitted Bourke on Count Two.

On November 10, 2009, Judge Scheindlin sentenced Bourke principally to a term of imprisonment of one year and one day and a $1 million fine.

Bourke remains free on bail pending resolution of this appeal.

Statement of Facts

A. The Government's Case

The evidence at trial established that Bourke, a successful entrepreneur and multi-millionaire, knowingly backed rogue investor Viktor Kozeny in a corrupt plan to purchase the state-owned Azerbaijani oil industry, in

---

* The Government filed a notice of appeal but is not pursuing a cross-appeal.

secret partnership with the president of Azerbaijan, Heydar Aliyev, and his family. The corrupt plan included the payment of bribes to Aliyev and other officials.

The evidence at trial included the testimony of cooperating witnesses Thomas Farrell and Hans Bodmer, who provided insiders' views of the criminal conspiracy; testimony from numerous other individuals who interacted with Bourke in the months he spent planning and pursuing the investment in Azerbaijani privatization vouchers; and evidence of Bourke's prior statements to co-conspirators, to his attorney, in sworn documents, and to the Federal Bureau of Investigation ("FBI"), all of which established that Bourke had joined the conspiracy and then lied to cover it up.

1. Background of the Conspiracy

a. Azerbaijan in the Late 1990s

Azerbaijan is a small and impoverished but oil-rich nation that had been a republic of the former Soviet Union. (Tr. 152-53, 164, 166-68).[*] Following the collapse of the Soviet Union, Azerbaijan came to be ruled by President Heydar Aliyev. (Tr. 153-58). From 1993, Aliyev ruled Azerbaijan with a strong hand until shortly before his death in 2003 (Tr. 160-61), by which time the presidency

---

[*] "Tr." refers to the trial transcript; "GX" refers to the Government's exhibits at trial; "A." refers to the joint appendix that Bourke submitted with his brief on appeal; "SA" refers to the special appendix that Bourke submitted with his brief on appeal; and "Br." refers to Bourke's brief on appeal.

had passed to his son, Ilham Aliyev (Tr. 155-56). As Bourke knew, Azerbaijan was regularly ranked as one of the most corrupt nations on earth. (Tr. 1496).

In the late 1990s, Azerbaijan embarked upon a voucher-based privatization initiative, similar to initiatives that had taken place in Russia and the Czech Republic, to transfer ownership of state-controlled industries to the citizens of the newly-created republic. (Tr. 175-82). Notwithstanding this program, the chance that the Azerbaijani oil company, SOCAR, would be privatized was extremely remote. (Tr. 182). Not only was SOCAR a critical economic asset from which the state reaped substantial revenues, but it was a political and military asset. (Tr. 172-73, 183). President Heydar Aliyev had installed his son and other loyalists in key positions at SOCAR and exercised extremely tight control over the company. (Tr. 182-83). Moreover, trends in the region and with respect to state-owned oil companies forecasted increased nationalization, not privatization. (Tr. 183-85). Indeed, SOCAR remains in state hands. (Tr. 188).

b. Bourke's Prior Business Ventures

Bourke is a successful, experienced private investor. (Tr. 1006, 1918). His businesses include a partnership in a luxury handbag and luggage company, Dooney & Bourke, as well as various investments in scientific and medical research, construction companies, and nanotechnology. (Tr. 1425, 1902-03).

In 1997, Bourke and his new friend, Viktor Kozeny, embarked on an investment partnership in the scientific field of protein crystallization. (Tr. 1536-38). Kozeny

ultimately withdrew his pledge of $25 million from the project. (Tr. 1536-38). Although Bourke, an avid biotechnology investor, was unhappy with Kozeny's decision, this did not discourage Bourke from pursuing future business ventures with Kozeny. (Tr. 1539-41).

c. Kozeny — "The Pirate of Prague"

At some point, Bourke learned about Kozeny's business success and strategies from a December 1996 Fortune magazine article. (Tr. 1929-30). Titled "The Pirate of Prague," the article chronicled how Kozeny and a business partner, Michael Dingman (an acquaintance of Bourke's (Tr. 1926)) orchestrated a successful scheme to encourage the state-owned industry privatization process in the Czech Republic. (GX 30). The article detailed Kozeny's insider trading, purchase of state secrets from a government official, and other fraudulent activity. (*Id.*). The article also described charges filed against Kozeny and his eventual settlement with the Czech government. (*Id.*). Having read the article and discussed it with his lawyers, Bourke was aware of Kozeny's questionable business practices; but Bourke was impressed by the outsized profits Kozeny generated in this scheme, and, as Bourke would later tell a prospective investor, Kozeny had not actually been convicted of a crime. (Tr. 1667).

Touring the former Soviet bloc with Bourke, Kozeny hoped to replicate his Czech Republic success in Azerbaijan. (Tr. 216). The privatization process in Azerbaijan resembled the process with which Kozeny was familiar from the Czech Republic. The Azerbaijani government issued to each citizen voucher booklets containing four coupons. (Tr. 403-04). These coupons,

which were freely tradeable, could be used to bid for shares of privatized enterprises at auction. (Tr. 405, 467, 999). Foreigners who wished to participate in the auction were required to pair their vouchers with so-called "options." (Tr. 305). Options were issued by the State Property Committee ("SPC"), the entity administering the privatization process. (Tr. 176, 460-61). Foreigners were required to match every purchased voucher booklet, which contained four coupons, with four options. (Tr. 462).*

d. Bourke and Kozeny's Relationship

In the spring of 1997, Bourke accepted Kozeny's invitation for a tour around the world in search of investment opportunities. (Tr. 218-19, 227-28, 249-57). In the course of these extensive travels, Kozeny and Bourke became close. (Tr. 385, 516).

On a May 1997 trip, Kozeny and Bourke learned of the privatization process in Azerbaijan. (Tr. 222-23). The prospective investors discussed Azerbaijani privatization and the potential profits of this investment. (Tr. 224). Kozeny and Bourke seemed enthusiastic and optimistic that this investment could succeed, saying that once the process was complete, they could rename the country

---

* Although a foreign investor would only have to buy sufficient options to match the number of voucher coupons, Kozeny nevertheless purchased options exceeding the required amount by several millions. (Tr. 467). Kozeny's stated rationale for doing so was that options might be used for additional transactions in the future. (*Id.*).

"Vikistan or Rickistan," after Viktor Kozeny or Rick Bourke. (Tr. 225). Shortly after this trip, Kozeny set up operations in Baku, Azerbaijan, recruiting employees and establishing relationships with government officials in an attempt to ensure the success of his venture. (Tr. 226, 381; GX 803).

2. Origins of the Conspiracy

a. Voucher Purchasing

Kozeny set up two entities operating out of the same office space in Baku, Azerbaijan, to facilitate the investment process: the Minaret Group, an investment bank, and Oily Rock, the entity which purchased and owned the vouchers. (Tr. 244-45, 400-01, 808-09, 1432, 1751). Kozeny instructed Farrell and other employees to begin purchasing vouchers. (Tr. 390-91).

Farrell and others purchased vouchers for Oily Rock using U.S. currency that was typically flown in on private jets from Zurich or Moscow. (Tr. 233, 410, 475-76, 1013). Each cash delivery was in the millions of dollars; a total of approximately $200 million was flown into Baku. (Tr. 475-77, 508-09). Kozeny's attorney, Hans Bodmer, prepared confirmation receipts for these cash deliveries that were signed by Farrell upon arrival. (Tr. 1013-15; GX 859-62, 864-66).

Voucher purchasing initially proceeded according to plan. At first, purchases were made informally in black markets on the street and in public places. (Tr. 409). In August 1997, however, Farrell and others encountered resistance in the voucher markets from local Chechens. (Tr. 417). To resolve this problem, Kozeny agreed to pay

protection money to the Chechens. (Tr. 416-17). When several voucher purchasers were arrested and the Chechen "protection" proved ineffective, a local contact arranged for Kozeny and Farrell to meet Ilham Aliyev, the president's son and the vice-president of the state-owned oil company, SOCAR. (Tr. 241, 423-25). This meeting led to an introduction to two key Azerbaijani officials, Nadir Nasibov, the chairman of the SPC, and his deputy, Barat Nuriyev. (Tr. 426-27). This was a welcome development for Kozeny, who understood that SOCAR was the crown jewel of Azerbaijan's state-owned companies and that the SPC would administer any auction of SOCAR.

b. The "Entry Fee"

In his initial discussions with the Azerbaijani officials, Kozeny expressed interest in acquiring SOCAR at auction, an auction that would require a special presidential decree. Over the course of the next few days, Kozeny met frequently with Nuriyev, who was already familiar with Kozeny's reputation from wide ranging coverage in the press. (Tr. 427-28). Together they sketched out the initial corrupt investment scheme for the privatization of SOCAR. (Tr. 429-32). Nuriyev and Kozeny agreed that future purchases of vouchers would be made exclusively through Nuriyev and his designees. Nuriyev informed Kozeny that the purchase of SOCAR at auction would require one million vouchers (*i.e.*, four million coupons, paired with four million options). (Tr. 436). In addition, Nuriyev "made it clear that [it] was also necessary to make some payments" to the Azerbaijani officials, including President Aliyev, as a sort of "entry fee." (Tr. 436-37). The entry fee was set at $8 to $12 million. (Tr. 437). This

was "the amount of money that Barat Nuriyev explained would be necessary to be passed to him on behalf of the president's family in order to further participate in privatization and to acquire SOCAR." (Tr. 450).

Kozeny agreed to pay this fee via wire transfers and cash payments. (Tr. 437). Farrell delivered the cash payments directly to Nuriyev. (Tr. 437, 451-52). Bodmer and his law firm arranged the wire transfers. (Tr. 454-55; GX 809). The payments were given code names for tracking purposes and were routed to accounts owned by Nasibov and Nuriyev and members of their families. (Tr. 452, 1050-52).

c. The "Two-Thirds/One-Third" Split

The final part of the corrupt arrangement was a transfer of two-thirds of Oily Rock's vouchers and options to Azerbaijani officials. (Tr. 432-33). Under this arrangement, the officials would receive two-thirds of the profits arising from the investment consortium's participation in the privatization of SOCAR and other valuable state assets without making any monetary investment. (Tr. 432-35, 1023).

In September 1997, to execute this corrupt arrangement, Kozeny instructed Bodmer to set up a corporate structure with three parent companies and numerous holding companies. (Tr. 1024-26; GX 229). The holding companies had control of the vouchers and options that were allocated to the Azerbaijani officials. (Tr. 1026). To conceal this corrupt transfer, Kozeny and the officials entered into a sham credit arrangement, which provided the Azerbaijani officials with two-thirds of the profits

from Kozeny's investment but did not require them to make any financial contribution to the venture or to or assume any risk. (Tr. 1037-49; GX 212-14).

3. Expansion of the Conspiracy

In December 1997, Nuriyev notified Farrell that President Aliyev had increased the voucher requirement for the auction of SOCAR from one to two million vouchers. (Tr. 506). By that point, Kozeny had purchased nearly one million vouchers. (Tr. 507-08). When Kozeny and Farrell began purchasing vouchers in July 1997, the going rate per voucher booklet was approximately $12. (Tr. 411). At the time Nuriyev informed Farrell of the change, the price of a booklet had risen to approximately $100. (Tr. 508). Despite this significant development, Kozeny remained optimistic and determined to go through with the investment, saying he would "come up with the money." (Tr. 508-09).

