UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 18 CR 333 (JGK)

AKSHAY AIYER,

Defendant.

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New York, N.Y.
June 3, 2019
4:50 p.m.

Before:

HON. JOHN G. KOELTL

District Judge

APPEARANCES

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
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THE COURT: Good afternoon, all. Please be seated.

(Case called)

MR. HART: Good afternoon, your Honor. Kevin Hart, Katherine Calle, David Chu, and Eric Hoffman on behalf of the United States.

THE COURT: Good afternoon.

MR. KLOTZ: Good afternoon, your Honor. Martin Klotz, Michael Schachter, Jocelyn Sher, and Samuel Kalar on behalf of Mr. Aiyer, to my left; and Peter Fitzgerald is also at the far end of counsel table doing some of the graphics work.

THE COURT: Good afternoon.

There are two motions to dismiss. I'll listen to argument. But I'm familiar with the papers.

So, defendant.

By the way, I note that the defendant is present. Right? The defendant is present? Yes?

MR. KLOTZ: Yes.

Shall I proceed, your Honor.

THE COURT: Sure.

MR. KLOTZ: Your Honor, I want to start, and I'm going to argue both of the motions together with the duplicity motion at the end. I want to start with the issue that if I were in your Honor's seat I would consider the most important issue to address which is why do I have to decide this motion now and indeed how can I decide this motion now.

With respect to the antitrust motion, the larger of the two motions, the government's position is this is really a premature Rule 29 motion. Maybe it's a premature motion in limine. But it's certainly not a motion that's ripe for decision now. And to the extent that it's presented now, because it's a motion to dismiss, it has to be decided within the four corners of the indictment. We disagree with both of those propositions.

To begin with, the issue that we raise in the antitrust motion, which is whether the behavior that we have put in issue in the motion is to be judged under the *per se* standard or the rule-of-reason standard is an issue of law for the Court and I don't think that's disputed by anyone. It's an issue that your Honor is going to have to decide at some point and it doesn't need -- it merely doesn't need -- it doesn't go to the jury. It's a decision for your Honor. And that decision does not need to be made solely confined to the four corners of the indictment as the government repeatedly argues in its papers. It's clear that your Honor is entitled to consider evidence that goes beyond the indictment.

The principal case that we cite for this is *United States v. Jones*. *United States v. Jones* is a criminal case from the Sixth Circuit. It involved a defendant who was charged with illicitly eavesdropping on his wife without her knowledge or permission on the home telephone while the couple

were involved in separation or divorce proceedings. And the indictment in that case was a bear bones indictment in which the government alleged that the defendant eavesdropped on another individual in violation of the statute which it recited. The defendant moved to dismiss.

THE COURT: By the way, any case from the Court of Appeals for the Second Circuit that stands for this proposition?

MR. KLOTZ: Not from the Court of Appeals for the Second Circuit, your Honor, but in a minute I'm going to get to a decision by Judge Kimba Wood from the Southern District that relies on and cites to *United States v. Jones*.

So, the defendant in *United States v. Jones* moves to dismiss the indictment. His argument is the statute doesn't apply to recordings of marital -- of members of the family essentially. And the government there, as the government here, argues, Judge, you can't go beyond the four corners of the indictment, the four corners of the indictment allege a crime, and the district court in that case says that doesn't make any sense. And the district court considers the bill of particulars that the government has filed in the case and it considers the defendant's indictment -- not indictment, affidavit. And it concludes: I understand that the recording in question was of a family member and I rule as a matter of law that that's not covered by the statute and I dismiss the

indictment.

On appeal, the government argues, again, as the government argues here, this was not proper for the court to go beyond the four corners of the indictment. And the Sixth Circuit in -- they actually reversed because they held that the district court got it wrong. But they said no, what the district court did in this case was entirely proper. It was entirely permitted to rely on the bill of particulars in the affidavit.

If I could have slide no. 1.

This is the statement from the Sixth Circuit in the Jones case. "Rules 12(e) and (g) clearly envision that a district court may make preliminary findings of fact necessary to decide the questions of law presented by pretrial motion so long as the court's findings on the motion do not invade the province of the ultimate finder of fact. The district court was not limited to the face of the indictment in ruling on the motion to dismiss."

Now, as I indicated, your Honor --

THE COURT: Here is my problem with your position. There is no comparable case in the Second Circuit and the language of the Court of Appeals with respect to the ability to consider evidence outside the four corners of the indictment is highly negative to that proposition unless the government has been fully heard with respect to its evidence on a proposition.

You concede in your papers that you're not trying to dismiss all of the conduct that the government alleges.

MR. KLOTZ: Correct.

THE COURT: Because some of that conduct are *per se* violations of Sherman Act section 1. So you ask the Court to do what?

What particular portions of the indictment, in the indictment do you ask the court to dismiss? Now, hold that thought.

All of the conduct alleged by the government doesn't have to be unlawful. A conspiracy can be furthered by means which are not unlawful.

MR. KLOTZ: For sure.

THE COURT: And so you say: Well, look, there are instances of conduct that might be anti competitive but would have to be judged by the rule of reason. Therefore, the government -- those allegations have to be dismissed. But there are -- it is not clear that the government would even rely upon what happened on the specific days that you talked about as instances of illegality rather than instances that further the undisputed illegal ends of the conspiracy. This is not a case where you can point to, for example, a specific use of a phone and say: Well, the indictment depends upon the illicit use of the phone and we can say that the illicit use of the phone is not a crime.

Here, we have an indictment that alleges a course of conduct, the ends of which is undisputed are *per se* violations of the law. And so you say: Well, consider all of our evidence that there are specific incidents that happened on specific days, none of which are specifically alleged in the indictment, and you should find that those instances are not *per se* violations of Section 1 of the Sherman Act even though the government may be allowed to introduce evidence of those very transactions as evidence in furtherance of the conspiracy because individual means and methods don't themselves have to be unlawful.

So at the end of the day what am I being asked to do? No specific allegations alleged in the indictment. Am I asked to dismiss. And to the extent that you raise practices, goes far beyond the indictment. And I can't tell at this stage, without a full presentation of the evidence, whether evidence of those -- of what happened on those days may be relevant to prove the undisputed illegal ends of the conspiracy.

MR. KLOTZ: So, Judge, I understand the issue. And what I would do is I would distinguish between means and methods which the government is perfectly entitled to put in evidence of means and methods which may not be independently illegal if they further an illegal objective and the different conduct that we are attacking in the motion.

What the court did --

THE COURT: Which specific allegations in the indictment are you asking me to dismiss?

MR. KLOTZ: It's not specific allegations in the indictment because the indictment simply recites legal principles and boilerplate conclusionary allegations that the defendant did all of these illegal things.

