UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	18 Cr. 333 (JGK)
v.	:	
AKSHAY AIYER,	:	
Defendant.	:	

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS THE INDICTMENT AS IMPERMISSIBLY DUPLICITOUS

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Defendant Akshay Aiyer respectfully submits this Memorandum of Law in support of his Motion to Dismiss the Indictment as Impermissibly Duplicitous.

PRELIMINARY STATEMENT

In a single count under Section 1 of the Sherman Act, the Indictment charges that Mr. Aiyer participated in a sweeping conspiracy to fix prices, and rig bids and offers, in the foreign currency exchange market. What the Government actually seeks to criminalize, however, are numerous distinct trading practices that occurred episodically and at different points in time and that cannot plausibly be charged as a single, continuing conspiracy. Prosecution under a single count is improper, and the Indictment should be dismissed as impermissibly duplicitous.

An indictment is duplicitous when it combines two or more separate crimes into a single count. The Indictment here is duplicitous because it forces multiple independent trading behaviors—behaviors that are factually and temporally disconnected and subject to different standards of antitrust scrutiny—under the umbrella of a single broad conspiracy count. According to the Government's own identification of specific conduct that may be the subject of evidence at trial, these trading practices included alleged horizontal agreements about prices to quote to customers, coordinated trading on an interdealer electronic trading platform, and transactions between two traders in a vertical, buyer-seller relationship with each other. These behaviors not only involve different fact patterns, but must also be analyzed using different legal principles.

Duplicity alone need not be fatal to an indictment; it must cause prejudice to a defendant to warrant dismissal. Mr. Aiyer is prejudiced here because, as charged, he is at risk of conviction pursuant to a verdict in which the jurors are not unanimous about the specific conduct deemed to be illegal or, separately, based solely on conduct that occurred outside the statute of limitations

period. When fundamental concerns such as these are implicated, a duplicitous indictment cannot stand.

STATEMENT OF FACTS

The Declaration of Martin Klotz ("Klotz Decl."), dated March 22, 2019 and filed simultaneously with this memorandum, contains a detailed discussion of the different types of trading behavior at issue in this case. In brief, the Indictment challenges at least the following different types of allegedly coordinated behavior by Mr. Aiyer and his alleged coconspirators:

- Agreeing on spreads to quote generally on currency transactions of different sizes (Klotz Decl. ¶¶ 3-4);
- Agreeing on prices to quote to specific customers for specific transactions (*id.* ¶ 5);
- Coordinated trading at the "fix" (*id.* ¶ 13);
- Coordinated trading to run customer stop loss orders (*id.* ¶¶ 14-16);
- Coordination between Mr. Aiyer and one of his alleged coconspirators, Jason Katz, on quoting ruble prices to Mr. Katz's customers (*id*. ¶¶ 6-12);
- Coordinated trading in the interdealer market (*id*. ¶¶ 17-19);
- Coordinated "spoofing" (*id*. ¶¶ 20-22); and
- Engaging in fictitious trades to deceive the interdealer market (*id*. ¶ 23).

ARGUMENT

I. Legal Standard

The rule against duplicity is straightforward: "[T]wo or more distinct crimes should not be alleged in a single count of an indictment." *United States v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980). "An indictment is impermissibly duplicitous where: 1) it combines two or more distinct crimes into one count in contravention of Fed. R. Crim. P. 8(a)'s requirement that there

be 'a separate count for each offense,' and 2) the defendant is prejudiced thereby." *United States v. Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001) (internal citation omitted). Prejudice occurs when a "challenged indictment affects [the duplicity] doctrine's underlying policy concerns: (1) avoiding uncertainty of general guilty verdict by concealing finding of guilty as to one crime and not guilty as to other, (2) avoiding risk that jurors may not have been unanimous as to any one of the crimes charged, (3) assuring defendant adequate notice of charged crimes, (4) providing basis for appropriate sentencing, and (5) providing adequate protection against double jeopardy in subsequent prosecution." *United States v. Olmeda*, 461 F.3d 271, 281 (2d Cir. 2006) (citing *United States v. Margiotta*, 646 F.2d 729, 732-33 (2d Cir. 1981)).