In December 1997, Kozeny began recruiting American investors to join the Azerbaijani privatization investment scheme. Kozeny threw a lavish holiday party at his home in Aspen, Colorado for this purpose. (Tr. 247-48, 505-06, 898, 1057-59, 1430). Bourke, who was Kozeny's next-door neighbor in Aspen, and Tom McCloskey, another Aspen neighbor who had already invested in Oily Rock, attended this event. (Tr. 1430, 1061).

In January 1998, Kozeny took a group of potential investors, including Bourke and Robert Evans (a child-hood friend of Bourke's), to Baku. (Tr. 249, 512). The trip included a visit to the Minaret Group offices, including the vault where the vouchers were kept, as well as a meeting

with Nuriyev. (Tr. 518, 1432-33, 1748). Carrie Wheeler, who was investigating the investment for the Texas Pacific Group ("TPG"), testified that "it seemed like the gist of the meeting was to communicate [to the potential] investors that Viktor [Kozeny] had a relationship with the government in some way," and that Nuriyev and Kozeny "knew each other well." (Tr. 1754).

In February 1998, Bourke and Evans took another trip to Baku with Kozeny. (Tr. 253-54). Bodmer, who had traveled to Baku separately, testified that during this trip Bourke approached Bodmer and asked about the Azerbaijani interests in the investment. (Tr. 1065). Bodmer then told Bourke the nature of the corrupt arrangement and the corporate structures set up to carry it out. (Tr. 1067-70).[*] Bodmer testified that he subsequently

---

[*] Bodmer testified that he had not been certain of the exact date of the conversation (Tr. 1073), but that he believed it had taken place on the occasion of Evans's visit to Azerbaijan, which Bodmer had recorded in his time records as February 6, 1998. (Tr. 1065-71, 1073-74). Bodmer also testified that Bourke had raised the subject with Bodmer the prior day, and that Bodmer obtained permission from Kozeny that evening to disclose the information to Bourke. (Tr. 1065-68). However, other records not available to Bodmer established that Bodmer was mistaken about the timing of the conversation because Bourke and Kozeny had not been in Baku on the evening of February 5. (Tr. 2501-02; GX 1100). Accordingly, it appears that Bodmer was either mistaken about consulting with Bourke and Kozeny on the day before the conversa-

mentioned the conversation to an associate at his law firm, Rolf Schmid. (Tr. 1074). Schmid confirmed this during his testimony. (Tr. 1366-70). Schmid also memorialized Bodmer's description of the conversation in a memorandum he prepared years later in connection with civil litigation:

> Ricky Bourke asked Hans Bodmer about the legal structure of Oily Rock and its subsidiaries, the ownership of vouchers and options by the holding companies, etc. Hans Bodmer remembers that — probably at the beginning of 1998 — he left together with Ricky Bourke the Hilton* Hotel in Baku and went for a walk together with Ricky Bourke. During this walk he briefed Ricky Bourke in detail about the involvement of the Azeri interests . . . the 2/3 : 1/3 arrangement . . . .

(GX 181A; Tr. 1385-86).

Bourke made his initial investment in Oily Rock without directing any of his many lawyers to conduct due diligence. For example, Bourke did not ask attorneys Arnold Levine, David Hempstead and Jay Colvin to research the investment or the privatization process.

---

tion with Bourke about the corrupt arrangement, or that this conversation took place in April 1998, when Bourke, Bodmer, and Kozeny, but not Evans, were all in Baku for a longer period of time.

* In the memorandum, Hilton is crossed out and Hyatt Regency is written in by hand. (A. 1211).

(Tr. 1969, 2141, 2318-19). After traveling to Baku, Bourke set up Blueport, an investment vehicle incorporated in the British Virgin Islands, and invested $7 million at the beginning of March 1998. (Tr. 1063, 1076, 1555-57; GX 526, 673-76). Bourke also recruited additional American investors, including his friends Evans and former Senator George Mitchell, to invest in Oily Rock through Blueport. (Tr. 257, 2035; GX 546). Bourke believed Mitchell's involvement in Oily Rock would be of great benefit to the investment, given Mitchell's reputation and prominence. (Tr. 926; GX4A-T-2). Bourke subsequently arranged for a directorship agreement that guaranteed Mitchell an annual income of $100,000, nanny and car service expenses, and an outright "gift" of one percent of Oily Rock stock. (Tr. 2137-38, 2243-44; GX 529, 555).

In April 1998, Bourke traveled back to Baku for the official opening of the Minaret offices. (Tr. 264, 813-14; GX 3A-B). Also in attendance at the opening were Kozeny, Mitchell, Bodmer, Farrell and other Oily Rock investors. During this trip, Mitchell met with President Aliyev to discuss Oily Rock's investment and had a follow-up meeting at SOCAR with Ilham Aliyev, at which Bourke joined Mitchell. (Tr. 533-34). Mitchell reported back to Bourke and Kozeny that the president intended to go forward with privatization. (Tr. 534).

Nevertheless, Bourke sought further assurances that the corrupt arrangement was both in place and effective. (Tr. 536). At the time of the office opening, Bourke asked Farrell what Nuriyev was saying about privatization and whether "Viktor was giving enough" to the Azerbaijani officials. (Tr. 536). This was the second time Bourke had

asked him that question, the first conversation taking place a few weeks earlier when Bourke asked Farrell, "Has Viktor given them enough?" (Tr. 519-21). Farrell tried to reassure Bourke and referred him to Kozeny. (Tr. 520).[*]

Bourke's interest in the investment was motivated by his knowledge of the corrupt arrangement. Because Bourke knew of the payments to Azerbaijani officials, Bourke demonstrated an assured confidence in the success of the privatization, even though most of the investors who were not privy to the details of the conspiracy viewed it as extremely risky.[**] The inherent risk in the investment arose

---

[*] Farrell, like Bodmer, initially had difficulty remembering the exact timing of the conversations, and his recollection at trial with respect to the timing was different from what he had previously told prosecutors and investigators during his proffer sessions in 2002. (Tr. 519, 521-25, 2494-95). However, former FBI Special Agent George Choundas, who had interviewed Farrell several times in 2002, testified that Farrell's recollection of the substance of the conversation never changed and that in 2002 Farrell had similarly recalled two conversations where Bourke asked if Kozeny was paying the Azerbaijani officials enough money. (Tr. 2496-97).

[**] For example, investor McCloskey testified that "this was a high risk/high return investment." (Tr. 1430). Amir Farman-Farma, a Minaret employee and expert in the region who did not invest, testified that the investment was "highly risky." (Tr. 1476). An expert witness, Rajan Menon, also testified that it was highly unlikely that Azerbaijan would have opted to auction SOCAR for

from the fact that the privatization of SOCAR required a presidential decree. (Tr. 203, 408-09). At the time Bourke made the investment and, as late as January 1999, no such decree had been made nor had the president ever given a public statement about his intentions to privatize SOCAR. (Tr. 408-09, 1493; GX 153). Bourke's knowledge about the arrangement enabled him to be extremely confident in the likelihood that SOCAR would be privatized. Bourke boasted to one of his lawyers that there was a 90 to 95 percent chance that Bourke would make 20 times his original investment. (Tr. 1973). Bourke also assured another one of his attorneys that this was an extraordinary opportunity to make billions of dollars. (Tr. 1553).

Other Americans also invested in Oily Rock. McCloskey, for example, invested $5 million in October 1997. (Tr. 1426-28). Kozeny also recruited institutional investors. (Tr. 1062). Omega and Pharos, hedge funds from New York, partnered with Columbia University and AIG and invested approximately $150 million in vouchers through Minaret. (Tr. 1062-63, 1127; GX 152).

4. The Advisory Companies and Related Entities

a. Bourke's Purpose in Establishing Advisory Companies

Shortly after the Minaret office opening, Bourke again traveled to Baku. (Tr. 268, 603; GX 846). Upon his return,

---

privatization vouchers given SOCAR's great economic and strategic importance to the Aliyev government. (Tr. 170-85).

he contacted his attorneys to discuss the investment and to explore ways to limit his liability for any FCPA violations. (Tr. 2161-71). In a partially recorded telephone conference, Bourke strongly indicated that he knew that the arrangement with the Azerbaijani officials and his own participation in this corrupt investment scheme violated the Foreign Corrupt Practices Act. (Tr. 2167-68; GX 4A, 4A-T-2). The participants in this call were Bourke, Colvin, Oily Rock investor Richard Friedman, and Friedman's attorney, William Benjamin. (GX 4A, 4A-T-2). At the outset of the call, Friedman contrasted Minaret (the investment bank) with Oily Rock (the voucher investment vehicle) and made an abbreviated reference to the two-thirds/one-third split with the Azerbaijani officials:

> What about if we stay on the board of Minaret but get off Oily Rocks? Minaret is, in fact, the company that provides — . . . . [W]e're not sinking any capital in Minaret. Uh, we have a document that Minaret does not, uh, have any kind of, uh, relationship with any foreign people, *it doesn't split the money*, blah-blah-blah, it advises Oily Rocks, something like that. How does that work?

(GX 4A-T-2 at 1-2 (emphasis added)). No one on the call requested clarification of this statement. During the call, Bourke repeatedly brought up the subject of bribe payments and the related investor liability. (GX 4A, 4A-T-2). For example, as Bourke put it to his fellow investors and their respective attorneys as he explored how it was he could limit any potential liability: "Let's say at dinner one

night . . . one of the guys at Minaret . . . says to you . . . 'We know we're going to get this deal. You know, we've taken care of this minister of finance, or this minister of this or that.' What are you going to do with that information?" (GX 4A-T-2 at 2). After Bourke's attorney commented that this could be an FCPA violation, Bourke continued:

> What happens if they break a law in, uh, in, uh, you know, Kazakhstan, or they bribe somebody in Kazakhstan and we're at dinner and, uh, you know, uh, one of the guys says, "Well, you know, we paid some guy ten million bucks to get this now." I don't know, you know, if somebody says that to you, I'm not part of it, I didn't, I didn't endorse it. But let's say, uh, they tell you that. You got knowledge of it. What do you do with that? I mean, do y—, and do you think, I, I'm just saying to you in general, do you think business — . . . . *No, but do you think business is done at arm's length in this part of the world*?

(GX 4A-T-2 at 3 (emphasis added)). Both Colvin and Benjamin responded that association with any corrupt practices could expose the investors to FCPA liability. (GX 4A, 4A-T-2). Bourke and Friedman then agreed that forming a separate company that would be affiliated with Oily Rock and Minaret would provide sufficient distance to shield them from liability for any corrupt payments made by Kozeny and his companies. (GX 4A-T-2).

