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Cooperation and the Limits of *Garrity*: Relevant Developments from the Coburn Trial

Companies have long cooperated with government investigations as a matter of course, and cooperation has long been a factor used by the government in considering how to proceed against a business organization.[1] Cooperation typically includes sharing information derived from internal investigations with the government. While the benefits of cooperating with the government are well known, extensive sharing of information with the government in an effort to

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1. DOJ's approach to prosecution of companies is currently described in the Principles of Federal Prosecution of Business Organizations, versions of which date back at least to Deputy Attorney General Lawrence Thompson in 2002. *See* Justice Manual §§ 9.28-300, 700, 720, 740, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300. The SEC has had considered similar factors since at least 2001, *see* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Release No. 34-44969 (Oct. 23, 2001) ("Seaboard Report"), available at http://www.sec.gov/litigation/investreport/34-44969.htm.

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cooperate can place the company at risk in subsequent, related litigation.[2] A prime example of this risk has been playing out in the FCPA case of Gordon Coburn and Steven Schwartz, former executives of Cognizant Technology Solutions (“Cognizant”).

In previous orders in the case, Judge Kevin McNulty of the District of New Jersey ruled that readouts of interview summaries to the government constitute a broad waiver of privilege as to all materials relied on for those disclosures.[3] In an important ruling for foreign entities, the court also found that voluntary cooperation with a DOJ investigation is not by itself sufficient to establish personal jurisdiction in the US over a foreign entity.[4]

On July 20, 2023, Judge McNulty again ruled on a question of interest to companies cooperating with government investigations, as well as employees caught up in those investigations: when does cooperation between a company and the government in the company’s internal investigation become so close as to implicate employees’ constitutional rights?[5] The answer, according to the district court, is that neither government policy strongly incentivizing companies to focus investigations on individuals nor deliberate tailoring of an internal investigation in response to those incentives renders a company a state actor.

Background

Defendants Coburn and Schwartz are the former CEO and general counsel, respectively, of Cognizant, an information technology services company headquartered in New Jersey. Part of Cognizant’s business involved providing IT services out of several large campuses in India. In February 2019, Cognizant settled with the SEC and received a declination from the DOJ relating to an alleged improper payment in India in 2014. At the same time, DOJ indicted — and the SEC brought civil claims against — Coburn and Schwartz for allegedly approving the payment.[6] Over the course of the next several years, both Coburn and Schwartz brought a series of pretrial motions challenging the indictment and

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2. *See* Bruce E. Yannett, Jane Shvets, Philip Rohlik, Samuel E. Gelb, “Privilege & Cooperation: A Difficult Balance,” FCPA Update, Vol. 14, No. 2 (Sept. 2022), https://www.debevoise.com/-/media/files/insights/publications/2022/09/fcpa-update-september-2022.pdf?rev=3d504911231748179ac1e8459a729e3b.

3. *United States v. Coburn*, Docket No. 268, Case. 2:19-cr-00120 at 5-14 (filed Feb. 1, 2022); *see also* Andrew M. Levine, Jane Shvets, and Bruce E. Yannett, “District Court Addresses Issues Arising from Corporate Investigations and Voluntary Cooperation with DOJ,” Debevoise Update (Feb. 17, 2022), https://www.debevoise.com/insights/publications/2022/02/district-court-addresses-issues-arising-from.

4. *Coburn*, Docket No. 268 at 28-31.

5. *United States v. Coburn*, Docket No. 495, Case 2:19-cr-00120 (KM), (July 20, 2023) (hereinafter, the “Order”).

6. *See* U.S. Department of Justice, “Former President and Former Chief Legal Officer of Publicly Traded Fortune 200 Technology Services Company Indicted in Connection with Alleged Multi-Million Dollar Foreign Bribery Scheme,” Press Rel. No. 19-127 (Feb. 15, 2019), https://www.justice.gov/opa/pr/former-president-and-former-chief-legal-officer-publicly-traded-fortune-200-technology.

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seeking discovery from third parties (including Cognizant). The trial on the SEC's complaint was stayed pending the criminal trial.

Cognizant began its internal investigation in early 2016. In August of that year, the company's outside counsel interviewed a senior Cognizant employee who allegedly implicated Coburn and Schwartz in an improper payment. In late August 2016, Cognizant demanded that Coburn and Schwartz sit for interviews at which they were allowed to have lawyers present, but those lawyers were not permitted to take notes or ask questions.