THE COURT: So you say: OK, we're not asking you to dismiss specific allegations in the indictment. We're asking you to tell the government not to admit evidence of some practices even though those practices might be evidence of admittedly illegal ends of the conspiracy.

MR. KLOTZ: I don't concede that.

I think what the government is, in fact, attacking in this case is eight or ten or twelve completely different types of behaviors. And what we are seeking to dismiss, I do not agree, the government would be permitted to introduce evidence of that as a means to the achievement of other objectives which I concede if the government could prove that -- and I don't think they can, but --

THE COURT: But all of that depends upon a granular exploration of the evidence which has not been proffered.

And you say widely, that there are practices that the government will seek to introduce that are not illegal acts. But, there is no basis to conclude that when the defendant, for example, was chatting with other people about interdealing --

interdealer transactions, which you say would not be in violation of the antitrust laws, that it was not part of the larger conspiracy to price fix or bid rig and, if for no other reason, it shows a course of dealing between the defendant and other coconspirators, evidence of which may be -- I don't know, I haven't heard any evidence yet -- evidence of the precise illegal ends of the conspiracy which you say you're not challenging.

MR. KLOTZ: Right. I understand the issue.

Let me see if I can illustrate why the problem doesn't arise. The classic way in which the participants in the chat room could have engaged in an antitrust violation is if they had gotten together and agreed to quote identical spreads to customers who were shopping around, what's your price to buy and what's your price to sell the following currency pair. And the government, in fact, contends that that -- I think they still contend that that happened, although I'm highly confident that it didn't and they'll never be able to prove it.

But what the defendants did in the interdealer market is totally unrelated to that. It can't possibly have advanced the objective of fixing spreads that the participants quote to customers. And if that's what the case is about, which we concede that would be a serious antitrust issue if that were the focus of the case, but this other stuff isn't related to it.

What we're asking your Honor to do is what the courts in *Jones* and *Heicklen* did which is let me understand enough of the facts so that I can understand the conduct at issue.

THE COURT: Please. Whether the specific use of a telephone among the parties in a case when it's the only thing that the government is relying on for the indictment should, if it's not illegal, cause the dismissal of the indictment is not at all like the indictment in this case and the series of actions which you say ought to be dismissed which even if I granted your entire motion would leave the indictment untouched.

MR. KLOTZ: It would leave the indictment untouched. It would eliminate three-quarters or more of the case. And that is one of the issues with proceeding the way the government intends to proceed, proposes to proceed, which is all of this should be deferred until the Rule 29 motion.

If we're correct, 75 percent or more of the evidence that the government proposes to introduce ought not be admissible. And if we get to the stage of Rule 29 and your Honor concludes, you know what, the defense was right all along, then --

THE COURT: But based on your motion I would not so conclude because I would still have the alleged core illegality which you don't challenge.

MR. KLOTZ: You would have the alleged core

illegality. But if you had the alleged core illegality against the background of the case where the majority of the evidence would have to be excised and the jury told to disregard it: A, everybody would have spent a great deal of time on evidence that shouldn't have come in to begin with; and B, under those circumstances there would be a serious risk that the entire case would be a mistrial.

THE COURT: Let me come back to the question that I raised with you earlier which is when the evidence that you seek to exclude -- and we've gotten beyond the fact that this is an alleged motion to dismiss portions of the indictment, when we've gotten to the point where you're saying that evidence ought to be excluded because it's not evidence of a crime, one wonders how I could possibly say at this point that actions by the defendant with other coconspirators during the course of the conspiracy should be excised from trial. That runs counter to the usual way in which evidence of a conspiracy is presented. So you don't -- the jury can't consider evidence of the relations between the coconspirators, the way in which the coconspirators developed confidence in each other, the way in which the coconspirators trusted each other, the way in which the coconspirators relied upon the secrecy of their dealings, not all of which I'm saying will be at issue in this case but it certainly would happen all the time that you can't restrict or shouldn't restrict the evidence of the way in which

the coconspirators allegedly dealt with each other.

MR. KLOTZ: Certainly your Honor is correct that even as to the more limited allegations of wrongdoing evidence is going to be admissible that relates to the coconspirator relationships.

Let me take one of the two specific examples, not the interdealer example but the ruble trading example, which is the second behavior that we seek to dismiss. This involves just Mr. Aiyer and Mr. Katz. It doesn't apparently involve the other two members of the Rand group chat room. And it involves a situation in which Mr. Aiyer -- could I have slide four. Sorry. Seven.

It involves trading in a currency in which, of the four members of the chat room, Mr. Aiyer is far and away the more active trader in the ruble. Mr. Cummins doesn't trade it at all. Mr. Williams trades it a little bit and there is no contention that he colluded with Mr. Aiyer. And Mr. Katz traded it 1/40th the amount of the time that Mr. Aiyer did.

We put in an affidavit from our currency expert that said the pattern between the two people, Katz and Aiyer, is Katz is completely uncomfortable trading the ruble. He doesn't understand it. He's worried about getting stuck with a position because he's going to lose money because he's priced it wrong. He would prefer not to deal with it at all.

When a customer comes though Mr. Katz, Mr. Katz goes

to Mr. Aiyer and says two things: One, will you take me out of the position if ideal with the customer; and two, I don't know what I'm doing, tell me what price I should quote to the customer. And that happens on a series of occasions that the government identifies. And we have shown that in every single instance in which Mr. Katz actually wins the customer business, with one exception that I'll get to, he immediately transfers the position to Mr. Aiyer. And we submit in our briefs it's absolutely crystal clear what's going on here. Aiyer knows the ruble and understands the ruble. Katz doesn't. If Katz were on his own, he wouldn't be able to trade the ruble when customers asked him about it.

This relationship benefits both parties. It's got nothing to do with fixing spreads or fixing the price of the ruble. It is the two of them consulting on a transaction where Mr. Katz is not comfortable and Mr. Aiyer is. It's like the sort of thing I do in the practice of law all the time. I compete with other lawyers in areas that I know.

THE COURT: I wouldn't place myself in the middle of the motion.

MR. KLOTZ: It's any lawyer is in the position where when a customer client comes to him and says here is my problem can you take the case, if the lawyer knows what he's doing he says yes; and if he doesn't know what he's doing, he goes to somebody who would otherwise be a competitor who can do the

work more effectively at a better price and in a better quality of work. And there are any number of examples that all of us are familiar with from business where somebody in business concludes correctly: I just can't compete in this particular product and service and if somebody comes to me with a question about it I'm going to somebody else who would otherwise be a competitor.