Bourke's knowledge of Kozeny's corrupt practices and his intention to give an appearance of distance from Kozeny's companies was further demonstrated during a subsequent conference call. (Tr. 2172; GX 555). During this call, Bourke, Colvin, Friedman, Clayton Lewis (a principal of a hedge fund called Omega Advisors), and others again discussed the option of setting up an American advisory board to appear removed from any illegal activity executed by Kozeny or his companies. (Tr. 2173-77). In notes he took during the conversation, Colvin wrote that Lewis — a member of the conspiracy who pleaded guilty (a fact elicited by the defense (Tr. 2816-17)) — asked whether setting up these advisory companies would make it appear as if the investors "intentionally did this as a shield." (Tr. 2176; GX 555). That the advisory companies were contemplated to cover up the investors' illegal activity was made clear by Colvin's notation of how the conversation ended: "Dick [Friedman] — this conversation never happened." (GX 555).

b. The Issuance of Additional Shares

In mid-1998, Kozeny and Bodmer informed Bourke that an additional 300,000,000 shares of Oily Rock would be issued and transferred to the Azerbaijani officials. (Tr. 1567-68). This issuance, which was authorized at a shareholder meeting on June 26, 1998, increased the number of Oily Rock shares from 150,000,000 to 450,000,000. (Tr. 1157). Bourke knew that the additional shares were authorized and issued to President Aliyev.

(Tr. 1569; GX 516).*

Bourke discussed the issuance of additional shares with several people, including his attorneys. Colvin's notes from one of these conversations includes a concluding remark that the increase did, in fact, dilute the investors' interests — in other words, the Azerbaijani officials who received the additional shares did not contribute full monetary value for them. (Tr. 2194-97; GX 543). In addition, in a barely veiled reference to the officials, Bourke told Minaret employee Farman-Farma that "Kozeny had claimed that the dilution was a necessary cost of doing business and that he had issued or sold shares to new partners who would maximize the chances of the deal going through, the privatization being a success." (Tr. 1484).

c. Bourke's Service on the Boards of the Advisory Companies and Related Entities

Around the time the additional Oily Rock shares were issued, the American investors formed the advisory companies. (GX 601). For their participation, the directors of the advisory companies received one percent of Oily

---

* During Bourke's proffers with the FBI, Bourke tried to walk away from incriminating aspects of a sworn statement he had provided on this subject in connection with a civil litigation (GX 516) by claiming that he believed Kozeny's claim was false and that Kozeny was really issuing the shares to himself rather than to Aliyev. (Tr. 2460-61, 2463).

Rock stock. (Tr. 1146). Bourke joined the board of directors of Oily Rock US Advisors ("ORUSA") and Minaret US Advisors ("MGUSA") on July 1, 1998. (Tr. 1582-83; GX 217, 601). Oily Rock Investment Corporation, another related entity, was also formed in July 1998, and Bourke was named its president. (GX 563).

Following Bourke's appointment to these positions, Bourke's Blueport made an additional investment in Oily Rock in the amount of $1 million, bringing its total investment to $8 million. (Tr. 2056; GX 526).

5. Lobbying

As of July 1998, SOCAR had not yet been privatized, and President Aliyev had not made a public statement of his intentions to do so. In an effort to bolster their standing with Aliyev, the directors of ORUSA and MGUSA turned their attention to lobbying efforts in the United States on behalf of Azerbaijan. (Tr. 2249). The budget drawn for the advisory companies included substantial funding for lobbying activities to benefit the government of Azerbaijan. (Tr. 1146, 1603). The funds for the lobbying activities, however, came from Oily Rock. (Tr. 1146, 2257). A draft memorandum prepared by Friedman on behalf of Kozeny and distributed to Bourke, Lewis, and Mitchell stated that the group's goal was to lobby Congress to repeal a portion of the Freedom Support Act, which placed heavy restrictions on United States aid to Azerbaijan. (GX 1014). Although these lobbying expenditures were a gift to the government of Azerbaijan, rather than to its leader in his personal capacity, the motivation was clear: to bring about the privatization auction of SOCAR. As Kozeny stated to Aliyev with respect to the

lobbying, "There will be no cost to your government." (GX 1014).

6. Continuation of the Conspiracy and Bribe Payments

a. Bribe Payments

In March 1998, Bodmer had set up Swiss bank accounts for the Azerbaijani officials for purpose of transferring bribe money. (Tr. 442-49, 1112-16). The beneficiaries of these accounts included Nuriyev, his son, Nasibov, and another relative of his, as well as President Aliyev's daughter. (Tr. 1114; GX 232). From May to September 1998, nearly $7 million in bribe payments were wired to these accounts. (Tr. 488, 1119; GX 261A through 261M).

b. Medical Visits and Visa Arrangements

In addition to paying cash bribes, the conspirators arranged and paid for medical care, travel, and lodging in the United States for both Nuriyev and Nasibov. Bourke was personally involved in three separate trips that the Azerbaijani officials made to New York for medical reasons. (Tr. 259-60, 846; GX 901). In March 1998, Bourke arranged a medical referral for Nasibov to see a cardiologist at Columbia University Medical Center. (Tr. 972-80; GX 921). In May 1998, Bourke arranged an appointment for Nuriyev with a urologist affiliated with Mount Sinai Hospital. (Tr. 846, 946-49). Bourke was listed as the emergency contact on Nuriyev's medical chart, and Bourke instructed Christine Rastas, a Kozeny employee who accompanied Nuriyev on the trip to New York, to keep Bourke updated on the doctor's visits.

(Tr. 853; GX 406B, 406C). Rastas paid the bill for the doctor's visits and hospital charges; she was reimbursed by one of Kozeny's companies. (Tr. 847-49, 851-56; GX 403). Rastas also paid and was reimbursed for Nuriyev's travel expenses to New York, hotel accommodation at the St. Regis, various dinners and tourist attractions Nuriyev and Rastas attended, as well as items Nuriyev purchased in New York. (Tr. 847-55; GX 403, 404). The total cost of the trip, paid for by Kozeny, was approximately $10,000. (Tr. 869).

In September 1998, Nuriyev took a second trip to New York for a scheduled surgery. Bourke remained the emergency contact and was listed as the patient's "Next of Kin" in Nuriyev's medical chart. (GX 406B, 912). Prior to Nuriyev's arrival in the United States in September 1998, Bourke and Farrell assisted him in obtaining the proper visa so that he would be able to enter the country the following month. (Tr. 588-89; GX 822). Although Nuriyev later reimbursed Kozeny for payments to the hospital and the surgical procedure, Nuriyev did so from a bank account set up by Bodmer to receive bribe payments. (Tr. 1114-15; GX 251).

7. Final Stages of the Conspiracy

By the end of 1998, Kozeny had purportedly written off the investment, believing that privatization would not go forward as he had hoped. (Tr. 1449). Kozeny told his investors that the vouchers were essentially valueless and that they could best be used as "wallpaper." (Tr. 1450, 1480). By January 1999, the Minaret Group fired most of its employees and reduced the salaries of those who remained employed. (Tr. 1486).

Bourke, nevertheless, did not abandon hope. (Tr. 1486, 1490). In December 1998 and January 1999, Bourke met with Farman-Farma to discuss what steps to take to influence Azerbaijani officials to go through with the original plan. (Tr. 1485). At these meetings, Farman-Farma suggested ways for investors to influence the Azerbaijani officials to move forward with privatization; Bourke encouraged Farman-Farma to memorialize these ideas. (Tr. 1486). Farman-Farma produced the memorandum and faxed it to Bourke and Leon Cooperman, the chairman of Omega. (Tr. 1487; GX 153).

In January 1999, Bourke resigned from the boards of ORUSA and MGUSA. (Tr. 2075; GX 506). After his resignation, Bourke made another trip to Baku to meet with President Aliyev in an attempt to use allegations of fraud against Kozeny and SPC officials to pressure Aliyev to follow through with the privatization of SOCAR. (Tr. 2322-24).

8. Bourke's Meetings with the Government

In late 2000, Kozeny's attorneys contacted the U.S. Attorney's Office to share information regarding the bribery scheme, which had become an issue in civil litigation in the United Kingdom among entities controlled by Kozeny and others. (Tr. 2450-51). Bourke subsequently was advised that he was a subject of the investigation, and he agreed to meet with representatives of the U.S. Attorney's Office and the FBI pursuant to a proffer agreement that he signed on April 26, 2002. (Tr. 2361, 2453; GX 101). During these sessions, Bourke was asked specifically whether he knew that Kozeny had made various corrupt

payments, transfers, and gifts to Azerbaijani government officials; Bourke falsely denied any such knowledge. (Tr. 2455).

B. The Defense Case

Bourke called numerous witnesses in his defense.

1. Senator George Mitchell

Mitchell testified about his March 1998 investment with Bourke in the Azerbaijani privatization project. (Tr. 1634). Mitchell testified that prior to his investment he directed staff at his law firm to research Kozeny. (Tr. 1632). He also read newspaper and magazine articles that were critical of Kozeny and his investment tactics in the Czech Republic. (Tr. 1632). When Mitchell mentioned these allegations to Bourke, Bourke vouched for Kozeny by saying that "Kozeny had not been charged with or convicted of any wrongdoing." (Tr. 1632). In addition, Mitchell testified that, in his April 1998 meeting with the U.S. ambassador to Azerbaijan, the ambassador warned Mitchell that he should not be involved with Kozeny because of his bad reputation. (Tr. 1640-41). Although he conveyed this advice to Bourke, Bourke responded as he previously had about the negative articles. (Tr. 1641).

Mitchell further testified on cross-examination that Bourke had never advised Mitchell that Bourke had developed concerns about Kozeny's potential violations of the FCPA and consulted lawyers on the matter, or that Bourke had restructured his and Mitchell's participation in the investment as a result of these consultations. (Tr. 1704-06). Instead, Bourke told Mitchell that their

board memberships and the company structures had been restructured due to unspecified information control issues. (Tr. 1637).

2. David Brodsky

David Brodsky, a lawyer who represented Omega during its investigation of Kozeny's options sales, testified that Bourke wanted Omega to report the allegations of apparent fraud to prosecutors. (Tr. 2345).* However, Stanley Twardy, who was Bourke's attorney at the time, had testified during the Government's case that Bourke did not approach prosecutors at any level with his allegations or concerns. (Tr. 2413-14).

3. William Benjamin

Benjamin, a lawyer who represented Friedman in connection with his investment in Oily Rock in 1998, testified that he participated in a conference call in May 1998, before Friedman invested. (Tr. 2514). Benjamin testified that no one on the call made statements concerning knowledge of illegal activity in the investment. (Tr. 2516). Friedman did not testify.

---

* During the trial, there was evidence and testimony that Kozeny had violated his contract with Omega to purchase its options from the Azerbaijan government by selling to Omega options owned by Oily Rock. (Tr. 1131-33, 2702-07). This dispute was later the subject of a civil lawsuit in London (Tr. 1189-94, 1378-80) and also resulted in Kozeny's indictment for grand larceny in New York State (Tr. 2412).

4. Robert Evans

Evans, a friend of Bourke's who also invested in Oily Rock through Blueport, testified about his trip to Azerbaijan and elsewhere with Bourke and Kozeny in 1998, as well as his later investment. (Tr. 2537). Evans testified that he and Bourke went to Baku on February 6, 1998, and met with Bodmer. (Tr. 2537). Bodmer told them that Bodmer and Kozeny had met with President Aliyev, that President Aliyev was in favor of the Americans' investment in Azerbaijan, that he would support it, and that he was also "in on the deal." (Tr. 2537-38). Evans claimed that he understood this to mean that the President was a co-investor and not that he was being bribed by Kozeny. (Tr. 2538). Evans also testified that he was with Bourke the entire six hours that he was in Azerbaijan on February 6, 1998, including the meeting, and that it was impossible for Bourke to have met with Bodmer on February 5, 1998, in Azerbaijan because Bourke and Evans were in London on that day. (Tr. 2543). Evans was only in Azerbaijan twice, once in January 1998 and once on February 6, 1998, but not in April 1998 for the Minaret opening. (Tr. 2542-43). Evans also testified that he did not see or encounter Bodmer on his January trip to Azerbaijan. (Tr. 2543).