> "[A]ccording to the district court … neither government policy strongly incentivizing companies to focus investigations on individuals nor deliberate tailoring of an internal investigation in response to those incentives renders a company a state actor."

At the beginning of September, Cognizant's attorneys contacted the DOJ and disclosed the internal investigation. Cognizant interviewed Mr. Schwartz a second time (under the same ground rules) three weeks later. During those three weeks, counsel for Cognizant was in frequent contact with the DOJ and was considering terminating both Schwartz and Coburn, although it did not consult with DOJ regarding their continued employment and DOJ did not request that Cognizant refrain from taking such action. Cognizant sought a second interview with Coburn and a third interview with Schwartz, but both men then resigned.[7] DOJ began taking investigative steps shortly after being contacted by Cognizant and began independently interviewing witnesses in February 2017.[8]

Cognizant's internal investigation took place shortly after DOJ's September 2015 release of the "Yates Memo," which required companies to provide all relevant facts relating to individuals responsible for corporate misconduct in order to qualify for any cooperation credit at all,[9] and during the pendency of the DOJ's "Pilot Program" offering leniency to companies that voluntarily disclosed FCPA violations, fully cooperated with the government investigation, and remediated those violations.[10]

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7. Order at 3-5.
8. *Id.* at 8-9.
9. Memorandum from Sally Quillian Yates, Deputy Attorney General, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.
10. U.S. Department of Justice, Criminal Division, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (Apr.5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

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(The Pilot Program was subsequently formalized into the DOJ's Corporate Enforcement Policy.)[11] Cognizant's internal investigation–including its interviews of Coburn and Schwartz–took place with full knowledge of what was then recent DOJ policy very strongly encouraging internal investigations to focus on individuals. In their first communication with DOJ at the beginning of September 2016, counsel for Cognizant specifically requested inclusion in the Pilot Program.[12]

Over the course of the next two and a half years, Cognizant continued to actively cooperate with DOJ's investigation, at a level that eventually led to a declination by DOJ. The cooperation included detailed downloads of witness interviews, leading to Judge McNulty's finding in 2022 that the company had waived both attorney-client and work product privilege over materials related to interviews conducted during the internal investigation, including any documents or communications that formed the basis of any presentation to the DOJ.[13]

Cooperation and the *Coburn* trial

In pretrial motions, both Coburn and Schwartz raised the issue of the scope of a company's cooperation with the government's investigation in seeking discovery from Cognizant as well as a foreign company which had also cooperated with the investigation. Defendants argued that DOJ had "outsourced" its investigation to both companies and applied for a subpoena pursuant to Federal Rule of Criminal Procedure 17 seeking discovery about each company's internal investigation, including but not limited to communications between the companies' counsel and DOJ. Judge McNulty granted the application narrowly, only insofar as it related to the interviews of the defendants.[14] Opposition to those Rule 17 subpoenas led to Judge McNulty's 2022 order finding a broad waiver of privilege by Cognizant and lack of jurisdiction over the foreign company.[15] After receiving additional documents from Cognizant relating to its internal investigation, Coburn and Schwartz moved to suppress the statements they made to Cognizant's attorneys during their interviews as being compelled by an investigation that was attributable to the government (the "*Garrity* motion"). They also sought to compel the government to search Cognizant's files for exculpatory evidence, arguing that the government had constructive possession of those records due its supposed outsourcing of the investigation (the "*Brady* motion").

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11. Paul R. Berger, Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, " U.S. Department of Justice Issues New FCPA Guidance and Launches Pilot Enforcement Program," FCPA Update, Vol. 7, No. 9 (Apr. 2016), https://www.debevoise.com/insights/publications/2016/04/fcpa-update-april-2016.
12. Order at 4.
13. *See* Levine et al., *supra* note 1.
14. *United States v. Coburn*, Docket No. 96, Case 2:19-cr-00120-KM (filed Sept. 14, 2020)
15. *See supra* n.3.

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After a two-day hearing on the motions, which saw both company counsel and DOJ prosecutors testify, Judge McNulty ruled against the defendants on July 20, 2023, finding that the incentive created by the Pilot Program to cooperate, and the close cooperation that followed, did not render Cognizant a government actor. The court concluded that two of the three interviews were conducted before the DOJ was aware of the internal investigation and that there was no documentary or testimonial evidence that the company took direction from the government during the last interview sufficient to convert the investigation into one directed by the government. The court also declined to compel DOJ to search Cognizant's internal files for exculpatory evidence, finding that DOJ did not have the required constructive possession of the company's files.