Although a "conspiracy indictment presents 'unique issues' in the duplicity analysis because 'a single agreement may encompass multiple illegal objects,'" *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992) (citing *Murray*, 618 F.2d at 896), the critical factor is whether the "acts [at issue] could be characterized as part of a single continuing scheme." *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989). Dismissal is appropriate when an indictment alleges conduct that cannot reasonably be characterized as pursuant to one comprehensive scheme, alleges multiple conspiracies as a matter of law, or where the elements of the multiple criminal objects charged as one conspiracy require separate legal analyses. *See United States v. Nachamie*, 101 F. Supp. 2d 134, 153 (S.D.N.Y. 2000) ("[A] court could conclude, as a matter of law, that the allegations in a single conspiracy count improperly charge multiple conspiracies."); *United States v. Abakporo*, 959 F. Supp. 2d 382, 391 (S.D.N.Y. 2013) ("[T]he Government has chosen to charge two separate conspiracies in Count One … each of which has different elements. By charging both conspiracies in a single count, the Government

has invited the very problems to which the prohibition against duplicity is directed (jury unanimity, notice, sentencing).").

Whether an indictment is duplicitous, and whether a single conspiracy count improperly encompasses multiple conspiracies, is a legal determination properly made by the district court.[1] *See Nachamie*, 101 F. Supp. 2d at 153. Upon a finding of improper duplicity, "the appropriate remedy is to decouple" and "reformulate" the charges into separate counts. *Abakporo*, 959 F. Supp. 2d at 391.

Duplicity concerns are particularly important in antitrust cases. *See* U.S. DEPARTMENT OF JUSTICE ANTITRUST RESOURCE MANUAL (Nov. 2017), https://www.justice.gov/jm/antitrust-resource-manual-1-attorney-generals-policy-statement ("The most difficult issue in many of these cases involves the determination of what constitutes the conspiracy. In antitrust criminal cases, it is especially important to determine whether a single, continuing conspiracy was in existence involving numerous price changes, bid awards, or markets allocated, or whether certain isolated price changes, bid awards, or markets allocated were the subjects of separate conspiracies."). Proper identification of the illegal conspiracy is crucial because different behaviors that raise possible antitrust concerns must be analyzed under different legal standards: per se condemnation and rule of reason analysis. Only per se violations are properly the subject

[1] In assessing the Indictment's duplicity, the Court may be guided by the specific instances of trading-related conduct the Government has now identified as conduct potentially at issue at trial. On December 17, 2018, in response to Mr. Aiyer's request for a bill of particulars, the Court issued an order (the "December 17 Order," ECF No. 43) requiring the Government to identify specific instances of allegedly problematic behavior. On January 31, 2019, the Government complied with the December 17 Order by producing a list of 80 instances of trading-related conduct it may feature at trial, thereby providing further specificity as to the actual conduct at issue. (Klotz Decl. ¶ 2.)

The Court may properly consider these additional facts in deciding this motion. As the Second Circuit has made clear, when construing an indictment "common sense must control, and … [the] indictment must be read to include facts which are necessarily implied by the specific allegations made." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992) (internal citation omitted).

of criminal prosecution. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-41 (1978) ("knowledge of likely [anticompetitive] effects" is necessary for the "imposition of criminal liability" for a Sherman Act violation, and only per se conduct has the "unquestionably anticompetitive effects" necessary to infer such knowledge); *see also id.* at 446.

The rule of reason is the presumptive mode of analysis in antitrust cases. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."); *see also State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (reiterating that "most antitrust claims are analyzed under a 'rule of reason'"). However, some conduct—naked horizontal price fixing, bid rigging, and customer allocation schemes—has been deemed per se unlawful, a characterization "reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Dagher*, 547 U.S. at 5 (internal citations omitted).