On cross-examination, Evans testified that before Evans invested, Kozeny had told Bourke and Evans that "you don't get the full asset for your investment because of these local interests." (Tr. 2622). Evans testified that the investor group was going to get two-thirds of the privatized company and the rest was going to stay in Azerbaijan for "local partners." (Tr. 2622). Evans

recollected that the Azerbaijanis would retain a third of the company in which the American investors invested. (Tr. 2622). Accordingly, although Evans appeared to have confused who would receive one-third and who would receive two-thirds, his testimony provided additional evidence that Bourke was aware of the split with Azerbaijani officials before he invested.

5. Eric Vincent

Eric Vincent, an investment manager who worked for Omega, testified that in October 1998 he discovered problems with Omega's options purchases. (Tr. 2703). When Vincent relayed these concerns to Bourke, Bourke was upset and agreed to assist in the investigation of possible fraud. (Tr. 2705, 2711-13). Vincent testified that Bourke said he wanted to share the findings of fraud with United States authorities and with President Aliyev. (Tr. 2714). When instructed that he could not present Omega's work product to the authorities, Bourke was angry. (Tr. 2714).

On cross-examination, Vincent testified that, notwithstanding his own limited role in the investment — as compared to Bourke, Lewis, and others — he had admittedly missed a variety of "red flags" which should have indicated to him that Kozeny's investment was in contravention of the FCPA. (Tr. 2798-2802).

Leon Cooperman, Omega's chairman, did not testify.

6. Katheryn Fleck

Katheryn Fleck, the daughter of Aaron Fleck and a partner of Fleck Family Partnership, testified that in March

1998 she went to Azerbaijan to conduct due diligence and confirm the information she had gotten from Kozeny about the project. (Tr. 2823). After the trip, she and her father decided to invest in the project on behalf of the Fleck Family Partnership. (Tr. 2824). Fleck testified that she was unaware of any bribes having been paid to Azerbaijani officials. (Tr. 2825). Her father, who was more directly involved in the investment and who sat on the advisory boards with Bourke (Tr. 2824-25, 2843), did not testify.

7. Megan Harvey

Megan Harvey, Bourke's life partner, testified that she accompanied Bourke on trips to Azerbaijan and invested in the project through Blueport. (Tr. 2850-51). Harvey testified about her own interactions with Kozeny and about a variety of statements made by Bourke and others. (Tr. 2850-99).

C. The Jury Verdict

On the third day of deliberations, the jury found Bourke guilty of the FCPA conspiracy and false statement counts and not guilty of the money laundering conspiracy count.

Following trial, Bourke filed a memorandum of law in support of his motion for a judgment of acquittal or, alternatively, for a new trial. On October 13, 2009, the District Court denied the motion in a written opinion and order. (SA 115-78).

ARGUMENT

POINT I

The District Court's *Mens Rea* Instructions Were Correct

Bourke argues that the District Court made three errors in instructing the jury on *mens rea*. First, Bourke challenges the District Court's conscious avoidance instruction, arguing that "there was no evidence that Bourke deliberately avoided learning about Kozeny's bribery." (Br. 28). Second, Bourke claims that the District Court erred by "rejecting Bourke's requested instruction on Count One [the FCPA conspiracy charge] that the government had to prove that he acted 'corruptly' and 'willfully.'" (Br. 36). Finally, Bourke argues that the District Court erred in refusing to give the jury a good-faith instruction in connection with both the FCPA and false statement counts. (Br. 39-41). For the reasons provided below, each of these arguments should be rejected.

A. Applicable Law

1. Jury Instructions Generally

This Court will "review challenged jury instructions *de novo* but will reverse only if all of the instructions, taken as a whole, caused a defendant prejudice." *United States* v. *Bok*, 156 F.3d 157, 160 (2d Cir. 1998). An appellant challenging a jury instruction faces a heavy burden: he must establish both that he requested a charge that "accurately represented the law in every respect" and that the charge delivered was erroneous and caused him prejudice. *United States* v. *Wilkerson*, 361 F.3d 717, 732 (2d Cir.

2004). In reviewing jury instructions, the Court must "review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *United States* v. *Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989) (quoting *California* v. *Brown*, 479 U.S. 538, 541 (1987)). A conviction will not be overturned for refusal to give a

requested charge "unless that instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States* v. *Doyle*, 130 F.3d 523, 540 (2d Cir. 1997) (quoting *United States* v. *Vasquez*, 82 F.3d 574, 577 (2d Cir. 1996)).

"No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." Fed. R. Crim. P. 30. The objection must direct the trial court's attention "to the precise contention" concerning the charge that the party later relies upon to challenge the outcome at trial. *United States* v. *Lanza*, 790 F.2d 1015, 1021 (2d Cir. 1986); *see United States* v. *Crowley*, 318 F.3d 401, 412 (2d Cir. 2003).

When a defendant does not make a specific and timely objection to a district court's legal instructions, those instructions are subject to review only for plain error. *United States* v. *Middlemiss*, 217 F.3d 112, 121 (2d Cir. 2000). Even if a timely objection is made and there is error in the jury charge, reversal is not warranted if the trial court's error was harmless. *United States* v. *Amuso*, 21 F.3d 1251, 1260-61 (2d Cir. 1994).

2. Conscious Avoidance

A conscious avoidance instruction is appropriate "'when a defendant claims to lack some specific aspect of knowledge necessary to convict but where the evidence may be construed as deliberate ignorance.'" *United States* v. *Reyes*, 302 F.3d 48, 54 (2d Cir. 2002) (quoting *United States* v. *Gabriel*, 125 F.3d 98, 98 (2d Cir. 1997)). That is because "in addition to actual knowledge, a defendant can also be said to know a fact if he 'is aware of a high probability of its existence, unless he actually believes it does not exist.'" *Id*. (quoting *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969)).

Thus, an instruction on conscious avoidance is proper:

> (i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction, *United States* v. *Civelli*, 883 F.2d 191, 194 (2d Cir. 1989), and (ii) the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion "beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact."

United States v. *Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (quoting *United States* v. *Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)).

A conscious avoidance instruction "is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge, while

urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain." *United States* v. *Hopkins*, 53 F.3d 533, 541 (2d Cir. 1995); *see United States* v. *Carlo*, 507 F.3d 799, 802 (2d Cir. 2007); *United States* v. *Kaplan,* 490 F.3d 110, 128 n.7 (2d Cir. 2007); *United States* v. *Nektalov*, 461 F.3d 309, 316 (2d Cir. 2006).

In a conspiracy case, a conscious avoidance charge is appropriate when the defendant disputes his knowledge of the object of the conspiracy. *See United States* v. *Svoboda*, 347 F.3d 471, 479 (2d Cir. 2003) ("[A] defendant's conscious avoidance of knowledge of [the conspiracy's] illegal purpose may substitute for knowledge of the illegal purpose."); *United States* v. *Tropeano*, 252 F.3d 653, 660 (2d Cir. 2001) (noting that "our well-established caselaw" reflects "that a conscious avoidance theory may support a finding that a defendant knew of the objects of the conspiracy").

B. Discussion

1. The Conscious Avoidance Instruction Was Appropriate

a. The Instruction

The District Court instructed the jury regarding the concept of conscious avoidance in the course of describing the elements of a substantive FCPA violation, which was an object of the conspiracy charged in Count One:

> The FCPA provides that a person's state of mind is knowing with respect to conduct, a

> circumstance, or a result if, and I'm quoting from the statute, the FCPA, if such person is aware that such person is engaging in such conduct; that such circumstances exist or that such result substantially is certain to occur, or such person has a firm belief that such circumstances exist or that such result is substantially certain to occur. That's the end of the quote.
>
> When knowledge of existence of a particular fact is an element of the offense, such knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.
>
> On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal.

(Tr. 3366-67).[*]

---

[*] The FCPA expressly includes the concept of conscious avoidance. *See* 15 U.S.C. § 78dd-2(h)(3)(B).

The District Court did not repeat this conscious avoidance language when instructing the jury regarding the knowledge element of conspiracy. (Tr. 3372). The District Court also instructed the jury that, to be guilty of conspiracy, "the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy with the intention of aiding in the accomplishment of those unlawful ends." (Tr. 3374).

b. There Was a Factual Basis for a Conscious Avoidance Instruction

There was an ample factual basis for a conscious avoidance charge in this case. To be sure, the Government's principal theory at trial was that Bourke had actual knowledge of the bribery scheme. But the jury easily could have found, in the alternative, that Bourke was aware of a high probability of the existence of corrupt arrangements, yet deliberately avoided confirming that fact. Such a finding would have been supported, by, among other things, the following evidence:

- Bourke was aware of the high level of corruption in Azerbaijan generally. (Tr. 1496 (Farman-Farma: "We were both aware by that time that Azerbaijan . . . was rated as one of the most corrupt countries in the world"); *see also* Tr. 1571 (Bourke's attorney Arnold Levine warned Bourke that Azerbaijan was like the "wild west")).

- Bourke had read a Fortune magazine article that described Kozeny's reliance on illegal business practices, such as insider trading, purchase of state secrets from a government official, and fraud, to accomplish the goals of a privatization scheme. (GX 30; Tr. 1924-25). This article

alerted Bourke that there was a high probability that Kozeny's latest scheme involving Azerbaijan also included corrupt arrangements, such as bribe payments or offers to pay bribes.

• Bourke defended Kozeny by stating that he had not actually been convicted of a crime. (Tr. 1667).

• Bourke expressed concern to other investors and their attorneys that Kozeny and his employees were paying bribes. (GX 4A-T-2 ("I mean, they're talking about doing a deal in Iran . . . Maybe they . . . bribed them, . . . with ten million bucks. . . . I'm not saying that's what they're going to do, but suppose they do that."); *id.* ("What happens if . . . they bribe somebody in Kazakhstan and we're at dinner and . . . one of the guys [says] 'Well, you know, we paid some guy ten million bucks to get this now.' . . . I'm just saying to you in general . . . do you think business is done at arm's length in this part of the world?")).

• Bourke proposed the formation of separate companies affiliated with Oily Rock and Minaret to shield Bourke and other American investors from liability from any corrupt payments. (*See* GX 4A-T-2 (proposing the formation of "Oily Rock Partners" after discussion of possible bribery by Kozeny)).

• Bourke played a role in coordinating United States medical treatments, combined with tourism and shopping excursions, for Azerbaijani officials. (Tr. 259-60, 846; GX 901).

From these facts, among others, a rational juror could have concluded that Bourke was aware of a high probability of the existence of corrupt arrangements, yet deliber-

ately avoided confirming that fact. Accordingly, Bourke is wrong when he suggests that a conscious avoidance was inappropriate because "the trial record contains no evidence that Bourke '*decided* not to learn' about Kozeny's bribery." (Br. 30). In fact, a conscious avoidance instruction was particularly appropriate in this case, because Bourke's corporate attorney had actually cautioned him that, if he thought there might be bribes paid, he could not just look the other way. (Tr. 2149-50).