The *Garrity* Motion

The 1967 Supreme Court case *Garrity v. State of New Jersey*[16] involved police officers who were subject to an internal investigation during the course of which they were compelled to sit for interviews, thereby "given the choice to forfeit their jobs or to incriminate themselves." Likening the compelled interviews to the interrogation practices in the then-recent *Miranda* decision, the court held that public officials cannot force employees to forfeit their Fifth Amendment right against self-incrimination on threat of termination.[17]

In May 2019, in *United States v. Connolly*,[18] a Southern District of New York court held that the *Garrity* reasoning could apply to internal investigations by private companies if the government "outsources" an investigation to a company and its counsel by directing the company's internal investigation. Any statements collected in that investigation would be inadmissible, having been unlawfully compelled in violation of the Fifth Amendment. *Connolly* involved a white-collar prosecution arising out of the CFTC's investigation of a bank's manipulation of the LIBOR interest rate. At the CFTC's insistence, the bank commenced a "voluntary" internal investigation by external counsel. During the investigation, the CFTC and other government agencies asked the bank's counsel to conduct specific interviews, including requesting that external counsel approach interviews as if he was a prosecutor.[19] The CFTC also required ongoing reporting by the company of its investigation, and the DOJ monitored interviews and waited for the internal investigation to develop before launching its own. As a result of the government's

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16. 385 U.S. 493 (1967).
17. *Id.* at 497.
18. No. Cr. 0373 (CM), 2019 WL 2120523 (S.D.N.Y. May 2, 2019).
19. *Id.* at *3-*4.

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direction to and coordination with a private employer's investigation, the *Connolly* court ruled that the *Garrity* rule "applies with equal vigor to private conduct where the actions of a private employer in obtaining statements are 'fairly attributable to the government.'"[20]

In *Coburn*, Judge McNulty reached an opposite conclusion, finding that Cognizant's investigation was not outsourced by the government. Judge McNulty agreed that interviews taking place in an internal investigation where company policies required cooperation with internal investigations on threat of termination were "involuntary" and "compelled."[21] He also found that Cognizant's decision to self-disclose and investigate its employees was made in "hope of benefit under the Yates Memo and the FCPA Pilot Program," and that Cognizant "evidently tailored the investigation in part to fit the priorities stated in the [Pilot] Program and the Yates Memo."In Judge McNulty's view, the fact that Cognizant tailored its investigation to generally applicable government policies, both in terms of focus and in terms of degree of cooperation, did not mean that the government had outsourced its investigation to Cognizant, because the government had not engaged in the same type of specific interventions that existed in the *Connolly* case. In *Coburn*, the government did not even learn of the investigation until Cognizant voluntarily disclosed the matter in September 2016, after its initial interview with Schwartz and only interview with Coburn.[22] Although counsel for Cognizant turned over notes of its interviews, including those of the defendants, to the government, shared updates on its investigation, and responded to DOJ inquiries, the court found that there was "literally no document or testimony establishing that the Government provided any direction to Cognizant" in connection with the interviews with the defendants.[23]

The *Brady* Motion

Defendants also asserted that the close cooperation between Cognizant's investigation and the government gave the government constructive possession of Cognizant's files, thereby requiring the government to search Cognizant's files (beyond those provided to the government by Cognizant) for potentially exculpatory evidence. Judge McNulty denied defendants' motion, once again on the grounds that close cooperation with a government investigation does not eliminate the distinction between the government and a private party.

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20. *United States v. Connolly*, No. 16 CR. 0370 (CM), 2019 WL 2120523, at *10 (S.D.N.Y. May 2, 2019) (quoting *United States v. Stein*, 541 F.3d 130, 152 n.11 (2d Cir. 2008)).
21. Order at 11-12.
22. *Id.* at 12.
23. *Id.* at 13.

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With regard to the *Brady* motion, the question before the court was whether the government had "constructive possession" of the company's investigation records. The Third Circuit has held that constructive possession is determined by three factors: "(1) whether the party with knowledge of the information is acting on the government's 'behalf' or is under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive possession has 'ready access' to the evidence."[24]

"With regard to interviews and the collection of data from personal devices, companies should consider clearly establishing expectations for internal investigations in company policies. Pre-existing guidelines allow companies to demonstrate and maintain the independence of internal investigations…."