Due to these fundamentally different analytical approaches, it is improper to include both rule of reason and per se conduct in a single count, because such a count combines "separate conspiracies … which [have] different elements," thereby "invit[ing] the very problems to which the prohibition against duplicity is directed." *Abakporo*, 959 F. Supp. 2d at 391 (holding that a conspiracy indictment that conflates different types of fraud is impermissibly duplicitous).

Rule of reason and per se violations of the Sherman Act are separate actions requiring separate legal analyses and, importantly for purposes of duplicity, different elements of proof. *U.S. Gypsum Co.*, 438 U.S. at 476 (1978) (Stevens, J., concurring in part and dissenting in part) ("[T]he rule of reason requires an element in addition to proof of the agreement itself—either an actual market effect or an express purpose to affect market price."). Simply put, combining rule

of reason and per se conduct under a single count is impermissible and unworkable under the law. *See Dagher*, 547 U.S. at 5 (distinguishing between rule of reason and per se conduct); *see also Mooney v. AXA Advisors, L.L.C.*, 19 F. Supp. 3d 486, 498 (S.D.N.Y. 2014) ("Classifying the nature of the restraint alleged—and thus identifying the [antitrust] doctrine to govern the analysis—is critical at the motion to dismiss phase[.]"); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, § 2000a (2018) ("[Conduct] must be properly characterized before the per se label can be applied.").

II. The Indictment Challenges Many Different Types Of Conduct That Occurred At Different Times And Are Subject To Different Types Of Analysis

A. The Indictment Challenges Four Different Behaviors That Are Potentially Subject To Per Se Condemnation.

Mr. Aiyer regularly quoted customers two-way prices "comprised of the 'bid' (the price at which the dealer will buy the base currency from the customer, in exchange for an agreed-upon amount of the counter currency) and the 'offer' (the price at which the dealer will sell the base currency to the customer, in exchange for an agreed-upon amount of the counter currency)." (Indictment ¶ 3.) The difference between the quoted bid and offer, called the "spread," is the price of a dealer's market-making services. (Klotz Decl. ¶ 3.) The Indictment alleges that Mr. Aiyer and his coconspirators "fill[ed] customers' orders at prices that the conspirators sought to increase, decrease, and stabilize" and "agree[d] on pricing to quote to customers, including customers who had solicited competing prices in the same CEEMEA currency pair from two or more of the coconspirators." (Indictment ¶¶ 22(e), (f).)

If Mr. Aiyer and his alleged coconspirators entered into an overarching agreement to fix spreads, it would look like horizontal price fixing. (Klotz Decl. ¶ 4.) Similarly, if Mr. Aiyer and his alleged coconspirators agreed on prices to quote specific customers at specific times, this practice would look like a different type of horizontal price fixing. (*Id.* ¶ 5.) Under the antitrust

laws, naked horizontal price fixing can be a per se violation of the Sherman Act, and the two different behaviors described above could be analyzed under the per se framework. *See, e.g.*, *Dagher*, 547 U.S. at 5 ("[H]orizontal price-fixing agreements … fall into the category of arrangements that are *per se* unlawful."); *see also* U.S. DEPARTMENT OF JUSTICE ANTITRUST RESOURCE MANUAL (Nov. 2017) ("Price fixing … [is] among the group of antitrust offenses that are considered 'per se' unreasonable restraints of trade.").

The Indictment also alleges that Mr. Aiyer and his alleged coconspirators "coordinat[ed] their bidding, offering, and trading of CEEMEA currencies in and around the times of certain fixes, in order to increase, decrease and stabilize the fix prices of CEEMEA currencies." (Indictment ¶ 22(d); Klotz Decl. ¶ 13.) To the extent the evidence shows that the alleged coconspirators agreed to manipulate fix outcomes, to their own benefit and their customers' disadvantage, this conduct could potentially be subject to per se condemnation. Finally, although the Indictment is silent on this subject, one of the allegedly problematic trading-related incidents identified by the Government is an incident in which the Government contends the alleged coconspirators coordinated their trading to run customer stop loss orders, to their own benefit and their customers' disadvantage. (*See* Klotz Decl. ¶¶ 14-16.) Depending on the evidence adduced at trial, this conduct, too, could potentially be subject to per se condemnation.