Bourke wrongly suggests that a conscious avoidance instruction was not warranted because "the government's entire presentation [sought] to establish that the defendant *actually knew* the fact at issue." (Br. 29). Bourke relies on this Court's decision in *United States* v. *Ferrarini*, 219 F.3d 145 (2d Cir. 2000). (Br. 29). Bourke, however, fails to address subsequent decisions from this Court which clarify *Ferrarini* and hold that a conscious avoidance instruction is almost always appropriate when a defendant raises a knowledge defense, even if the Government's principal theory is that the defendant had actual knowledge. *See*, *e.g.*, *United States* v. *Carlo*, 507 F.3d at 802 ("There was nothing inappropriate or inconsistent in the government arguing that Carlo had actual knowledge that his statements were false or, in the alternative, that he was aware of a high probability that they were false, but consciously avoided confirming that suspicion."); *United States* v. *Nektalov*, 461 F.3d at 316; *United States* v. *Aina-Marshall*, 336 F.3d at 171-72 (distinguishing *Ferrarini* and holding that "[w]hen a defendant charged with knowingly possessing contraband items takes the stand and admits possession of the contraband but denies having known of the nature of the items, a conscious avoidance

charge is appropriate in all but the highly unusual — perhaps non-existent — case").

Bourke's assertion that the conscious avoidance instruction allowed the jury to convict on a negligence theory (Br. 32) is mistaken. To the contrary, the District Court told the jury that it could not find Bourke guilty merely because he was negligent. (Tr. 3367, 3372). The Government did not argue that the jury should convict because Bourke was negligent in failing to ask his lawyers to conduct due diligence. Rather, the Government argued that Bourke refrained from asking his lawyers to conduct due diligence either because he was consciously avoiding learning about the bribes or because he did not want his lawyers to learn the true facts of his corrupt investment.[*] Hence, in its summation, the Government argued: "[Bourke] didn't even hire a lawyer at that point or send anybody to Switzerland to do any kind of due diligence. And that's because he didn't need to. He either didn't want to know the whole story or he knew enough." (Tr. 3141).

In sum, a rational juror could have concluded based on, among other things, Bourke's close relationship to Kozeny and other co-conspirators, Bourke's understanding of the Azerbaijan investment and the Azerbaijani government, and Bourke's previously expressed concerns about Kozeny's paying of bribes, that Bourke was aware of a high probability that Kozeny was paying bribes but deliberately avoided confirming that fact. Accordingly, the

---

[*] Bourke's attorneys testified that they would have resigned if they had learned of the bribes. (Tr. 1559-63, 2090-91, 2199).

District Court properly instructed the jury on the doctrine of conscious avoidance.

c. Any Error in the Conscious Avoidance Instruction Would Have Been Harmless

Even if the District Court erred in instructing the jury on the doctrine of conscious avoidance (and it did not), the error would provide no basis for vacating Bourke's conviction. This Court has repeatedly ruled that a conscious avoidance instruction is harmless in cases where, as here, there was sufficient evidence of the defendant's actual knowledge to support the jury's verdict. In *United States* v. *Adeniji*, 31 F.3d 58 (2d Cir. 1994), for example, this Court ruled that a conscious avoidance instruction was harmless:

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

Id. at 63 (citations omitted); *see also United States* v. *Kaplan*, 490 F.3d at 127-28 (holding that "error [in giving conscious avoidance charge] was harmless because there was overwhelming evidence of [the defendant's] actual knowledge"); *Ferrarini*, 219 F.3d at 157 (holding that error in giving conscious avoidance charge was harmless because there was overwhelming evidence that the defen-

dant actually knew of the fraudulent nature of the loans and the jury was properly instructed on actual knowledge).

In this case, the Government offered ample evidence of Bourke's actual knowledge that bribes were being paid or offered. As Bourke acknowledges, the "government presented testimony through Farrell and Bodmer that Bourke asked *repeatedly* about Kozeny's corrupt arrangement with the Azeris." (Br. 31). In addition to Bodmer and Farrell's testimony — which, separately and together, provided more than sufficient evidence related to actual knowledge — Farman-Farma and Evans also testified that Bourke had learned from Kozeny about bribery. (Tr. 1484-85 (Bourke told Farman-Farma that Kozeny informed him "that the dilution [of the shareholders' interests] was a necessary cost of doing business"); Tr. 2526 (Bourke and Evans learned directly from Kozeny that they "would not get the full value of [their] investment . . . because of this split with local interests")).

There was also circumstantial evidence of Bourke's actual knowledge. For example, the jury was entitled to conclude from Bourke's tape-recorded statements that, despite how he framed his words, he had actual knowledge of the corrupt scheme underway in Azerbaijan. The circumstantial evidence of Bourke's actual knowledge included his closeness to Kozeny, Bourke's frequent trips to Baku, his independent relationship with Nuriyev, Bourke's leadership role in recruiting other investors, Bourke's assessment of the high probability of the success of his investment, and his calculation of his astronomical likely returns.

Moreover, conscious avoidance was not a prominent feature of the Government's arguments to the jury. Although the Government did refer to evidence of Bourke's conscious avoidance, the Government's primary argument was that Bourke had actual knowledge of the bribes. (Tr. 3278).

Further, the jury's verdict on the false statements count establishes that the jury found that Bourke had actual knowledge of the bribery scheme. For this reason, as well, any error in instructing the jury about conscious avoidance was harmless.*

2. The District Court Properly Instructed the Jury on *Mens Rea* for the FCPA Conspiracy Count

Bourke next asserts that there was error in the District Court's instruction on the requisite *mens rea* for a conviction on the FCPA conspiracy count because the instruction did not mirror the *mens rea* instruction for a substantive offense. Bourke complains that the District Court instructed the jury that the defendant must have "willfully" joined in an "unlawful" agreement but did not state that the defendant had to join the conspiracy "willfully" and "corruptly." Bourke did not lodge this objection in this District Court, and therefore, this part of the charge is

---

* Although statements by jurors after trial ordinarily are of no legal consequence, *see Jacobson* v. *Henderson*, 765 F.2d 12, 14-15 (2d Cir. 1985), it should be noted that the news story cited by Bourke quotes a juror as stating, foremost, "We thought he knew . . . ." (Br. 35-36).

reviewed for plain error. The District Court's *mens rea* instruction was correct and was certainly not plainly erroneous.

The District Court instructed the jury on all the elements of a substantive FCPA violation, including the requirement that the defendant act "willfully" and "corruptly," terms which the Court defined for the jury. (Tr. 3364). The District Court then instructed the jury that, to be guilty of the conspiracy charged in Count One, Bourke had to "participate in [the conspiracy] with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective." (Tr. 3372). The District Court later reiterated that, for the defendant to be guilty of conspiracy,

> 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.

(Tr. 3374-75).

The District Court's charge encompassed the *mens rea* elements of the FCPA and was not plainly erroneous. The "word 'corruptly' in the FCPA signifies . . . a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position. But there is nothing in the word or any thing else in the FCPA that indicates that the government must establish that the defendant in

fact knew that his or her conduct violated the FCPA to be guilty." *Stichting Ter Behartiging van de Belangen van Oudaandeelhouders in het Kapitaal van Saybolt International B.V.* v. *Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003). The District Court correctly instructed the jury on this element. (Tr. 3364). The District Court's extensive instructions on *mens rea* included the instruction that Bourke had to act "with the specific intention of furthering [the conspiracy's] business or objective" and "for the purpose of furthering the illegal undertaking." (Tr. 3372, 3375).

It is simply not possible to conspire to act corruptly without acting corruptly. The District Court instructed the jury that the object of the conspiracy was to pay bribes "willfully" and "corruptly." (Tr. 3364). In light of the District Court's explanation of those terms, it is difficult to see how Bourke can complain that the instructions "omitted the crucial 'intent to do something that the law forbids' and 'bad purpose to disobey or disregard the law' language," or that the *mens rea* requirement was in any other way "water[ed]-down." (Br. 38). Bourke does not explain what additional information would have been connoted had the District Court used the word "corruptly" additional times in the course of instructing the jury on Count One. Nor does Bourke explain how whatever additional meaning he would ascribe to this word would have altered the jury's conclusion that Bourke conspired to violate the FCPA and the Travel Act. *See*, *e.g., United States* v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990) (approving of jury instructions advising that "an act is done corruptly if done voluntarily and intentionally and with the bad purpose of accomplishing an unlawful result

or to accomplish a lawful result by unlawful means or method"). Assuming that Bourke knew about payments to the Azerbaijani officials made in the course of the conspiracy, he could not possibly have thought those payments were anything but "unlawful" and "corrupt."

The cases cited by Bourke do not suggest a different result. In *United States* v. *Feola*, 420 U.S. 671 (1974), the Supreme Court referred to "decisions establish[ing] that in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *Id.* at 686. But *Feola* presented the question of whether a conviction for conspiracy to assault federal officers required knowledge that the victims were federal officers, and the Supreme Court held "that where a substantive offense embodies only a requirement of *mens rea* as to each of its elements, the general federal conspiracy statute requires no more." *Id.* at 692. In *Ingram* v. *United States,* 360 U.S. 672 (1959), the Court merely held that a conspiracy to evade taxes willfully "cannot be committed in the absence of knowledge of willfullness." *Id.* at 678. And in *United States* v. *Pickney*, 85 F.3d 4 (2d Cir. 1996), this Court held simply that, for a conspiracy conviction, the Government "must prove that 'the intended future conduct [the conspirators] agreed upon includes all the elements of the substantive crime." *Id.* at 7 (internal quotation marks and alterations omitted). That is consistent with the District Court's instructions in this case.

Finally, Bourke failed to raise this highly abstract objection during any of the several conferences on the jury

charge. Bourke's counsel initially stated that it "may well be" that the District Court's proposed charge "captures what's required." (Tr. 2946). Defense counsel then went on to request a "clear statement that the intent required for the conspiracy includes, and must include the intent required for the underlying substantive offense. In this case we're talking about the FCPA and it's willfully —." (Tr. 2946). At that point, the District Court interjected that this was a standard conspiracy charge and expressed doubt that any additional language was necessary." (Tr. 2946). Without explaining why the word "corruptly" should be included, and without even articulating the word, counsel moved on to other objections. This was not sufficient to preserve an objection to the charge. *See*, *e.g.*, *United States* v. *Crowley*, 318 F.3d at 412. Accordingly, the charge is subject to review only for plain error. There was no error, much less plain error, in this case.

3. The District Court Properly Instructed the Jury on Good Faith

Bourke further contends that the District Court erred by not giving the jury a separate good faith instruction in connection with the FCPA and false statement counts. (Br. 39-41). Bourke's contention is without merit. A separate good faith instruction was not necessary in this case, as the relevant jury instructions effectively communicated the essence of a good faith defense in its discussion of the elements of knowledge and willfulness.

This Court has long adhered to the view that a trial court is not required to give a separate "good faith defense" instruction, so long as the trial court properly instructs the jury on the Government's burden to prove the

element of willfulness, which necessarily captures the essence of a good faith defense. *See United States* v. *Doyle*, 130 F.3d at 540-41; *United States* v. *McElroy*, 910 F.2d at 1025-26 (holding that district court did not err in refusing to give separate good faith instruction in bribery case).