The government doesn't contest that that's the relationship. The government says two things. It says: Well, that's not within the four corners of the indictment. True, but there is no dispute that that's, in fact, what's going on. And second, the government says: We don't care if that's what's going on. We say that because these two people are at competitor banks they are not permitted to talk to each other like this. Period. End of story. And that's just crazy. It's absolutely obvious that there is nothing improper about this relationship between Katz and Aiyer and it is not something that could reasonably be considered by the jury in considering whether Katz and Aiyer or anybody else did anything that's actually a violation of the antitrust laws.

THE COURT: The government says, among other things, that the reason for the rule about not considering the sufficiency of the evidence before the government has made a full proffer of all of its evidence is that there can be other evidence such as e-mails, testimony, which place in context

specific transactions. I don't know. And certainly I don't take the government's response with respect to any of the transactions simply because the government says in some circumstances even that can be a *per se* violation. I don't take the government's response as saying here is all of the evidence that we will present with respect to a specific transaction and every basis on which we will argue that the transaction is evidence of the illegal conspiracy.

MR. KLOTZ: I agree that the government hasn't put in all of its evidence and doesn't necessarily agree with anything that I've said. But let me turn then to the case that we submit sets out how a court should go about deciding does the case get governed by the *per se* standard or by the rule of reason. And that is the *Medical Center* case also, coincidentally, a Sixth Circuit decision that was decided just a couple months ago, didn't make it into our original brief but therefore made it into our reply brief.

In the *Medical Center* case, a civil case, but for reasons that I'm going to go into I think highly relevant here, there's a motion before the court to rule prior to trial that the case cannot proceed as a *per se* case; it's got to proceed, if at all, as a rule-of-reason case. And the court there concludes a number of things. First, there's a legal presumption that it's a rule-of-reason case; but second, and most importantly, I don't have to decide -- we don't have to

decide, it's the Sixth Circuit, we don't have to decide all of the issues of fact that are disputed. We have to simply look and ask the question: Has the defendant presented a plausible argument that the behavior that's at issue in the case is potentially procompetitive. And that can be done without resolving factual issues.

Slide two, if I could have it.

THE COURT: But the standard that you're relying on is classically a standard applied in civil cases, testing the sufficiency of allegations under the plausible standard of *Iqbal* and *Twombly*. It's not the standard that we use in judging whether an indictment should be dismissed.

MR. KLOTZ: Judge, it's a civil case to be sure, not a criminal case; but it wasn't a *Twombly* or *Iqbal* case.

THE COURT: The standard as you articulate it is the plausibility standard that's used to test the sufficiency of allegations in a civil case.

MR. KLOTZ: I think the standard that we're talking about, *Twombly* and *Iqbal*, is a standard that says for the plaintiff to be permitted to proceed, they have to make out a plausible argument for anti competitive conduct.

THE COURT: True.

MR. KLOTZ: That's not *Medical Center*. What *Medical Center* is saying, for the Court to be comfortable saying this is a rule-of-reason case, we, the Court, have to reach that

conclusion if the defendant has put forward a plausible argument about why the behavior is not anti competitive. And it doesn't matter if the other side disagrees with them. If they have a plausible argument to that effect, that by itself takes the case out of *per se* territory.

THE COURT: That would transpose into a criminal context the proposition that if a defendant has a plausible defense, the indictment should be dismissed.

MR. KLOTZ: This is a standard that simply applies to antitrust cases and it pertains to the -- which standard.

THE COURT: I want to just make sure that that's the argument; that if a defendant raises a "plausible defense" the indictment should be dismissed.

MR. KLOTZ: No. That's not what I'm arguing and I wouldn't for a minute suggest that that's an appropriate rule.

What the court in *Medical Center* is saying is on the limited issue of law is this case governed by the *per se* rule or the rule of reason, on that issue alone if the defendant advances a plausible argument about why the behavior is not necessarily anti competitive, that takes the case out of the *per se* terrain and puts it in the rule of reason domain.

The court, in reaching that decision, relies on Judge Sotomayor in her concurring opinion in *Major League Baseball Properties*, relies on Judge Posner in his *Sulfuric Acid* decision, relies on Judge Easterbrook in the *Pope Brothers*

decision, and says basically there is an agreement among the majority of the circuits that this is the standard for deciding prior to trial whether you apply the *per se* standard or the rule of reason. And it's not a summary judgment standard. It doesn't require the Court -- the material facts to be undisputed and the defendant wins as a matter of law. It simply is the defense puts into issue the potential procompetitive consequences of the conduct and that tells you the rule of reason has the govern.

THE COURT: And what case in the Second Circuit has accepted that proposition as a basis to dismiss all or part of an indictment?

MR. KLOTZ: Not in a criminal case. But the Second Circuit case that the Sixth Circuit cites for that principle is Judge Sotomayor's concurrence in *Major League Baseball Properties*. And we've cited that in our brief, along with several other decisions by, I submit, luminaries of the antitrust jurisprudence. That's what the case says.

Now, in this particular case that decision that you have to apply the rule of reason to certain behaviors that we've identified because we have plausible arguments why they're potentially procompetitive and the government hasn't even tried to rebut that, in this case that has significant consequences because the government can't go to trial in the antitrust case on behavior that's governed by the rule of

reason. They can't go to trial on it because their own policy guidelines say they can't do it and they can't go to trial on it because their policy guidelines aren't just there because they want to go easy on antitrust defendants; the policy guidelines are there because if you stretch criminal prosecutions under the antitrust laws outside the classic clear-cut *per se* violation domain, you run into the void for vagueness issue that the Supreme Court identified in *Skilling*. And I won't belabor that. We discussed that in our briefs as well.

And that in a nutshell is our argument. You don't need a lot of facts in order to make this decision which you're going to have to make at some point in any event. The standard that the Sixth Circuit not only articulates for the Sixth Circuit but marshals the legal principles from all of -- not all of the other circuits but the major other circuits that agree with the Sixth Circuit is one which it's clear that we can prevail on now. And the consequence of concluding that the behavior at issue on this motion should be governed by the rule of reason is the government can't proceed criminally on it.

We contend there are other behaviors that your Honor can't rule on now because it's just not clear enough. There aren't enough facts in and, God bless the government, if they want to proceed with this case on those behaviors, we're happy to have them do it; we're confident that they can't prove that

any of it happened.

But the majority of their case is this conduct that under the Sixth Circuit standard -- and I call it the Sixth Circuit standard and I keep coming back to they rely on the Second Circuit Judge Sotomayor, the Seventh Circuit Judge Posner and they say two other circuits that they're in agreement with under that standard, that portion of the conduct that is governed by that standard is the majority of the government's case in this case.

Now, let me say just a few words about the duplicity motion because it is our contention that the way in which the government has pleaded this case is part of the reason it's so difficult to talk through this motion, and I grant that it's difficult to talk it through because it's an unusual motion and it's an unusual procedural posture that we're in.