For each of these four different types of horizontal coordination of pricing or trading, a primary issue at trial will be whether the conduct actually occurred in the manner alleged by the Government. At least two of the behaviors—agreeing on spreads and running customer stop loss orders—occurred, if at all, in or before 2012, more than five years prior to the filing of the Indictment. (*Id.* ¶¶ 4, 16.)

B. The Indictment Charges Multiple Types Of Information Sharing And Other Coordinated Activity That Are Subject To Rule Of Reason Analysis.

The Indictment alleges that Mr. Aiyer and his coconspirators "engag[ed] in near-daily conversations … to reveal their currency positions, trading strategies, bids and offers on Reuters, customer identities, customer limit order price levels, upcoming customer orders, and planned pricing for customer orders, among other information." (Indictment ¶ 22(a).) As the Supreme Court has consistently held, such exchanges of information, even among competitors, do not fit into any established per se category and must be analyzed under the rule of reason. *U.S. Gypsum Co.*, 438 U.S. at 441 n.16 ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act.") (collecting cases).

The Indictment further alleges that Mr. Aiyer and his coconspirators "coordinat[ed] their bidding, offering, and trading, including, at times, by refraining from bidding, offering, and trading against each other." (Indictment ¶¶ 22(b).) This coordination occurred "on electronic trading platforms such as Reuters and elsewhere in the interdealer market." (*Id.* ¶ 22(c).) The exact nature of this alleged coordination has now been identified by the Government, and it involves a number of distinct categories of conduct, including: refraining from trading or coordinated trading on Reuters; coordinated "spoofing"; and engaging in fictitious trades. (Klotz Decl. ¶¶ 17-23.) The Government's examples of fictitious trades, if they occurred at all, occurred in 2011, more than five years before the filing of the Indictment. (*Id.* ¶ 23.)

If they occurred, these behaviors were all related to a more general, procompetitive collaboration: "When FX traders seek to offset positions that resulted from customer orders …

[t]hey do so by contacting each other directly[.]" (Indictment ¶ 9.) Abstaining from trading on Reuters, pulling unnecessary bids from Reuters, and sequencing trades are in furtherance of and ancillary to a broad understanding between traders that one would not misuse information provided by another in connection with a mutually-beneficial exchange of information. (Klotz Decl. ¶¶ 17-19.) "A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output. If the restraint, viewed at the time it was adopted, may promote the success of this more extensive cooperation, then the court must scrutinize things carefully under the Rule of Reason." *Polk Bros, Inc.. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.) (internal citations omitted).

Additionally, behaviors confined entirely to the interdealer market, with no necessary or systematic effect on aggregate end-user supply or demand, are also not properly subject to per se condemnation. This includes trade execution strategies in the interdealer market that the Government contends involved "spoofing," which occurs when a trader expresses a trading interest on Reuters opposite to that trader's actual interest in order to draw out otherwise dormant counterparties. (Klotz Decl. ¶ 20.) "Spoofing" in currency trading is not illegal. (*Id.* ¶ 22). It has no necessary or systematic impact either on long-term currency prices or on customer transaction prices (Affidavit of Prof. Richard Lyons, dated Mar. 21, 2019, ¶ 35), and it may have procompetitive effects. (Affidavit of Prof. Dennis Carlton, dated Mar. 22, 2019, ¶¶ 27, 32.)

Even assuming price impacts ultimately resulted from this interdealer activity, the per se standard would still be inappropriate, as per se price fixing does not occur unless "a conspiracy was formed *for the purpose of price-fixing.*" *Apex Oil Co. v. DiMauro*, 713 F. Supp. 587, 597 (S.D.N.Y. 1989) (emphasis in original); *see also id.* at 596 ("[C]ourts have not applied the *per se* rule to instances of constructive price-fixing, that is, if the purpose of the alleged conspiracy is

not price-fixing, but prices are nevertheless affected by the challenged behavior, that behavior must be judged under the Rule of Reason.") (collecting cases); *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 240 (1918) (interdealer conduct having "no appreciable effect on general market prices" does not violate the antitrust laws).