The District Court instructed the jury regarding the element of an FCPA violation that a defendant act "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.

(Tr. 3364). In addition, in connection with the conspiracy charge, the District Court instructed the jury that:

> An act is done knowingly and willfully if it is done deliberately and voluntarily, that is, the defendant's act or acts must have been the product of his conscious objective, rather than the product of a mistake or accident or mere negligence or some other innocent reason.

(Tr. 3372). The District Court instructed the jury that this definition also applied to the false statement count. (Tr. 3382). These instructions are similar to the instructions at issue in *Doyle* and *McElroy* — instructions that this Court held captured the essence of a good faith defense. *See Doyle*, 130 F.3d at 540-41; *McElroy*, 910 F.2d at 1025-26.

Indeed, the District Court's instructions that an FCPA violation required a defendant to act "with a bad purpose to disobey or disregard the law" and that the Government could not meet its burden of proof by showing that the defendant's actions were the result of "mere negligence or some other innocent explanation" captured the concepts identified in Bourke's proposed charge — that Bourke could not be convicted of Count One if he believed he "was acting properly in connection with the matters alleged in [Count One], even if he was mistaken in that belief, and even if others were injured by his conduct" (A. 58), and that Bourke could not be convicted of Count Three if he believed in the "accuracy" of the false statements (A. 59). Thus, the good faith instructions Bourke requested were "effectively presented elsewhere in the charge." *Doyle*, 130 F.3d at 540. Accordingly, the District Court's decision not to deliver a separate good faith charge

was appropriate and does not provide a basis for a new trial.

POINT II

The District Court Properly Admitted Wheeler and Rossman's Testimony and Precluded Dresner's Proposed Testimony

Bourke contends that the District Court erred in admitting the testimony of Carrie Wheeler and James Rossman, who conducted due diligence for potential Oily Rock investor David Bonderman of TPG and learned of likely FCPA violations. (Br. 42-44). Bourke asserts that the purpose of this testimony was "to exploit the danger inherent in the conscious avoidance instruction [so] that the jury would convict Bourke for negligence or recklessness." (Br. 44). Bourke's argument misses the mark. The testimony of Wheeler and Rossman was not offered to show Bourke was negligent; the purpose was to show that Kozeny had not concealed evidence of the corrupt arrangements from potential investors in Oily Rock. Given that Bourke was much closer to Kozeny than Bonderman was, this was important circumstantial evidence of Bourke's knowledge. As such, the testimony was relevant and appropriately admitted by the District Court.

Bourke also contends that the District Court erred in barring the testimony of Bruce Dresner, who served as Columbia University's Vice President for Investments in 1998, and, in that capacity, based on representations by Omega's Clayton Lewis and Leon Cooperman, recommended that Columbia invest $15 million in privatization vouchers through Omega. (Br. 45-47). Bourke complains

that, although the Government was permitted to call Wheeler and Rossman to contrast their due diligence with Bourke's, he was not permitted to contrast his due diligence with Columbia's. The comparison is inapt. Unlike Wheeler and Rossman, who testified about a potential investment in Oily Rock itself, Columbia University was a potential investor in Omega, which was merely planning to invest alongside Oily Rock. The District Court did not abuse its discretion in excluding this proposed testimony.

A. Relevant Facts

1. Wheeler and Rossman's Testimony

Wheeler testified that in 1998 she worked for TPG's Bonderman, who had been invited to invest in Oily Rock by Kozeny. (Tr. 1748). To conduct due diligence on the Oily Rock investment, at Kozeny's invitation, Wheeler traveled to Baku with Bourke and several other potential investors; together, they toured Kozeny's operations and were introduced to Azerbaijani government officials. (Tr. 1748-56). Based on what she saw during her visit and her assessment that the investment was "risky [in] nature" (Tr. 1759), Wheeler and Bonderman brought in TPG's outside counsel, Cleary Gottlieb, to perform due diligence. (Tr. 1761).

Rossman testified that, in 1998, he was a Cleary Gottlieb attorney. (Tr. 1798). During that time, he was asked to conduct due diligence on the Oily Rock investment for TPG. As a part of due diligence, Rossman met with Bodmer at Bodmer's law offices. During this meeting, Bodmer provided Rossman with various documents related to the Oily Rock investment, and Bodmer and

Rossman discussed various details regarding the investment, including the involvement of Azerbaijani investors. (Tr. 1836-37). Based on his review of documents, his understanding of the investment thesis, and Kozeny's reputation, which he researched from news coverage (Tr. 1802), Rossman concluded that this proposed investment could violate the FCPA, and he advised his client not to make the investment. (Tr. 1863). TPG did not invest in Oily Rock. (Tr. 1762).

2. Dresner's Proposed Testimony

According to Bourke's offer of proof, in 1998, Dresner was an official at Columbia University responsible for investing its endowment. (A. 809). Dresner was contacted by Lewis and Cooperman of Omega Funds in connection with their marketing of an investment in Azerbaijani vouchers through Omega. (*Id.*). Dresner and other Columbia representatives met with Omega representatives concerning the investment. The Omega representatives addressed a variety of questions and concerns about the investment, including whether it might violate the FCPA. (*Id.*). Having been assured by Omega that the FCPA would not be violated, Dresner authorized the investment of $15 million. (*Id.*).

B. Applicable Law

Trial courts have broad discretion regarding the admissibility of evidence, and this Court reviews a district court's evidentiary rulings for abuse of discretion. *See United States* v. *Anglin*, 169 F.3d 154, 162 (2d Cir. 1999). This Court gives considerable deference to a district court's ruling that the probative value of evidence out-

weighs the danger of unfair prejudice, and will disturb a district court's conclusion only when it is arbitrary or irrational. *United States* v. *Massino*, 546 F.3d 123, 132 (2d Cir. 2008). In reviewing a district court's decision that evidence is admissible under Fed. R. Evid. 403, this Court "maximiz[es] its probative value and minimiz[es] its prejudicial effect'" *Id.* (internal quotations omitted).

Any error in admitting evidence should be disregarded if the error was harmless. *See* Fed. R. Crim. P. 52(a). Accordingly, so long as there is "fair assurance" that the jury's "judgment was not substantially swayed by the error," the error will be disregarded as harmless. *Kotteakos* v. *United States,* 328 U.S. 750, 764-65 (1946); *accord United States* v. *Paulino,* 445 F.3d 211, 219 (2d Cir. 2006).

C. Discussion

1. The District Court Properly Admitted the Testimony of Wheeler and Rossman

In arguing that the District Court erred in admitting the testimony of Wheeler and Rossman, Bourke relies principally on *United States* v. *Kaplan*, in which this Court held that "evidence regarding the knowledge of individuals other than the defendant should be admitted only if there is some other evidence in the record — concerning, for example, the nature of the fraud *or the relationship of the parties* — from which to conclude that the defendant would have the same knowledge." 490 F.3d at 120 (emphasis supplied). But, contrary to Bourke's claim, under *Kaplan*, Wheeler and Rossman's testimony was appropri-

ately admitted, because Bourke was exposed at minimum to the same sources of information as Wheeler and Rossman — Wheeler and Bourke took the same fact-finding trip to Baku in January 1998, and Rossman, like Bourke, learned of the investment structure from Bodmer. Accordingly, this testimony was probative of Bourke's knowledge.*

Rossman's testimony regarding his due diligence was also admissible because it confirmed that Bodmer — whose credibility was heavily assaulted by the defense — did what Bodmer testified he did: reveal the structure of the investment to potential investors, like Bourke, upon Kozeny's authorization. (Tr. 1025-38, 1803, 1849-63). If the defense motion had been granted, after the defense's attack on Bodmer was complete, the jury would have been left to wonder why some of the investors or investors' lawyers, whom Bodmer had claimed were advised of the illicit relationship with the Azerbaijanis and did not invest, were not called to testify and to corroborate him.

The testimony of Wheeler and Rossman was also relevant because Bourke elicited testimony during the Government's case from his own attorneys who had

---

* Indeed, in written decision prior to trial, the District Court rejected Bourke's general argument — based on *Kaplan* — that evidence of third party knowledge should be precluded. *See United States* v. *Kozeny*, 643 F. Supp. 2d 415, 423 (S.D.N.Y. 2009). In doing so, the District Court noted that Bourke was exposed to the same sources from which others had derived their knowledge of the criminal scheme. *Id*.

advised him on the privatization investment and did some form of due diligence at points. Bourke sought to portray these attorneys as having done exactly what experienced and competent corporate lawyers do when presented with complicated investments in developing markets like Azerbaijan. (Tr. 2325-39 (Levine), 2104-05 (Hempstead), 2209-10, 2212-18 (Colvin); *see also* Tr. 3241-43 (defense summation)). The contrasting example of Wheeler and Rossman was probative of whether Bourke really wanted his counsel to get to the bottom of the numerous vagaries in the Oily Rock investment.

Further, unlike in *Kaplan*, neither Wheeler nor Rossman speculated about Bourke's general knowledge and intent; rather these witnesses simply testified about "discrete matters," such as their understanding of the information that was available both to them and to Bourke. *See United States* v. *Tsekhanovich*, 507 F.3d 127, 130 (2d Cir. 2007) (distinguishing *Kaplan* and affirming admission of testimony where witness did not "speculate[] about the general knowledge or intent" of the defendant, but rather offered "testimony only about discrete matters").

For these reasons, the District Court's decision to admit Wheeler and Rossman's testimony was entirely appropriate. Moreover, given the volume of direct and circumstantial evidence of Bourke's knowledge of the conspiracy's objectives, any conceivable error was harmless.

2. The District Court Properly Precluded Dresner's Proposed Testimony

Bourke contends that Dresner's testimony would have been relevant: (1) because Dresner would have testified about Columbia's due diligence, which was purportedly relevant "as a benchmark for measuring Bourke's inquiry"; and (2) because "Dresner's testimony would have [helped] rebut[] the government's argument, based on the May 18, 1998 tape, that Bourke's questions about the possibility that Kozeny was paying bribes abroad showed guilty knowledge." (Br. 46-47).

The District Court properly precluded Dresner's testimony because it was not relevant. (Tr. 2699-2701). As the District Court stated, Dresner's state of mind "has nothing to do with the defendant on trial." (Tr. 2700). Unlike other defense witnesses and Government witnesses who were present in Baku with Bourke to consider an investment in Oily Rock and therefore possessed relevant information regarding Bourke's knowledge, Dresner had no contact with Bourke and was considering investing in Omega, not Oily Rock. Dresner never traveled to Azerbaijan to investigate the investment opportunity, relying instead on the recommendation of Omega. Dresner never met Kozeny, Farrell, or Bodmer — the individuals who discussed the FCPA violations with Bourke.

Moreover, evidence that Dresner asked questions about the FCPA would not show that Bourke's purported "questions" about the FCPA on the recorded call were innocent, as Bourke contends. As the District Court put it, "That's because [the defense] choose[s] to understand them to be questions. The government is going to argue they are

statements. Interpreting that tape is in the eye and ear of the beholder." (Tr. 2700). In any event, the defense was

able to elicit testimony from witnesses who had acted as Bourke's attorneys that asking questions about potential liability is not improper or suspicious. (Tr. 2104-05, 2213-13; *see also* Tr. 1742-43, 2516).