THE COURT: When I read your initial brief and saw the citation to *Usher* and you relied on it in your initial brief on the motion to dismiss in part the indictment, and you said this is just like *Usher*, look at the allegations in *Usher*, they're like the conduct that's alleged here. I said to myself: Gee, how did *Usher* come out. And it was only after I then read *Usher* that I said to myself: But, wait, in *Usher* the motion to dismiss the indictment was denied.

MR. KLOTZ: Yes.

THE COURT: Why the citation to *Usher* without

explaining that even though the Court denied the motion it was one that should have been granted?

MR. KLOTZ: I don't think the *Usher* motion should have been granted, your Honor.

And when we cited *Usher* we did not cite *Usher* for the proposition that you should grant our motion to dismiss because of the principle laid out in *Usher*. We cited *Usher* for a very specific evidentiary finding that was basically overwhelming but is related to one of the points we make.

Let me circle back to the motion to dismiss in *Usher* because I don't contend that that motion to dismiss should have been granted. There are two distinctions between our case and *Usher*. The first distinction is in terms of what conduct was at issue in *Usher*. It was almost exclusively focused on competitors getting together at the fix and coordinating their trading in order to drive the fix -- the fix price of whatever currency was at issue in a particular direction: Up, down, or sideways. It was different in different circumstances. That was the core allegation in *Usher*. And that is an allegation that we have expressly said in this case, to the extent that this case is about that, we agree it can't be dismissed. We don't think the government can prove that we did anything improper with respect to the fix. But if their case is based on an *Usher*-like contention that Mr. Aiyer got together with other people to manipulate the fix to his advantage and the

other traders' advantage and their the customers' disadvantage. That looks like an antitrust case and that's something the government should be permitted to proceed with.

The second difference in *Usher*, and it's sort of related to the first, is what the defendants argued in *Usher* is these traders are partially in a horizontal relationship as competitors but partially in a vertical relationship because they buy and sell from each other. That's a mixed relationship and we say that means that absolutely everything they did is governed by the rule of reason and can't be prosecuted criminally.

The proposition that the *Usher* defendants proposed was these defendants, because of the relationship they had, cannot possibly commit a *per se* violation of the antitrust laws. And that's not our argument. We are very clear that Mr. Aiyer and the other traders could, if they had done it, have violated the antitrust laws in a *per se* way. And those are the two differences in *Usher*.

Now, the important thing that emerged in the *Usher* trial after the motion to dismiss was denied, in my judgment properly, the important thing that emerged at trial was a whole raft of evidence about a particular behavior of people in the trading arena, once they had shared information with a counterparty, then not using that information against the other counterparty. And that is behavior that is at issue in the

interdealer market trading that we raise and we point out in the brief there was uncontradicted testimony from the government's own witnesses in *Usher* that this was perfectly widespread, understood to be routine, etc. But that's all we cited *Usher* for.

THE COURT: But *Usher* was a case that went to the jury.

MR. KLOTZ: Correct.

THE COURT: And the jury found that the defendants were not guilty.

MR. KLOTZ: Correct. They were acquitted of everything.

THE COURT: So the bottomline --

MR. KLOTZ: I certainly --

THE COURT: *Usher* is --

MR. KLOTZ: I certainly anticipate that outcome here based on *Usher*. But my client has the right to be free from prosecution and being put at risk of a guilty finding for conduct that isn't a crime. And that's what we're seeking to do on this motion.

On the antitrust motion, I'll take just five minutes. I don't want to cause your Honor to indulge too much of this.

THE COURT: No. I haven't set a time limit.

MR. KLOTZ: On the duplicity motion. Get to that section with my comments.

We agree and we get it that the government gets considerable latitude to charge a single conspiracy with multiple objectives. There's ample case law that says they're entitled to do this. But our submission is there has to be a sufficiently strong common thread to make it plausible that the agreement is, in fact, a single agreement. And that's what we think is missing here; not missing from the language of the indictment. The language of the indictment says over and over again, hammers away at it, what these people were doing was conspiring to fix prices and rig bids and that's the common thread.

But if you look at the behavior, at the objectives, and ask the question: What was the agreement and is it a single agreement? We submit that the agreement, if there was one, between Mr. Katz and Mr. Aiyer about how they would handle ruble transactions when Mr. Katz was approached by a customer -- not, by the way, even involving two of the other four alleged coconspirators -- is simply a different agreement from an agreement, if there was one, for all of these people to get together and agree that they would quote the same spreads in order to support a, in effect, a wide profit margin to their collective advantage, in effect to raise prices on customers. And that, in turn, is different from an alleged agreement, if it actually happened, to get together in trading to manipulate either the price of the currency through a stock loss level

which the government alleges in one instance or to manipulate the fix which the government alleges in another couple instances. And that's very different from the agreement that's alleged if it took place with respect to conduct in the interdealer market. And it is simply not proper to smoosh all these together and say we allege that this is a *per se* violation of the antitrust laws and that's what makes it a single conspiracy.

Now there are many circumstances in which a defendant would not be prejudiced by a less than crystal clear single conspiracy indictment. But in this case my client, if the case goes to the jury as a single conspiracy, is at risk that the jury won't even be unanimous on which conduct actually violated the antitrust laws because the conduct at issue is so different.

And more troubling is the fact that some of the conduct and some of the conduct that if the government is right that it actually took place -- I don't think it did -- but if it did, it would be more nearly troublesome to, in my judgment, an ordinary jury. That conduct took place outside the statute of limitations. And so my client is at risk if the whole thing goes to the jury as a single conspiracy that he gets convicted based on conduct that couldn't even properly be charged if recognized as separate conduct involving a separate objective and a separate crime.

That's our argument on the duplicity motion. The remedy is to essentially make the government replead; replead the indictment in discrete components that make sense and that deal with a specific type of behavior. And if the government were to do that either now or later in the case or when it goes to the jury, at least people would be able to sort out is what these people did that was wrong, that they fixed spreads, in effect supported their profit margins; or is what they did that was wrong that they manipulated the fix. What is it? Then at least people would be able to make sensible judgments up or down on the real behavior that's at issue. Thank you

THE COURT: Thank you.

MS. CALLE: Your Honor, I'll be brief. On the issue of what the Court may consider at this stage of the case at a motion to dismiss an indictment, I think the controlling Second Circuit case in this is *United States v. Sampson* and that's a 2018 decision by the Second Circuit that makes very clear that on a motion to dismiss an indictment a district court is confined to the four corners of the indictment unless a full proffer of the evidence has been made. And that has not been made here.

THE COURT: I could consider a bill of particulars, couldn't I?