C. The Indictment Challenges Information Sharing Or Coordinated Trading Where The Relationship Between The Parties Is A Vertical, Buyer-Seller Relationship.

The Government's identification of conduct pursuant to the December 17 Order shows that the Indictment's allegation of "agree[ments] on pricing to quote to customers" (Indictment ¶ 22(f)) includes a large number of instances where Mr. Aiyer and the agreeing party were situated vertically in the market. The clearest example of this involves trading in the ruble. (Klotz Decl. ¶¶ 6-12.) The trading-related instances that the Government has identified include numerous instances in which Mr. Katz used Mr. Aiyer as a wholesaler to fill a ruble order that originated with a customer who did not approach Mr. Aiyer directly. (*Id.* ¶ 10.) Under these circumstances, Mr. Aiyer and Mr. Katz (or any similarly situated trader) are not competitors at the same level of the industry—i.e., they are not traders competing for the same customer's business—but instead occupy different levels of the market, making their relationship vertical. Conduct that occurs within a vertical arrangement must be analyzed under the rule of reason. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) ("Vertical price restraints are to be judged according to the rule of reason.").

In a few related incidents, a customer approached both Mr. Katz and Mr. Aiyer simultaneously, either directly or through a broker, and the Government contends that the two agreed on who should quote what price to the customer. (Klotz Decl. ¶ 11.) Even if this occurred as alleged, the relationship between Mr. Katz and Mr. Aiyer was still a vertical one in which Mr. Katz looked to Mr. Aiyer to do an offsetting transaction in the event Mr. Katz won the

customer order. (*Id.*) The discussions, accordingly, remain governed by the rule of reason. *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, No. 10 CIV. 8 DAB, 2011 WL 1044898, at *2 (S.D.N.Y. Mar. 10, 2011), *aff'd on other grounds*, 711 F.3d 68 (2d Cir. 2013) ("[C]laims alleging a vertical relationship or mixed vertical and horizontal relationships must be evaluated under the rule of reason.").

The allegations pertaining to the ruble also show that the single conspiracy charged by the Indictment is not plausible. While the Government has identified numerous instances of what it believes to be problematic trading in the ruble, none of these involve trading activity between Mr. Aiyer and Mr. Williams. (Klotz Dec. ¶ 12.) The Government has identified a handful of instances in which Mr. Cummins consulted Mr. Aiyer about how to price a customer ruble transaction, but Mr. Cummins was not responsible for ruble trading and cannot plausibly be considered a member of an ongoing conspiracy to suppress competition in ruble transactions. (*Id.*) The alleged ruble conspiracy is confined entirely to trading between Mr. Aiyer and Mr. Katz. To the extent the Indictment charges Mr. Aiyer with conspiring to suppress competition in ruble transactions, this conduct cannot properly be included within a single overarching conspiracy also involving Mr. Cummins and Mr. Williams.

D. On A Standalone Basis, Many Of The Behaviors Challenged By The Indictment Could Not Be Prosecuted For Statute Of Limitations Reasons.

Many of the behaviors challenged by the Indictment occurred, if at all, only at specific times more than five years prior to the Indictment. These include discussions of an agreement to fix spreads (2012), coordinated stop loss running (2012), coordinated pricing to specific ruble customers (2010), and engaging in fictitious trades (2011). These activities are very different from each other and very different from other activities that occurred within the statute of

limitations. They can be charged in this Indictment only if they are in fact part of a single conspiracy that continued into the statute of limitations period.