In addition, Dresner's testimony would not have been particularly helpful to Bourke, and therefore any error in excluding the testimony would have been harmless. Notwithstanding Dresner's exclusion, Bourke offered evidence through several Government and defense witnesses that Columbia University had invested in the same project (Tr. 511, 721, 1063, 1133, 1276-77, 1975, 2659), and there was no suggestion in any of that testimony or in arguments that Columbia University was aware of bribes or was prosecuted. Thus, Bourke was able to establish that some investors in the Azerbaijani vouchers were not aware of the bribes. Had Dresner actually testified, he would have revealed that Columbia and Bourke were not similarly situated and that Columbia had much less information about the investment than Bourke did. At best, Bourke could have hoped to prove that Cooperman and Lewis concealed knowledge of bribes from Dresner, not that Kozeny, Farrell, or Bodmer concealed the bribes from Bourke.

In sum, the District Court acted within its discretion in excluding Dresner's testimony, and this ruling does not warrant a new trial.

PAGE REDACTED

PAGE REDACTED

PAGE REDACTED

PAGE REDACTED

PAGE REDACTED

PAGE REDACTED

PAGE REDACTED

PAGE REDACTED

PAGE REDACTED

PAGE REDACTED

POINT IV

The District Court Properly Admitted a Portion of Schmid's Memorandum

Following the testimony of Swiss attorney Bodmer concerning his private conversation with Bourke in Baku, the Government offered testimony from Bodmer's associate, Rolf Schmid, that Bodmer had reported on this meeting upon his return from Baku. (Tr. 1366-70). The District Court also permitted the Government to offer in evidence a writing prepared by Schmid memorializing this conversation.

On appeal, Bourke ignores the Court's reason for admitting both the testimony and the exhibit, over Bourke's objection, pursuant to Rule 801(d)(1)(B) of the Federal Rules of Evidence, as non-hearsay to rebut a charge of recent fabrication. Apparently abandoning this objection, Bourke pursues only his claim that the District Court erred in not permitting him to offer the balance of Schmid's memorandum, which concerned other topics. There was no error.

A. Relevant Facts

Bodmer testified that, during his walk in Baku with Bourke, Bourke asked Bodmer to explain the corporate structure that would implement the two-thirds stock transfer to the Azerbaijani officials. (Tr. 1068-70). The main thrust of the defense's cross-examination of Bodmer was an attempt to characterize Bodmer's testimony as a fabrication, based principally on Bodmer's difficulty in recalling which of his several trips to Baku encompassed this conversation. (Tr. 1299-1309).

Following Bodmer's testimony, the Government requested, pursuant to Rule 801(d)(1)(B), that Schmid be permitted to testify about his recollection of Bodmer reporting his conversation in Baku with Bourke upon Bodmer's return to the office. The District Court ruled that this would be admissible as a prior consistent statement. (Tr. 1344). The Government further requested permission to offer a portion of Schmid's memorandum (GX 181-A (A. 1210-12)), drafted years later in 2001, but well before any criminal investigation or motive to fabricate, which contained his recollection of Bodmer's statement to him. (Tr. 1344-45). The Court ruled that this redacted memorandum would be admitted.

The defense contended that it should be permitted to put into evidence the entire memorandum (GX 181 (A. 1202-09)), first, under the rule of completeness, Fed. R. Evid. 106, and second, as prior inconsistent statements of Bodmer. (Tr. 1345-47). Defense counsel focused on the prior inconsistent statements argument and barely articulated the rule of completeness argument:

> What Bodmer told him, so long as under the rule of completeness, 106, we are allowed to show, first of all, the context in which that was said. And context includes statements attributed to or, essentially, affirmed by Mr. Bodmer to Mr. Schmid in this memo, the gist of which were that; one, explicitly, this credit facility was an arm's length transaction, and I'm quoting from the document; two, another section of the memo, Mr.

> Bodmer had no knowledge of corrupt arrangements with Azeris.

(Tr. 1345-46).

At the conclusion of the sidebar, the Court ruled that the defense would be permitted to attempt to lay a foundation for its claim that other statements in the Schmid memorandum were prior inconsistent statements of Bodmer by showing that Bodmer adopted them. (Tr. 1348-49). The defense tried and failed to lay such a foundation. (Tr. 1382). Schmid testified that the memorandum was based on his personal understanding and recollection. (Tr. 1384).

B. Applicable Law

Rule 106 of the Federal Rules of Evidence requires that "[w]hen a writing . . . or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part . . . which ought in fairness to be considered contemporaneously with it." Fed. R. Evid. 106. "Under this principle, an omitted portion of a statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion. . . . The completeness doctrine does not, however, require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages." *United States* v. *Jackson*, 180 F.3d 55, 73 (2d Cir.), *on reh'g*, 196 F.3d 383 (1999). The burden rests with the defendant to demonstrate that the portions of the statement he seeks to offer are necessary to clarify or explain the portions the Govern-

ment intends to offer. *See United States* v. *Glover*, 101 F.3d 1183, 1190 (7th Cir. 1996) ("[T]he proponent of the additional evidence sought to be admitted must demonstrate its relevance to the issues in the case, and must show that it clarifies or explains the portion offered by the opponent.").

C. Discussion

Bourke contends that the omitted portions of the memorandum were necessary to put in context the admitted portion, because the admitted portion "appears to corroborate Bodmer's trial testimony about the walk talk" (Br. 64), while other portions of the memorandum portray the transactions with the Azerbaijanis as legitimate, arm's-length loans (Br. 65). But the legal opinion of Schmid, a then-junior associate working for Bodmer, as to the legality of the transactions in question was entirely irrelevant. Schmid, unlike Bodmer, was not a member of the conspiracy. Moreover, as Schmid testified, his writing on the legality of the transactions was based on his own understanding and opinions; he had not consulted Bodmer in drafting the memorandum, nor had he obtained Bodmer's views on the memorandum or made revisions to reflect such. (Tr. 1399-1400, 1402-03).

Indeed, Bodmer testified that he did not share his understanding and view of the transactions with Schmid. (Tr. 1074-75). Schmid did not contradict that testimony. Instead, Schmid testified on cross-examination that he was unaware whether his own "recollection" of the transactions comported with Bodmer's. (Tr. 1403). He further testified on cross-examination that he did not recall having worked on the transactions. (Tr. 1405).

Schmid's testimony, and the redacted portion of his memorandum corroborating it, was admitted for the purpose of showing that Bodmer had not fabricated his testimony about briefing Bourke while they walked around their hotel. The defense was perfectly able to contend that the admitted portion itself described what Bourke had been told by Bodmer, and did not reflect anything illegal. Moreover, Schmid testified that had no concerns about criminal liability on his part or Bodmer's part. (Tr. 1384). This undermines Bourke's contention that "[t]he jury undoubtedly concluded from the admitted portion of the memorandum that when Bodmer claimed to have 'briefed Ricky Bourke in detail about the involvement of the Azeri Interests by way of the credit facility agreements,' . . . he told Bourke . . . that the agreements were risk-free shams." (Br. 64). Assuming the jury reached this conclusion, it did so because of Bodmer's testimony to that effect. Neither Schmid, nor Schmid's redacted memorandum, said that Bodmer had characterized the loans to the Azerbaijanis as such. Accordingly, there was no requirement under Rule 106 to admit evidence of Schmid's understanding, from the outside looking in, of the sham transactions Bodmer and Kozeny had crafted with the Azerbaijani officials. The District Court did not abuse its discretion in admitting only the portions of the memorandum containing the prior consistent statements.

Even if the entire memorandum had been admitted, Bourke's contention that he would have used Schmid to show that the transactions were, contrary to Bodmer's assessment, legitimate, is not convincing. Regardless of whether Schmid was privy to all of the corrupt details known to Bodmer, Schmid provided important corrobora-

tion for Bodmer — not just as to the briefing of Bourke, but also regarding their due diligence meeting with Rossman (Tr. 1361-63) and other details of Bodmer's testimony. As a result, regardless of the District Court's ruling on the admission of Schmid's memorandum, the defense was likely better served by the strategy it in fact chose at trial in the defense summation: to portray Schmid (at great length) as a liar who had lied in the memorandum to avoid exposing his firm's complicity in illegal conduct, and as an abettor in the false story that Bodmer was "cooking up" about Bourke. (Tr. 3216-24). Given that this was the only way Bourke could explain away the critical corroboration that Schmid provided for Bodmer's testimony, the notion that Bourke would have preferred to use the Schmid memorandum to prove that the transactions with the Azerbaijanis were legitimate is not plausible. Any error was therefore harmless.

POINT V

There Was No Cumulative Effect of Errors

Bourke contends correctly that the cumulative effect of errors that are individually harmless can cast doubt upon the fairness of a conviction. *See, e.g., United States* v. *Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008). For the reasons set forth above, there were no such errors. Accordingly, Bourke's "cumulative effect" argument provides no basis for granting a new trial.

POINT VI

There Was Ample Evidence to Support the Verdict on the False Statements Count

There was ample evidence to support the jury's verdict on Count Three — the charge that Bourke lied to the FBI when he claimed he did not know Kozeny was bribing the Azerbaijani officials.

A. Applicable Law

A defendant challenging the sufficiency of the evidence bears a "heavy burden." *See United States* v. *Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004). A reviewing court must review the evidence "in the light most favorable to the government," drawing all reasonable inferences in its favor, *id.*, and resolving "all issues of credibility in favor of the jury's verdict." *United States* v. *Desena*, 287 F.3d 170, 177 (2d Cir. 2002). A conviction must therefore be affirmed if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). In determining whether the evidence was sufficient to support the jury's verdict, this Court considers all of the evidence introduced at trial, including any evidence that was improperly admitted. *E.g., Lockhart* v. *Nelson*, 488 U.S. 33, 40 (1988); *United States* v. *Hardwick*, 523 F.3d 94, 101 (2d Cir. 2008).

"[A] defendant may not be convicted under § 1001 on the basis of a statement that is, although misleading, literally true." *United States* v. *Mandanici*, 729 F.2d 914, 921 (2d Cir. 1984). "Whether a statement was literally true is generally an issue for the jury to decide." *United States*

v. *Carey*, 152 F. Supp. 2d 415, 424 (S.D.N.Y. 2001) (citing *United States* v. *Lighte*, 782 F.2d 367, 372, 374 (2d Cir. 1986)). "[T]he court may make this determination in limited circumstances where 'there can be *no doubt* that [the defendant's] answers were literally true under *any conceivable interpretation* of the questions,'" *United States* v. *Carey*, 152 F. Supp. 2d at 424 (emphases added) (quoting *Lighte*, 782 F.2d at 374). However, "[t]he consideration of this defense [that a statement was literally true], whether by the court or the jury, is not made in a vacuum; it must take into account the context of the testimony as a whole. *Carey,* 152 F. Supp. 2d at 424 (citing *United States* v. *Schafrick*, 871 F.2d 300, 303-04 (2d Cir. 1989)).

B. Discussion

The evidence at trial amply established that Bourke falsely stated during four proffer sessions with the FBI that he was not aware that Kozeny had made corrupt payments, transfers and gifts to Azeri officials, when in fact, Bourke was aware of Kozeny's actions.