MS. CALLE: Your Honor, the one exception that the Second Circuit has acknowledged that has happened in this

circuit is when the government has made a point-by-point proffer of all the evidence it intends to submit at trial.

THE COURT: I know that. I know that. I know the language.

I was asking a specific question about whether if the government had responded to a bill of particulars which attempts to define the indictment I could consider the bill of particulars.

MS. CALLE: It's a very narrow circumstance, your Honor, and it doesn't apply here.

THE COURT: I got that. But I was just asking that question for my own benefit.

MS. CALLE: Confined to the four corners in the indictment, your Honor, the indictment alleges a horizontal price fixing and bid rigging conspiracy, similar to the indictment in *United States v. Usher*, your Honor. The indictment alleges that --

THE COURT: If you don't know the answer to the question just say you don't know and there is no specific bill of particulars in this case. I asked the government to identify the trading days on which there would be transactions offered in the course of the trial. But, at least give me the benefit of the government's response, whether it's I don't know; or no, you can't consider a bill of particulars; or simply it's not at issue in this case.

MS. CALLE: Your Honor, I would argue that it's not an issue and also that under the Second Circuit precedent a full proffer of the evidence could be considered by the judge on ruling on a motion to dismiss and if that full proffer had been made then, Judge, you could consider that.

THE COURT: Go ahead.

MS. CALLE: The indictment alleges a *per se* price fixing conspiracy between the defendant and his coconspirators who are all rival traders at competing banks in New York. This is similar to what was at issue in the *Usher* case. They -- these traders competed over a product. The product was CEEMEA currencies. That product had a price. And the defendant and his coconspirators entered into an agreement to suppress competition in order to move that price. This is a classic *per se* violation, this horizontal restraint of trade. And courts in this circuit have considered similar conduct. I would point the Court to *Gelboim*, *United States v. Usher*, and *In Re: Foreign Exchange* on this issue.

The indictment alleges several means and methods as have been discussed. These means and methods need not be unlawful in and of themselves. They need not be standalone *per se* violations. On this point I would point your Honor to *United States v. Apple* in which a horizontal price fixing conspiracy was carried out through vertical agreements. I would also point your Honor to a recent decision out of the

district court in the Northern District of California in which the defendant identified one particular means and methods in a *per se* Sherman Act case and he alleged that that particular means and methods would be subject to the rule of reason and, therefore, the indictment was duplicitous or alternatively should be governed by the rule of reason. The district court in that case denied that motion to dismiss relying substantially on the *United States v. Apple* decision.

THE COURT: Could you give me some feel for the way in which the trial will work in this case. If I deny the defendant's motion, the defendant says much of the conduct which we think the government is going to offer with respect to the trading that occurred on all of these dates that the government has identified as dates on which it's going to introduce trading records will be evidence at most of alleged anti competitive conduct that has to be judged by the rule of reason and, therefore, can't be the basis for an antitrust violation.

Can you give me some idea now of what the government intends to argue at trial?

As I've already explored with Mr. Klotz, I can conceive of lots of reasons why trading conduct which isn't even *per se* unlawful would be relevant to the specific allegations of *per se* illegal conduct; price fixing, bid rigging.

Defendant essentially argues the government is going to be introducing all this evidence. The great bulk of the evidence will not go to price fixing or bid rigging but to other practices among the traders which is not a *per se* violation of the antitrust laws.

Can you give me some insight into the way in which the case will actually be tried?

Assume that the motion is denied and there is evidence of all of these transactions that occurred on all of these days. Can you give me some feel for what purpose?

MS. CALLE: Your Honor, many of the instances will be direct evidence of this price fixing and bid rigging conspiracy. And those instances of conduct will be offered through members of the conspiracy, including two individuals who pled guilty to this crime, and they will explain how they effectuated this bid rigging and price fixing conspiracy. They will explain that by sharing information with one another they were able to coordinate their trading on the interdealer platform and that the coordination of trading on the interdealer platform was intended to affect the price of currency. They will explain how they concealed their actions or any of the means and methods. This testimony will come through them. And we will -- it will go to the elements of the crime; that they knowingly joined a conspiracy, that a conspiracy existed, that the object of that conspiracy was

price fixing and bid rigging.

And so the jury will be instructed that they have to find that evidence put forward at trial is evidence of this conspiracy. And so through all of this testimony through the examples and through the conduct that will be properly before the jury they will decide whether this conspiracy existed.

THE COURT: OK. Go ahead.

MS. CALLE: On the duplicity motion, I would again point you to *Apple* and *Olshefsky* that alleging multiple means and methods of a conspiracy does not render an indictment duplicitous. What is necessary is that the indictment alleges a single overarching conspiracy. And that is the case here. And that you cannot isolate these standing alone and argue that they would be tried under the rule of reason if they are offered in furtherance of a *per se* case. The indictment is not duplicitous. It is not uncommon for a conspiracy charge to include various means and methods of effecting that single overarching conspiracy and that's the law of this circuit. And the Court can deny that motion to dismiss the indictment as duplicitous.

If there are no further questions, your Honor, we would rest on our papers.

THE COURT: All right. Thank you. Briefly.

MR. KLOTZ: Very briefly, Judge. I can't find the case quickly but one of the cases that we cite for the

proposition that your Honor can consider material outside the four corners of the indictment, the phrase rings in my head, agrees with the proposition that you can consider material outside the four corners and says there is some older cases that suggest otherwise but that's not the current law. Now *Sampson*, of course, is a very current case but I don't think that it stands for the proposition that the only circumstance in which you can consider material outside the four corners of the indictment is this full presentation of the government's evidence, which we agree has not taken place here. But the example -- I think it predates *Sampson* but nonetheless an example from this district in which the court does consider material outside the indictment is the *Heicklen* case that I mentioned earlier where the issue was whether a person who stood on the courthouse steps admonishing jurors that they had the right to find the defendant not guilty no matter what the facts and the law were, was charged with jury tampering. And Judge Kimba Woods said: Well, exactly what is the conduct that's at issue because the indictment just says he engaged in jury tampering. And the government there said: Fair enough, you need to understand the indictment and what the conduct is. And so the government produced a transcript of an undercover discussion with the defendant and the two pamphlets the defendant was handing out and the court considered those in dismissing the indictment as not applicable to the conduct at

issue.

Finally, the government argues that this case is like, and cites three cases where motions to dismiss have been denied, and the three cases are *Usher*, which we discussed a couple minutes ago, *Gelboim*, and *In Re: Foreign Exchange*. Those are all cases involving the manipulation of benchmarks to the detriment of hundreds and hundreds of customers. We've never contended that that behavior should be dismissed at this point in the proceeding.

THE COURT: OK. All right. Well, I'm prepared to decide.