* * * * *

While some of these distinct behaviors may properly be alleged as independent Sherman Act violations, they must be charged separately, as the conduct cannot reasonably be construed as "a single continuing scheme." *Tutino*, 883 F.2d at 1141. Even if some factual overlap exists, the conduct described in the Indictment's single count contains "separate conspiracies" with "different elements," *Abakporo*, 959 F. Supp. 2d at 391, especially because rule of reason and per se antitrust violations have different elements of proof. *U.S. Gypsum Co.*, 438 U.S. at 476. Because the collection of conduct that the Indictment describes cannot have been part of one broad scheme, and cannot be deemed illegal through the application of a single set of legal principles, the Indictment "combines two or more distinct crimes into one count in contravention of Fed. R. Crim. P. 8(a)" and is duplicitous. *Sturdivant*, 244 F.3d at 75.

III. Mr. Aiyer Is Prejudiced By The Duplicitous Indictment

The Indictment's improper commingling of different behaviors under a single count implicates Rule 8(a)'s core policy concerns. Specifically, trying this case under the Indictment in its present form puts Mr. Aiyer at risk that a general guilty verdict "will not reveal whether the jury found defendant guilty of only one crime and not the other" and will not "indicate whether the jury found defendant guilty without having reached an unanimous verdict on the commission of a particular offense." *Murray*, 618 F.2d at 896. The Indictment's duplicity also poses the risk that Mr. Aiyer will be convicted of time-barred conduct. Finally, a conviction under the current Indictment would create serious sentencing issues.

A. Uncertainty In A Guilty Verdict And Jury Unanimity

If Mr. Aiyer were convicted under the Indictment in its present form, the precise conduct on which the guilty verdict was based would be unclear. Such a verdict would not reflect whether the jury determined, for example, that there had been an agreement to fix spreads (Indictment ¶¶ 22(e), (f)), or merely an agreement to exchange pricing information (*id.* ¶ 22(a)). "[A]voiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another" is a core "policy consideration" underlying the duplicity doctrine. *Margiotta*, 646 F.2d at 733.

Even more concerning, a jury could find Mr. Aiyer guilty despite a lack of unanimity. If some jurors were to vote to convict only for fixing spreads, others only for exchanging pricing information, and others only for vertical conduct trading the ruble, for example, a guilty verdict would result despite a failure to reach a unanimous decision as to what behavior was actually illegal, or even as to what behavior actually occurred. Because the Indictment creates this "risk that the jurors may not have been unanimous as to any one of the crimes charged," it cannot stand. *Id.*

B. Statute Of Limitations Implications

Courts have recognized that a duplicitous indictment may prejudice a defendant when it joins time-barred offenses with offenses that occurred within the limitations period. *United States v. Burfoot*, 899 F.3d 326, 337 (4th Cir. 2018) ("When an indictment impermissibly joins separate offenses that occurred at different times, prosecution of the earlier acts may be barred by the statute of limitations."); *see also United States v. Wirsing*, 719 F.2d 859, 870-71 (6th Cir. 1983) (Porter, J., dissenting) (explaining that a defendant may be prejudiced by duplicity if one of the separate conspiracies ended before the onset of the limitations period). This is precisely what the Indictment does here. By improperly joining all alleged acts under one unreasonably

broad conspiracy, the Indictment's duplicity threatens to deprive Mr. Aiyer of the protection provided by the statute of limitations.

For example, under Indictment ¶¶ 22(e) and (f), the Government has alleged a conspiracy to fix spreads, i.e., a horizontal price fixing conspiracy. (*See supra* p. 6-7.) But as the Government's identification of specific conduct confirms, all discussions of fixing spreads among Mr. Aiyer and his alleged coconspirators occurred in or before 2012. (Klotz Decl. ¶ 4.) Because the Indictment impermissibly joins a conspiracy to fix spreads with separate acts—such as the exchange of pricing information under Indictment ¶ 22(a)—if a jury reached a guilty verdict on the basis of fixing spreads, Mr. Aiyer could be found guilty due solely to conduct that occurred outside the confines of the statute of limitations. *See* 18 U.S.C. 3282 (2018) (setting a five-year statute of limitations for non-capital crimes); *see also United States v. Beard*, 713 F. Supp. 285, 291 (S.D. Ind. 1989) (dismissing one count of an indictment "to the extent that that count attempts to indict [the defendant] for acts … that were completed more than five years before the date of the indictment"). To avoid such a result, the Indictment's separate conspiracies should be decoupled.