As with the *Garrity* motion, Judge McNulty found that, absent specific directions from the government, a company acting in its own interest to cooperate with the government is not acting on behalf of the government. Indeed, the fact that Cognizant asserted privilege with respect to certain documents covered by government subpoenas demonstrated that Cognizant, despite having interests closely aligned with the government, was an independent actor. Nor does cooperation with a government investigation make the government part of the internal investigation "team," as long as the government takes independent investigative steps.[25] Nor did extensive sharing of documents with the government mean that the government had "ready access" to Cognizant's files, as demonstrated by the fact that many of those documents were shared pursuant to a subpoena.[26]

Key Takeaways

How the government assesses cooperation, how companies structure internal investigations in response to those assessments, and how employees react to internal investigations are evolving areas of FCPA practice. This is especially true given Deputy Attorney General Lisa Monaco's reiteration of DOJ's focus on individual accountability, a theme central to the Yates Memo.[27] While the *Connolly* case caused a

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24. *Id.* at 18 (quoting *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006)).

25. *Id.* at 20.

26. *Id.* at 21.

27. Debevoise In Depth, "DOJ Revises Corporate Criminal Enforcement Policies" (Nov. 1, 2021), https://www.debevoise.com/insights/publications/2021/11/doj-revises-corporate-criminal-enforcement.

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stir when it was issued in 2019, Judge McNulty's order in the *Coburn* case suggests that *Connolly* involved a unique set of circumstances. With DOJ being transparent about what focus it expects from internal investigations and the FCPA bar being replete with former prosecutors, the chances of the government ever again "outsourcing" an investigation in the manner described in *Connolly* is low. That said, the Order provides some reminders about best practices in investigations and cooperation.

First, in finding that Cognizant acted independently in interviewing Coburn and Schwartz, Judge McNulty noted that cooperation was required by Cognizant's internal policies. With regard to interviews and the collection of data from personal devices, companies should consider clearly establishing expectations for internal investigations in company policies. Pre-existing guidelines allow companies to demonstrate and maintain the independence of internal investigations and are especially important in circumstances where at-will employment does not apply.

Second, companies should feel comfortable refusing to waive privilege. Another piece of evidence demonstrating Cognizant's independence was its assertion of privilege–yet another reason for a company to decline to waive privilege if it finds itself in the rare situation in which the government pressures the company to do so.

Third, and ironically, the Order provides cooperating companies an argument for discussions with the government concerning the timeliness of self-reporting. DOJ's Corporate Enforcement Policy states that to be eligible for credit, corporations must disclose misconduct "within a reasonably prompt time after becoming aware of the offense."[28] While DOJ's declination letter noted that Cognizant made a voluntary self-disclosure "within two weeks of the Board learning of the criminal conduct,"[29] the Order is clear that the company had commenced its investigation earlier and waited to interview key employees before self-reporting. Although timeliness is important, taking time to understand allegations is a sign of independence, not delay.

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28. JM § 9-47.120.

29. Letter from Courtney Howard and David A. Last to Karl H. Buch and others, "Re: Cognizant Technology Solutions Corporation," (Feb. 13, 2019), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations.

DOJ Pursues Dual Prosecutions in *Aguilar* to Address Venue Challenges

DOJ's current prosecution of a Texas oil trader on FCPA and money laundering charges illustrates novel venue issues that can arise in complex FCPA cases, as well as related challenges for both prosecutors and defendants. Quite unusually, DOJ is prosecuting Javier Aguilar in separate cases in Brooklyn and Houston based on evidence and underlying conduct that significantly overlap. DOJ initially brought the case in Brooklyn, despite Houston being the main locus of relevant U.S. conduct. Later, DOJ filed a superseding indictment, adding charges but lacking a basis for venue, which led to the dismissal of certain new charges and then refiling in Houston. With the trial in Brooklyn fast approaching, the parties are locked in heated litigation over various issues arising from the overlapping charges. As the two cases unfold, the prosecutorial stakes are high in terms of whether DOJ's choice of venue will impact the outcome and ultimately the government's strategy on venue in future FCPA cases.