The defendant, Akshay Aiyer, is charged with violating the Sherman Act by conspiring with traders at competing banks to suppress and eliminate competition by fixing prices of and rigging bids and offers for certain currencies. The defendant has moved to dismiss the indictment. The defendant argues that the indictment should be dismissed entirely because it is duplicitous or dismissed in part because certain allegations in the indictment fail to state a criminal violation of the Sherman Act.

It is well established that an indictment is sufficient if it: First, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend; and second, enables him to plead an acquittal or conviction and bar future prosecutions for the

same offense. *United States v. Alphonso*, 143 F.3d 772, 776 (2d Cir. 1998). A motion to dismiss is not an appropriate vehicle for challenging the sufficiency of an indictment. A court may not "look beyond the face of the indictment and draw inferences as to the proof that would be introduced by the government at trial" unless the government has made "a full proffer of the evidence it intends to present at trial." Id.

On May 10, 2018 the grand jury returned a single-count indictment against the defendant. The indictment charges the defendant with conspiring to restrain trade in violation of the Sherman Act, 15 U.S.C. Section 1. The indictment alleges the following facts which are taken as true for the purposes of deciding this motion.

From around July 2006 to around March 2015 the defendant worked for a bank as a foreign currency exchange analyst and trader. Indictment paragraph 13. The defendant traded in currencies from Central and Eastern European, Middle Eastern, and African Emerging Markets. "CEEMEA" Id. paragraph 1. From approximately October 2010 to July 2013 the defendant conspired with traders at competing banks to suppress and eliminate competition by fixing prices of and rigging bids and offers for CEEMEA currencies. Id. paragraphs 20 to 21. The indictment describes instances of the means and methods the conspirators used in forming and carrying out the alleged conspiracy; namely, that the defendant and his coconspirators

revealed customer information, risk positions, and trading strategies, Id. paragraph 22(a); agreed to coordinate and, in fact, coordinated trading in order to increase, decrease, and stabilize the prices and fixed rates of CEEMEA currencies, Id. paragraph 22(b) through (d); filled customers' orders of prices that the conspirators sought to increase, decrease, or stabilize, Id. paragraph 22(e); agreed on prices to quote to customers, Id. paragraph 22(f); and employed measures to conceal their actions, Id. paragraph 22(g).

The defendant is accused of criminally violating the Sherman Act. Violations under the Sherman Act take one of two forms, either a *per se* violation or a violation under the rule of reason. Id. *United States v. U.S. Gypsum Company*, 438 U.S. 422, 438-41, (1978). Only *per se* violations of the Sherman Act are criminal. Id. at 440-43. Certain acts have been defined as *per se* violations such as horizontal price fixing conspiracies which are agreements "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Bid-rigging conspiracies, agreements to coordinate the submission or withholding of bids and price fixing, have been found to be *per se* violations. Id. at 224 n.59; *United States v. Koppers Co.*, 652 F.2d 290, 293-94 (2d Cir. 1981).

The defendant moves to dismiss the indictment entirely arguing that it is duplicitous. The defendant argues alternatively that the allegations in the indictment that do not state a *per se* violation of the Sherman Act should be dismissed.

The defendant contends that the indictment is impermissibly duplicitous because it alleges both criminal and noncriminal violations of the Sherman Act; that is, that some actions alleged in the indictment are *per se* violations and others are subject to the rule of reason.

"An indictment is impermissibly duplicitous where: One, it combines two or more distinct crimes into one count in contravention of Federal Rule 8(a)'s requirement that there be a separate count for each offense; and two, the defendant is prejudiced thereby." *United States v. Vilar*, 729 F.3d 62, 79 (2d Cir. 2013).

The indictment in this case alleges only one crime that the defendant conspired to suppress and eliminate competition by fixing prices of and rigging bids and offers for CEEMEA currencies. The defendant argues that the indictment is duplicitous because it alleges more than one crime by charging the defendant with a variety of distinct trading practices that occurred at different points in time. But it is well established that "the allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for the

conspiracy is the crime and that is one, however diverse its objects." *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992); see also *Braverman v. United States*, 317 U.S. 49, 53 (1942), "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." Courts have repeatedly indicated that so long as the indictment alleges a single conspiracy, whether the conspiracy is a single conspiracy or multiple conspiracies is an issue of fact singularly well suited for determination by a jury. *United States v. Ohle*, 678 F.Supp. 2d 215, 223 (S.D.N.Y. (2010). (Sand, J.) (collecting cases). The indictment in this case alleges a single conspiracy and not multiple conspiracies.

The indictment alleges that the defendant conspired to suppress and eliminate competition by fixing prices of and rigging bids and offers for CEEMEA currencies. The indictment offers various means and methods that the defendant and his coconspirators used in effectuating their unlawful goal such as price fixing and bid rigging. Stating these different means and methods does not render the indictment duplicitous. It simply describes the different practices the coconspirators used to commit the single crime alleged.

Furthermore, under the second prong of the duplicity analysis there is no risk of prejudice to the defendant. The defendant states that if the indictment is not dismissed there is a risk that the jury will convict him of one or more noncriminal or time-barred acts. But any potential risk is easily resolved by a jury instruction. *Ohle*, 678 F.Supp. 2d at 223, n.7. "Courts have noted that much of the risk of prejudice created by a potentially duplicative charge can be cured through proper instructions at trial."

Because the indictment alleges a single crime and there is no risk of prejudice to the defendant, the defendant's motion to dismiss the indictment based on duplicity is denied.

In a separate motion the defendant moves to dismiss the indictment in part for failure to state a criminal violation of the Sherman Act. Defendant's dismissal memo at 1. The defendant does not state specifically which parts of the indictment should be dismissed and declined to do so at oral argument. Rather, the defendant argued that any conduct described in the indictment that is subject to the rule of reason and not a *per se* violation of the Sherman Act should be dismissed from the indictment.

The dismissal of an indictment is an extraordinary remedy and is "reserved only for extremely limited circumstances implicating fundamental rights." *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001). "An

indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir 1992). "It is generally sufficient that the indictment set forth the events in the words of the statute itself, as long as those words have themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *DeVonish v. Keane*, 19 F.3d 107, 108 (2d Cir. 1994). At the motion to dismiss stage the Court must accept all allegations in the indictment as true. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343, n.16 (1952), and ordinarily may not address the sufficiency of the evidence, *Alphonso*, 143 F.3d at 777. An extraordinarily narrow exception to this rule exists when the government has made a "detailed presentation of the entirety of the evidence" before the district court prior to the filing of a pretrial motion to dismiss. *United States v. Sampson*, 898 F.3d 270, 282 (2d Cir. 2018). The government has not made such a presentation in this case and the defendant does not allege that the government has made such a presentation. Therefore, the Court's analysis is limited to the allegations in the indictment.