C. Appropriate Sentencing

Sentencing under the Sherman Act is based in large part on the volume of commerce attributable to the violation at issue. U.S.S.G. § 2R1.1; *see also* U.S.S.G. § 2R1.1 (Comment) ("The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute."). A verdict stemming from a duplicitous indictment would be impossible to interpret to determine the relevant effects on commerce. *See, e.g.*, *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999) ("If the conspiracy was a non-starter, or if during the course of the conspiracy there were intervals when

the illegal agreement was ineffectual and had no effect or influence on prices, then sales in those intervals are not 'affected by' the illegal agreement, and should be excluded from the volume of commerce calculation."). Here, a guilty verdict would provide no information about which conduct resulted in the conviction and what the market impact of that conduct was (e.g., customer-facing price fixing versus conduct in the interdealer market), and therefore would not "provid[e] the basis for appropriate sentencing." *Margiotta*, 646 F.2d at 733.

IV. No Alternative Remedies Can Alleviate The Prejudice Mr. Aiyer Would Suffer If Tried Under The Duplicitous Indictment

Short of dismissal, there is no remedy that could mitigate the prejudice to Mr. Aiyer if this case proceeds to trial on the duplicitous Indictment. While "multiple conspiracy" jury instructions have been used when an indictment comingles more than one conspiracy, the purpose of such an instruction "is to avoid any 'spill over effect of permitting testimony regarding one conspiracy to prejudice the mind of the jury against the defendant who is not part of that conspiracy but another.'" *United States v. Ulbricht*, No. 14-CR-68 KBF, 2015 WL 413426, at *1 (S.D.N.Y. Feb. 2, 2015) (citing *United States v. Restrepo*, 547 F. App'x 34, 40 (2d Cir. 2013)). The risk of spillover, or guilt by association, is the only justification the Second Circuit has recognized for use of a multiple conspiracies jury instruction. *Id.* at *1 (collecting cases). This justification does not apply in the trial of a single defendant, and, even if it did, would not provide any relief to Mr. Aiyer, as spillover is not the prejudice from which he seeks relief.

Similarly, special interrogatories would be inappropriate here. As a general matter, special interrogatories are disfavored in federal criminal cases. *United States v. Bell*, 584 F.3d 478, 484 (2d Cir. 2009); *see also Black v. United States*, 561 U.S. 465, 472 (2010) ("Although not dispositive, the absence of a Criminal Rule authorizing special verdicts counsels caution.");

United States v. Yakobowicz, 427 F.3d 144, 152 (2d Cir. 2005) ("[G]eneral verdicts are strongly preferred."); Charles Alan Wright & Arthur R. Miller, 3 Fed. Prac. & Proc. Crim. § 512 (4th ed. 2018) ("Criminal law favors general verdicts over special verdicts."). Special interrogatories not only have the "potential for confusing the jury," *United States v. Pierce*, 479 F.3d 546, 551 (8th Cir. 2007), but their use "invades the province of the jury." *United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980) (collecting cases) (internal quotation marks omitted).

Special interrogatories might also be ineffective here, and they might merely add confusion to an already complex case. The use of special interrogatories would require the jury to plot a variety of distinct, complicated trading behaviors challenged by the Indictment and apply different types of antitrust analysis to them. This complicated analysis would heighten the precise risks that cause special interrogatories to be disfavored. Because the special interrogatories would be so complex, they likely would not eliminate the prejudice to Mr. Aiyer of this duplicitous Indictment. *See United States v. Cataldo*, No. S-84-CR-809 (JFK), 1990 WL 134896, at *2 (S.D.N.Y. Sept. 11, 1990) ("Interrogatories of the specificity suggested . . . would unduly confuse the jury and further complicate an already complex [conspiracy] trial."). The only remedy for this prejudice is to decouple the duplicitous Indictment into separate counts.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Aiyer's Motion to Dismiss the Indictment as Impermissibly Duplicitous.

Dated: March 22, 2018
New York, New York

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