Special Agent Choundas testified that, when Bourke was asked if he learned of any personal favors or gifts or exchanges among Kozeny and government officials that seemed suspicious, Bourke replied, "I was unaware. I'm still unaware of any transfers of anything." (Tr. 2359). Similarly, when asked if Bourke had any reason to suspect, by the time of the opening in April 1998, that Kozeny had paid bribes or made corrupt payments to Azeri government officials, Bourke replied, "No." (Tr. 2458). Bourke's statements to the FBI were squarely contradicted by Bodmer and Farrell's testimony. In addition, the state-

ments were contradicted by the other direct and circumstantial evidence of Bourke's knowledge. Accordingly, there was sufficient evidence to support the false statement conviction, and it should not be disturbed on appeal.

Bourke's various challenges to the sufficiency of the evidence fail. First, Bourke reiterates his attack on Bodmer and Farrell as having been "extensively prepared for their testimony," and for discrepancies in their recollection of the timing of their conversations with Bourke. (Br. 72). This attack is without merit, because "[a]ll issues of credibility, including the credibility of cooperating witnesses, must be resolved in favor of the jury's verdict." *United States* v. *Riggi*, 541 F.3d 94, 108 (2d Cir. 2008).

Bourke highlights Farrell's testimony that he had told Bourke to ask Kozeny for details on the bribe payments (Br. 72-73), but this ignores the testimony that each time this was in response to Bourke's query as to whether Kozeny was paying the government officials "enough" (Tr. 519-20, 726-27). From this testimony, a juror could easily conclude that Bourke had already learned that bribes had been paid from another source or sources — including Kozeny himself.

Bourke appears to contend that his statements were true because he revealed to the FBI his purported understanding of certain financial arrangements with Azerbaijani government officials, particularly the share capital increase. (Br. 73). But a rational juror could have still found that Bourke's denials of knowledge of bribe payments to be materially false. Moreover, Bourke's claim to the FBI that he believed Kozeny was really issuing stock to himself contradicted a sworn affidavit, in which

Bourke stated that Kozeny had told Bourke that the shares were being issued to the president, and further stated, without mentioning any disbelief of Kozeny's claim, that Bourke had objected to this. (GX 516). A rational juror could have easily concluded that Bourke was lying to the FBI.

During his FBI interview, Bourke disavowed any actual knowledge of payoffs. (Tr. 2456 ("[Bourke] said he had no evidence, no knowledge of [payoffs] whatsoever.")). His claim on appeal that the "substance" of his statements to the FBI was that he concluded "*in retrospect*" that Kozeny had made corrupt arrangements with the Azerbaijanis (Br. 74) is contrary to the trial evidence. The arrangements Bourke purported to describe to the FBI — and of which he stated he had no actual knowledge — concerned Kozeny's conduct with respect to the sale of options to Omega, not bribes to privatize SOCAR.

Bourke contends that there was no evidence that Bourke knew who had paid for the medical trips for the Azerbaijani privatization officials (Br. 73). But, even if this particular false statement were needed for a conviction, a rational juror could have inferred that, based on the close relationship between Kozeny and Bourke, as well as Bourke's heavy involvement in arranging the medical appointments, that Bourke did in fact have such knowledge, given that Kozeny did in fact pay for the trips and associated costs.

Finally, Bourke claims that his statements may have been "literally true" because the FBI asked him whether he knew of bribes "by the time of the opening of Minaret's offices in Baku." (Br. 74). Thus, Bodmer and Farrell's

recollection of the timing of their critical conversations with Bourke would be crucial, Bourke contends, because they may have occurred *at* the time of the opening, and not *by* the time. (Br. 74). Even if Bourke's arguments about the timing were correct, his unsupportable distinction between "at the time" and "by the time" is irrelevant. A rational juror could easily conclude that Bourke's conversations with Bodmer and Farrell, which Bourke had initiated, established that Bourke already knew about the bribes before those conversations. There was, of course, ample circumstantial evidence that Bourke knew of the bribes by this late point in the conspiracy, given his heavy involvement with Kozeny and his laying the groundwork for the investment. It is therefore unsurprising that the defense did not attempt to make the "at the time/by the time" distinction in its closing argument to the jury.

In sum, the evidence supporting the jury's verdict on the false statements count was more than sufficient, and the verdict should not be disturbed.

POINT VII

The District Court Properly Declined to Instruct the Jury that It Had to Unanimously Agree on a Specific Overt Act

Bourke contends that the District Court erred in refusing to instruct the jury that to convict it must unanimously agree on a specific overt act committed in furtherance of the conspiracy. (Br. 76-79). Bourke is mistaken.

In *United States* v. *Shaoul*, 41 F. 3d 811 (2d Cir. 1994), this Court rejected a defendant's claim, on plain error review, that "[the trial court] did not properly instruct the

jury that they had to be unanimous regarding [] *which* overt acts took place in furtherance of the charged conspiracy." *Id.* at 817-18 (emphasis in original). This Court ruled that, even "[a]ssuming for the argument only that the jury did have to agree on which particular overt act [the defendant] committed . . . the district court was required only to instruct the jury generally about its duty to return a unanimous verdict." *Id.* (citing *United States* v. *Harris*, 8 F.3d 943, 945 (2d Cir. 1993) ("While a specific charge regarding unanimity of the factual basis for the verdict may be given, it is not error to refuse to give such a charge."), and *United States* v. *Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986) ("A general instruction on unanimity is sufficient to insure that . . . a unanimous verdict is reached, except in cases where the complexity of the evidence or other factors create a genuine danger of jury confusion.") (internal citations omitted)); *see also United States* v. *Castellano*, 610 F. Supp. 1359, 1408 (S.D.N.Y. 1985) ("So long as the jury unanimously finds that a conspiracy was proved, including some overt act, no requirement exists that it unanimously agree to any of the other particulars charged.").*

Two other circuits — the Fifth and the Seventh Circuits — have held that the jury need not agree unanimously on a particular overt act committed in furtherance of a conspiracy in order to convict. *See United States* v. *Griggs*, 569 F.3d 341, 343 (7th Cir. 2009) (holding that a

---

* There is no dispute that the District Court gave a general charge to the jury about its duty to return a unanimous verdict.

trial court is not "required (or indeed permitted) to tell the jury that," to convict a defendant of a conspiracy, "it had to agree unanimously on an overt act that at least one of the conspirators had committed"); *United States* v. *Sutherland*, 656 F.2d 1181, 1202 (5th Cir. 1981) ("We are convinced that in this case the jury need not specifically have considered and agreed as to which of a large number of potential overt acts of bribery were established by the government."). As the Seventh Circuit reasoned, "[t]he law distinguishes between the elements of a crime, as to which the jury must be unanimous, and the means by which the crime is committed." *United States* v. *Griggs*, 569 F.3d at 343 (citing *Richardson* v. *United States*, 526 U.S. 813, 817-19 (1999)). In other words, jurors must agree unanimously on what crime a defendant commits, and in the context of a conspiracy charge, they must agree "that he had taken a step toward accomplishing the goal of the conspiracy, had gone beyond mere words." *Id.* at 344. But the fact the jurors "may have disagreed on what step [a defendant] took was inconsequential, especially since they didn't have to find that the step itself was a crime, or even base conviction on an overt act." *Id.* (internal citations omitted).

The cases cited by Bourke do not support his claim that a district court must instruct the jury that it must unanimously agree on an overt act committed in furtherance of the conspiracy. Specifically, Bourke's reliance on *United States* v. *Haskell*, 468 F.3d 1064 (8th Cir. 2006), and *United States* v. *Jones*, 712 F.2d 1316 (9th Cir. 1983), fails because in neither of those cases did the court actually hold that unanimity as to an overt act was required. Rather, in each instance, the appeals court merely rejected a

factual claim by the defendant that the trial court's jury charge had not required unanimity as to overt acts. Neither case actually reached the issue of whether unanimity was necessary.*

In any event, the absence of Bourke's requested instruction could not have affected the jury verdict, given that there were so many overt acts, both legal and illegal, carried out by the many members of the conspiracy that were within the limitations period and upon which the jury could have easily agreed — including, for Bourke's part alone: Nuriyev's August 1998 trip to New York to meet Bourke's doctors (Tr. 598, 945-50); Bourke's October 1998 trip to Baku (Tr. 1177); a November 1998 payment by Minaret U.S. Advisers to a Washington lobbying firm (Tr. 1479-80); Bourke's November 1998 trip to London to meet Nuriyev (Tr. 2772-73; GX 161); Bourke's November 1998 payment from Minaret U.S. Advisers (Tr. 1101-02); and Bourke's January 1999 trip to Baku to meet Azerbaijani officials including President Aliyev (Tr. 632-

---

* For example, in *Haskell*, the Eighth Circuit ruled that a trial court's instruction to the jury that it "must unanimously agree upon which act was done" as requiring what it stated. *United States* v. *Haskell*, 468 F.3d at 1074-75. It therefore rejected the defendant's "conten[tion] [that] this instruction allowed the jury to agree that some overt act was done in furtherance of the conspiracy, but disagree as to which overt act." *Id.* As a result, the Court determined the charge to be "adequate." *Id.* The Court did not, however, hold that trial courts must instruct the jury that unanimity as to overt act is required.

33). Other members of the conspiracy committed various overt acts that could not be seriously disputed, including the August 1998 transfer of $1,000,000 in investment funds from Boston to an offshore bank account in Jersey, Channel Islands (Tr. 1009); Farrell's assistance in August 1998 to Nuriyev in gaining admission for Nuriyev's son to a U.S. graduate program (Tr. 589); and Farrell's trip to Baku in January 1999 to meet with Nuriyev (Tr. 631-32). *See United States* v. *Salmonese,* 352 F.3d 608, 616-17 (2d Cir. 2003) (holding that conspiracy continues so long as overt committed by any single one of the conspirators). Thus, even if there were any error in failing to instruct the jury that it had to agree unanimously on an overt act, such error would have been harmless.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: New York, New York
July 29, 2010

Respectfully submitted,

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

HARRY A. CHERNOFF,
IRIS LAN,
ANDREW L. FISH,
Assistant United States Attorneys,
ROBERTSON PARK,
Assistant Chief, Fraud Section,
United States Department of Justice,
Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief does not comply with the type-volume limitation of Rule 32(a)(7)(B) but complies with this Court's order stating that the Government may file a brief not to exceed 19,000 words. As measured by the word-processing system used to prepare this brief, there are 18,640 words in this brief.

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

By: ANDREW L. FISH,
Assistant United States Attorney

ANTI-VIRUS CERTIFICATION

Case Name: United States v. Bourke

Docket Number: 09-4704-cr(L)

I, Karen Wrightson, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/29/2010) and found to be VIRUS FREE.

/s/Karen Wrightson
Karen Wrightson
Record Press, Inc.

Dated: July 29, 2010

CERTIFICATE OF SERVICE

09-4704-cr(L) USA v. Bourke

I hereby certify that two copies of this Brief for the United States of America [REDACTED] were sent by Regular First Class Mail to:

John D. Cline, Esq.
5A Funston Avenue
San Francisco CA 94219

I also certify that the original and five copies were also shipped via Hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 29th day of July 2010.

Notary Public:

_____

Sworn to me this

July 29, 2010

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

_____

SAMANTHA COLLINS
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949