The Vitol Resolution and the Original Indictment of Aguilar

In December 2020, Vitol Inc. – the U.S. affiliate of a multinational energy trading firm – agreed to pay $135 million and entered into a deferred prosecution agreement to resolve a DOJ investigation into FCPA violations arising from schemes to bribe officials in Brazil, Ecuador, and Mexico.[1] The charges were filed in the Eastern District of New York ("EDNY"), and Vitol agreed to waive any objection as to venue.[2]

Separately, in September 2020, DOJ indicted a U.S.-based Vitol manager and oil trader, Javier Aguilar, in EDNY, for his alleged role in the Ecuador scheme.[3] DOJ alleged that Aguilar participated in a scheme to pay approximately $870,000 in bribes to Ecuadorian officials in exchange for their assistance in helping Vitol obtain a $300-million contract for fuel oil from Ecuador's state-owned oil company, Petroecuador.[4] Aguilar was charged with one count of conspiring to violate thet

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1. U.S. Department of Justice, "Vitol Inc. Agrees to Pay over $135 Million to Resolve Foreign Bribery Case" (Dec. 20, 2023), https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case.
2. *United States v. Vitol Inc.*, Deferred Prosecution Agreement ¶ 1 (Dec. 3, 2020).
3. Indictment, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. Sept. 22, 2020).
4. *Id.* ¶ 2.

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FCPA and one count of conspiring to commit international money laundering. The money laundering charge was predicated on underlying alleged violations of the FCPA as well as Ecuadorian bribery law.

Aguilar is a citizen of Mexico and worked in Houston, which was also Vitol's principal place of business in the United States. The indictment alleged that venue was proper in EDNY, apparently based on emails and wire transfers, though provided scant detail.

The Superseding Indictment

On December 2, 2022, more than two years after the original indictment's filing, and about seven months before trial was scheduled to commence, the government brought a superseding indictment against Aguilar, alleging that he also participated in the Mexico scheme.[5] DOJ charged Aguilar with FCPA and international money laundering violations for conspiring to pay bribes to Mexican officials in exchange for assistance in securing a contract for Vitol with a subsidiary of Mexico's state-owned oil company, PEMEX.

Although the superseding indictment was returned in EDNY, it did not allege any basis for venue in EDNY as to the Mexico-related FCPA charges. Rather, it alleged that venue was proper in the Southern District of Texas ("SDTX") as to these charges. Also, instead of adding a separate money laundering charge based on the Mexico scheme, DOJ charged a *single* money laundering conspiracy, encompassing both the Ecuador and Mexico schemes, claiming that venue for this charge was proper in EDNY.

In sum, the superseding indictment therefore charged the following:

- Count One, an FCPA conspiracy as to the Ecuador scheme (EDNY venue);
- Count Two, an FCPA conspiracy as to the Mexico scheme (SDTX venue);
- Counts Three and Four, substantive FCPA offenses as to the Ecuador and Mexico schemes, respectively (SDTX venue); and
- Count Five, a money laundering conspiracy as to both the Ecuador and Mexico schemes (EDNY venue).

DOJ likely hoped that Aguilar would waive venue as to Counts Two through Four, preferring to fight DOJ in a single venue rather than face multiple charges simultaneously in two different courts. But Aguilar took a different tack.

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5. Superseding Indictment, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. Dec. 2, 2022).

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The Venue Dispute

In March 2023, Aguilar moved to sever the Mexico-based charges and, once severed, dismiss them for lack of venue.[6] In response, the government acknowledged that "venue for Counts Two, Three and Four does not lie in this District" and argued that Aguilar was "free to move for the dismissal or transfer" of those counts, but was not free to make such a motion "conditional" on the success of his motion for severance.[7] In his reply, Aguilar asserted that the court should dismiss, for lack of venue, not only Counts Two and Four, but also Count Five (the money laundering charge) insofar as it was based on the Mexico-related allegations.[8]

"No matter how the court rules, the result here is very unusual: DOJ simultaneously prosecuting a defendant in two different courts on overlapping charges."