The defendant alleges that the Court can consider

records relating to dates that the government has indicated it will offer evidence about at trial. However, even considering those dates which go beyond the indictment, there is no indication that the government has proffered all of the evidence it will offer at trial concerning the trading activity on those dates nor is there any indication where the government's evidence about what happened on those dates will fit into the allegations of a conspiracy to fix prices and rig bids. Even otherwise innocent activities can be the means by which an unlawful conspiracy is furthered.

The indictment in this case alleges that the defendant and his coconspirators were competitors that entered into an agreement to fix prices and rig bids of CEEMEA currencies. The indictment alleges various means and methods by which this agreement was carried out; namely, revealing customer information, risk positions, and trading strategies, indictment paragraph 22(a); agreeing to coordinate and, in fact, coordinating trading in order to increase, decrease, and stabilize the prices and fixed rates of CEEMEA currencies, Id. paragraph 22(b) through (d); filling customer orders at prices that the conspirators sought to increase, decrease, or stabilize, Id. paragraph 22(e); agreeing on prices to quote to customers, Id. paragraph 22(f); and employing methods to conceal their actions, Id. paragraph 22(g). Judge Berman recently denied a similar motion to dismiss an indictment for

an alleged criminal violation of the Sherman Act. See *United States v. Usher*, No. 17 CR 019 2018 WL 2424555 at 4. (S.D.N.Y. May 4, 2018), denying the defendant's motion to dismiss where the indictment alleged that the defendant used means and methods in the conspiracy nearly identical to those allegedly employed by the defendant in this case. *Usher* is consistent with other cases that have upheld similar *per se* price fixing allegations in civil complaints. See, for example, *Gelboim v. Bank of America Corp.*, 823 F.3d 759, 771 (2d Cir. 2016); *In Re: Foreign Exchange Benchmark Rates Antitrust Litigation*, 74 F.Supp. 3d 581, 592 (S.D.N.Y. 2015).

The defendant takes issue with certain acts described in the indictment. For example, the defendant argues that the descriptions of coordinated trading in the interdealer market and coordinated price quoting to customers do not describe *per se* violations of the Sherman Act and should be analyzed under the rule of reason. The defendant argues that the indictment fails to allege that these violations are *per se* violations of the Sherman Act and offers a slew of potential trial evidence, expert reports, and attorney declarations to describe the way in which these coordinated trades and alleged price fixing took place. The defendant argues that, although the acts described in the indictment have a "superficial resemblance" to *per se* violations of the Sherman Act, the Court should review the defendant's evidence which he claims will show that the way in

which he conducted these acts is noncriminal.

This defendant's evidence is improper at this stage of the case and cannot be considered. *Alphonso*, 143 F.3d at 776. When considering a pretrial motion to dismiss, a district court may not ordinarily "look beyond the face of the indictment and draw inferences to the proof that would be introduced by the government at trial." Rather, the Court must consider only the allegations in the indictment.

The indictment properly alleges a single overarching conspiracy; namely, that the defendant knowingly conspired to suppress and eliminate competition by fixing prices and rigging bids and offers for CEEMEA currencies in violation of Section 1 of the Sherman Act. The defendant attempts to divide the indictment into two categories: *Per se* violations of the Sherman Act and actions subject to the rule of reason. But the means and methods set forth in the indictment do not necessarily need to be standalone crimes or indeed crimes at all. Each act committed by a coconspirator in furtherance of the conspiracy need not be criminal in and of itself. *American Tobacco Company v. United States*, 328 U.S. 781, 809 (1946). "It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which

the statute forbids, they come within its prohibition." The means and methods alleged in the indictment must be considered in relation to the overall conspiracy. It is irrelevant that certain activity set forth in the indictment may not alone constitute a *per se* crime. What is relevant is that those acts enable the defendant and his coconspirators to carry out an unlawful conspiracy. See *United States v. Apple, Inc.*, 791 F.3d 290, 325 (2d Cir. 2015), applying the *per say* rule to a price-fixing conspiracy even though it was implemented in part through vertical agreements with distributors. The indictment alleges that the defendant conspired to suppress and eliminate competition by fixing prices of and rigging bids and offers for CEEMEA currencies. That is sufficient to state a *per se* violation of the Sherman Act. See *Usher*, 2018 WL 2424555 at 4, holding that the indictment stated a *per se* violation of the Sherman Act where it alleged that the defendant competitors "agreed to coordinate their bidding, offering and trading, including their agreement to refrain from bidding, offering, and trading." Therefore, the defendant's motion to dismiss the indictment in part is denied.

The Court has considered all of the arguments raised by the parties. To the extent not specifically addressed, the arguments are either moot or without merit. The defendant's motions to dismiss the indictment in whole or in part are denied.

So ordered.

All right. I set out the schedule already. When is our next conference?

MR. KLOTZ: I'm not sure we have one, your Honor. We have a series of deadlines that are all in place and we're all working towards but I don't think we've set a next time to get together.

THE COURT: Do the parties need to get together before you've made all of your submissions?

MR. HART: We remain in contact with the defense and should any need arise we'll address it at that point.

THE COURT: If you need another conference just send me a letter and I'm happy to schedule another conference.

MR. KLOTZ: The one thing that occurs to me, your Honor, is on the schedule are deadlines for motions in limine and responses to motions in limine. I don't know whether your Honor hears oral argument on those motions. That would be something that if you did hear oral argument we could at least consider setting a date now but we wouldn't have to.

THE COURT: It really varies. When are the motions in limine going to be fully briefed?

MR. KLOTZ: If my recollection is correct, I think it will be the middle of August.

THE COURT: OK. Well I'll consider whether I need argument.

Just a word to all of you. In criminal cases I don't impose any page limits. I just think it's unfair and so I don't do it. And in civil cases I impose time limits at trial. I don't in criminal cases because I just don't think it's right. I don't impose limits on the length of time for openings or summations. But I urge you to be judicious in the papers that you submit to me because you have to appreciate all of those papers go through me. I go over all of those papers. I remember an admonition given by a great trial judge in Chicago who said just remember that all of the paper that you submit has to go through the eye of a very small needle, me. And so briefer is better. The fact that there are lots of motions in limine doesn't make them better. The fact that they are longer doesn't make them better. The fact that the Supreme Court has had to limit the length of the briefs before the Supreme Court despite the fact that all of the advocates said: Oh, Justices, we really need the extra pages in order to be able to explain to you how important these issues are met deaf ears. So I just leave that little homily with all of you. I don't restrict what you give to me. I will get through all of it.

Thank you, all.

MR. SCHACHTER: Your Honor, may I raise one additional issue. I just want to make sure that I -- certainly we saw your Honor's ruling on our request for adjournment. And we

just had one point of clarification.

THE COURT: Sure.

MR. SCHACHTER: I am perhaps too optimistic but I saw in the Court's ruling that the motion for adjournment was denied and the Court used the words "at this time" and from that I gained a glimmer of hope and I also am just asking your Honor perhaps for some guidance.

We are in an unfortunate position for the following reasons. Mr. Aiyer selected myself and Mr. Klotz to be his trial counsel. I have tried mightily to avoid this conflict. We demanded, before Judge Kuntz in the Eastern District, a speedy trial on multiple occasions and the government has said that they are ready for trial. Nonetheless, Judge Kuntz has denied our request and we are scheduled for trial in October. I can't ask that that trial be delayed because Mr. Boustani is detained. And if the current situation is going to stand, then Mr. Aiyer will be denied his choice of trial counsel. That's not in any way through the fault of your Honor, of course. I have never had this circumstance where I have told a judge who set a trial that I have a conflict and that Court set the trial nonetheless, particularly in a circumstance where this man has been detained since January 2 and we've been asking for a speedy trial and that request has also been denied.

So, I am left in a circumstance where I don't know what to do other than step away from this case which will deny

Mr. Aiyer his choice of counsel, and it is with that background and not seeing any other way of handling this that I am wondering if the "at this time" was some type of signal as to when we can and should be renewing this motion because I don't see a circumstance in which this is going to resolve itself. With each passing day there is less and less of a chance that Judge Kuntz is going to be doing anything about that trial date. I don't anticipate that he will. Mr. Aiyer is here and, of course, the government has an interest in a speedy trial as does the Court, of course. However, we ask that the Court to consider that as the Court balances the Court's interests in a quick trial, the government's interest, and Mr. Aiyer's ability to proceed with counsel of his choosing, that if all those things are balanced, that some delay in this trial to allow me to proceed as trial counsel, we ask the Court to consider that.

THE COURT: The reason that I put in "at this time" was in part that I didn't know what Judge Kuntz would do. The government took the position that there was no basis for the motion at the time when the motion was made. And I went back to look at the prior history in this case. When the case was brought, when I set the trial date. And when I set the trial date was prior to when other judges came in and set trial dates and was, in fact, prior to the time that defense counsel took on a subsequent representation for the defendant who was then incarcerated prior to trial. And so where are we?

Early on I set the trial date in this case and lawyers ought not to take on conflicting obligations that may conflict with the trial date in this case. And you would expect other judges also to respect a trial date that was previously set. Why this has happened, I don't know. I do know that it was not of my doing because the trial date in this case was long set and the defendant in this case was entitled to the representation of his counsel of choice in this case. And so I denied the motion and I said "at this time" because things can always happen.

I didn't mean to leave lots of hope out there. I certainly would have preferred that other dates be moved rather than the date that I long set in this case and I don't know what's going on in other cases. I don't know what judges' calendars are like in other cases. And I don't know what the government's position is at this point in this case. It was somewhat tentative last time.

So am I inclined to move the trial date? No. Can I rule it out? I try not to make rulings that are cast in stone because matters can change. You could apply to other judges to change their trial dates.

MR. SCHACHTER: Your Honor, I have -- first of all, I certainly agree with your Honor that this should not have happened. I agree wholeheartedly. And we both advised Judge Kuntz of the conflict and we have written to Judge Kuntz

advising Judge Kuntz of the conflict and asked for that trial to be moved up particularly given that a detained defendant is begging for a quicker trial. We noted case law that suggests that this is actually a constitutional violation that will result in the reversal of a conviction were one to be entered.

THE COURT: Perhaps that's not the best way to approach a judge.

MR. SCHACHTER: We've tried everything, your Honor. All I know is that Judge Kuntz has not -- has not even responded to that letter and now that we're at the beginning of June it's getting very close to -- particularly given the complexities of both of those cases, this one and the other, that --

THE COURT: Perhaps -- perhaps asking, please, without threatening the judge for reversal would be a better strategy.

MR. SCHACHTER: I will try please.

The problem is that Judge Kuntz said is that he is -- I can speak to the government and if the government is willing to consent to an earlier date in that case then he's willing to consider that. And so I went to the government and they effectively said no. They said they would agree to move it up by one month to September. However, I was appointed -- I have a CJA case which we do on a pro bono basis, but that's neither here nor there, to represent a detained defendant before Judge Engelmayer at the beginning of September. So the offer of the

government to move that trial up to September does not offer much in the way of assistance. Now that said, I am hopeful that that case will be resolved. But --

THE COURT: And if it were not resolved there are other members of your firm on the CJA panel, aren't there?

MR. SCHACHTER: I am the only member of my firm and in any event my understanding of the CJA rules is that counsel are appointed, not firms.

THE COURT: No. That's true. But other counsel can be appointed.

MR. SCHACHTER: No, no. I'm sorry. I raised it with Judge Engelmayer as well. When he first -- when I was first appointed I actually raised the potential conflict with your Honor's trial. And Judge Engelmayer said I think you got plenty of time to handle both of those. And then after Judge Kuntz, beyond my expectations, scheduled an October 7 trial I again raised it before Judge Engelmayer and Judge Engelmayer said not my problem; your client is detained and so I can't delay that trial; he is detained and he has to go to trial. And that is -- I have tried many times in many different ways to resolve this conflict and I am left here at the beginning of June, as fall approaches, without much in the way of opportunities to resolve this issue. And as Mr. Aiyer is the one defendant who is not detained of that group, it occurred that as one balances the interests of all concerned that

perhaps a short adjournment of this trial could be accommodated by the Court.

I have to also note -- your Honor, may I have one moment?

(Counsel confer)

MR. SCHACHTER: Your Honor, we have been taking up the Court's -- a lot of the Court's time. Mr. Aiyer needs to excuse himself for a comfort break.

THE COURT: Well we're at an end. The government seems as though they want to say something but they don't have to. You can both talk about it. It's odd, it really is, that the parties come to the court which first set the trial date, and said, OK, here's the trial date. I understand people have busy schedules. So here's the date. We're going to work on that date. And that counsel ends up taking other cases that end up conflicting with that date. It's not the way in which it usually works.

So, you're welcome to talk to the government in this case. I don't know what you're talking about in terms of -- in terms of a brief adjournment in this case. So you can talk to the government and you can always write me a letter and -- what's the trial date at present in this case?

MR. KLOTZ: October 21.

MR. SCHACHTER: Can Mr. Aiyer be excused, your Honor?

THE COURT: I'm sorry?

MR. SCHACHTER: Can Mr. Aiyer be excused?

THE COURT: We're done. So, yes, of course. Everyone can. Thank you, all.

(Adjourned)