The court denied Aguilar's motion for severance and required him to make clear precisely what relief he was seeking: transfer only the Mexico-related charges to SDTX or the entire case to SDTX, or waive venue and proceed to trial in EDNY on all charges. Moreover, the court made clear that, even if the Mexico-related charges were transferred or dismissed, "evidence related to those charges will likely be admissible under Rule 404(b) in a trial [in EDNY] on only the Ecuador-related charges."[9]

In late April 2023, Aguilar renewed his motion to dismiss Counts Two and Four (the Mexico scheme FCPA charges) and part of Count Five (the money laundering charge insofar as it was based on Mexico-related conduct).[10] The government consented to the dismissal of Counts Two and Four, but objected to the dismissal of

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6. Defendant's Motion to Sever and Dismiss or Transfer the Mexico-Related Charges, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. March 3, 2023).
7. Memorandum of Law in Opposition to the Defendant's Motion to Sever and Dismiss or Transfer the Mexico-Related Charges at 23-26, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. March 17, 2023).
8. Reply Memorandum of Law in Support of Defendant's Motion to Sever and Dismiss of Transfer the Mexico-Related Charges, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. March 24, 2023).
9. Memorandum & Order at 16, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. April 12, 2023).
10. Defendant's Renewed Motion to Dismiss the Mexico-Related Charges for Lack of Venue at 2, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. April 27, 2023).

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any part of Count Five, arguing that this count charges a *single* money laundering conspiracy, encompassing both the Ecuador- and Mexico-related conduct, and that venue need not be established as to each "part" of an offense.[11]

On May 31, 2023, the court dismissed Counts Two and Four without prejudice, but declined to dismiss any part of Count Five.[12] Citing the venue provisions of the money laundering statute (18 U.S.C. § 1956(i)), the court reasoned that DOJ's allegation of a single money laundering conspiracy involving the proceeds of both the Mexico and Ecuador schemes, and allegedly being effected through financial transactions in EDNY, was sufficient to state a proper basis for venue as to Count Five. Trial in EDNY is set to commence on January 2, 2024.

The New Indictment

On August 3, 2023, DOJ returned an indictment against Aguilar in SDTX, charging him with (*i*) the Mexico-related FCPA charges that were dismissed from the EDNY case, (*ii*) related money laundering charges that appear to be based on essentially the same conduct underlying Count Five of the EDNY case, which remains pending, and (*iii*) a related violation of the Travel Act.[13]

Aguilar promptly moved in EDNY to dismiss the Mexico-related portion of Count Five, arguing that it is impermissibly duplicitous and unnecessarily prejudicial in light of the newly filed SDTX charges.[14] The government filed its opposition on August 21, 2023.[15]

It remains to be seen how the court will rule. But, at this point, it appears Aguilar will proceed to trial in EDNY in early January, facing FCPA charges on the Ecuador scheme and money laundering charges on both the Ecuador and Mexico schemes,

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11. Memorandum of Law in Response to the Defendant's Renewed Motion to Dismiss at 4, 9-14, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. May 15, 2023).
12. Memorandum & Order at 1-4, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. May 31, 2023).
13. Indictment, *United States v. Aguilar Morales*, No. 4:23-CR-335 (S.D. Tex. Aug. 3, 2023).
14. Defendant's Motion to Dismiss the Mexico-Related Portion of Count Five as Duplicitous, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. Aug. 9, 2023).
15. Memorandum of Law in Response to the Defendant's Motion to Dismiss the Mexico-Related Portion of Count Five as Duplicitous, *United States v. Aguilar*, No. 1:20-CR-390 (E.D.N.Y. Aug. 21, 2023).
16. Motion to Designate Case as Complex and Exclude Time at 4, *United States v. Aguilar Morales*, No. 4:23-CR-335 (S.D. Tex. Aug. 3, 2023).

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and, separately, will proceed to trial in SDTX on FCPA and money laundering charges related to the Mexico scheme. The SDTX trial is currently set for mid-October 2023, but the government recently noted that the defense plans to request, without any objection from the government, an adjournment of the trial date until after the EDNY trial is complete.[16] In any event, given the broad standards of Rule 404(b), evidence of both the Ecuador and Mexico schemes likely will be admitted in both trials.

Conclusion

No matter how the court rules, the result here is very unusual: DOJ simultaneously prosecuting a defendant in two different courts on overlapping charges. This is partly a consequence of DOJ's decision to bring the original indictment in Brooklyn rather than Houston; partly a consequence of Aguilar's decision not to consent to venue in EDNY (though that is absolutely his constitutional right); and partly a consequence of the complex nature of the alleged foreign bribery-related conduct at issue.

We will be watching closely to see how the cases unfold and to evaluate what lessons may be drawn for future FCPA prosecutions. In particular, it will be interesting to see how, if at all, DOJ's venue decisions impact its prosecutorial success, and whether the government adopts a different strategy in future cases to avoid having an indictment split across multiple districts.

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