Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

NG CHONG HWA *also known as* ROGER NG,

Defendant.

FILED UNDER SEAL

MEMORANDUM & ORDER
18-CR-538 (MKB)

MARGO K. BRODIE, United States District Judge:

On October 3, 2018, a grand jury returned an Indictment against Defendant Ng Chong Hwa, also known as Roger Ng, charging him with two counts of conspiracy to violate the Foreign Corrupt Practices Act in violation of 15 U.S.C. § 78 *et seq.* (the "FCPA") and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956 *et seq*. (Indictment ¶¶ 58–65, Docket Entry No. 1.)

On October 30, 2020, Ng moved to dismiss the Indictment and for other relief, arguing (1) lack of venue; (2) failure to include all essential elements of conspiracy to commit bribery under the FCPA in Count One; (3) failure to allege that he conspired to circumvent a set of controls cognizable under the FCPA in Count Two; and (4) failure to provide the constitutional requirements and to properly allege the elements of conspiracy to commit money laundering in Count Three. (Def.'s Mot. to Dismiss ("Def.'s Mot."), at i–iii, Docket Entry No. 42; Def.'s Mem. in Supp. of Def.'s Mot. ("Def.'s Mem.") 28–82, Docket Entry No. 46.) In addition, Ng argues that the Court should (1) modify the Deferred Prosecution Agreement between the Government and The Goldman Sachs Group, Inc. (the "Goldman Sachs Group"), entered into on October 22, 2020 (the "DPA"), because certain provisions will violate his constitutional rights at trial, (2) order the Government to promptly provide *Brady* material in its possession, and [redacted]

On November 13, 2020, prior to filing its opposition, the Government sent Ng a letter summarizing "certain representations and arguments made by legal counsel for [the] Goldman [Sachs] Group, its affiliates[,] and subsidiaries in the course of [their] interactions with the

[G]overnment" during the Government's investigation and plea discussions leading up to the DPA (the "November 2020 Letter"). (November 2020 Letter, annexed to Def.'s Reply Mem. in Supp. of Def.'s Mot. as Ex. 1, Docket Entry No. 58-1.)

The Government opposed Ng's motion on December 4, 2020, (Gov't Opp'n to Def.'s Mot. ("Gov't Opp'n"), Docket Entry No. 54), and superseded the Indictment on December 9, 2020, (Superseding Indictment, Docket Entry No. 55).

On December 22, 2020, Ng responded to the Government's opposition and replied to the Superseding Indictment and the November 2020 Letter. (Def.'s Reply Mem. in Supp. of Def.'s Mot. ("Def.'s Reply"), Docket Entry No. 58.) On January 13, 2021, the Government filed a sur-reply, (Gov't Sur-Reply to Def.'s Reply ("Gov't Sur-Reply"), Docket Entry No. 59), and, on January 22, 2021, Ng filed a reply to the Government's sur-reply, along with affirmations from his attorneys responding to new facts that he argues the Government asserted in its sur-reply, (Def.'s Reply to Sur-Reply, Docket Entry No. 60; Affirmation of Marc A. Agnifilo, Esq. ("Agnifilo Affirmation"), Docket Entry No. 61; Affirmation of Teny R. Geragos, Esq., Docket Entry No. 62).

For the reasons discussed below, the Court denies Ng's motion and other requests for relief.

I. Factual background

a. Relevant entities

The "Goldman Sachs Group[1] [is] a global investment banking, securities[,] and investment management firm incorporated in Delaware and headquartered in New York . . . ."

[1] The original Indictment referred to the Goldman Sachs Group and its subsidiaries and affiliated entities collectively as "U.S. Financial Institution #1." (Indictment ¶ 3.)

(Superseding Indictment ¶ 3.) The "Goldman Sachs Group had a class of securities registered pursuant to [s]ection 12 of the Securities and Exchange Act of 1934 and was required to file reports with the U.S. Securities and Exchange Commission [('SEC')] under section 15(d) of the Exchange Act." (*Id.* (citations omitted).) "As such, [the] Goldman Sachs Group was an 'issuer' within the meaning of the FCPA." (*Id.*) The "Goldman Sachs Group conducted its activities primarily through various subsidiaries and affiliates (collectively referred to [in the Superseding Indictment] as 'Goldman')." (*Id.*)

Ng is "a Malaysian national who was employed as a Managing Director by various subsidiaries of [the] Goldman Sachs Group and acted as an agent and employee of [the] Goldman Sachs Group from approximately 2005 to May [of] 2014." (*Id.* ¶ 2.) "Ng also owned stock in [the] Goldman Sachs Group." (*Id.*) "Ng was thus an 'employee,' 'agent,' and 'stockholder' of an 'issuer' within the meaning of the [FCPA]." (*Id.*) Ng's co-conspirator, Co-Conspirator #1 ("CC1"), was also "employed by various subsidiaries, and acted as an agent and employee, of [the] Goldman Sachs Group." (*Id.* ¶¶ 3, 7.) "Prior to his separation from Goldman . . . , [CC1] was the Southeast Asia Chairman and a Participating Managing Director of [the] Goldman Sachs Group." (*Id.* ¶ 7.)

In 2009, the Malaysian Ministry of Finance took federal control of the Terengganu Investment Authority ("TIA"), (*id.* ¶ 1), which, until then, had been the sovereign wealth fund of the state of Terengganu, Malaysia, (*id.* ¶ 4). In doing so, the Malaysian government created 1Malaysia Development Berhad ("1MDB") — a strategic investment and development company wholly owned and controlled by the Malaysian government. (*Id.*) "1MDB was created to pursue investment and development projects for the economic benefit of Malaysia and its people, primarily relying on debt to fund these investments." (*Id.*) 1MDB was overseen by senior

Malaysian government officials, was controlled by the Malaysian government, and performed a government function on behalf of Malaysia, making 1MDB an "instrumentality" of a foreign government within the meaning of the FCPA. (*Id.*) 1MDB Officials #1, #2, and #3 were high-ranking officials at 1MDB, (*id.* ¶¶ 10–12), and, even higher up, Malaysian Official #1 was a Malaysian national and high-ranking official in the Malaysian government and Ministry of Finance, with high-level authority to approve 1MDB business, (*id.* ¶ 13). Co-Conspirator #3 was a Malaysian national who "was a close relative" of Malaysian Official #1 and owned U.S. Motion Picture Company #1, "a U.S. legal entity in the business of film production." (*Id.* ¶ 9.)

"Foreign Agency A was an investment fund wholly owned by the Government of Abu Dhabi," established with "a mandate to advance Abu Dhabi's natural petroleum wealth for the development of the emirate." (*Id.* ¶ 5.) Like 1MDB, Foreign Agency A was overseen by senior Abu Dhabi government officials, was controlled by the government of Abu Dhabi, and performed a government function on behalf of Abu Dhabi, making Foreign Agency A an "instrumentality" of a foreign government within the meaning of the FCPA. (*Id.*) "Foreign Investment Firm A, a subsidiary of Foreign Agency A, was a private joint stock company incorporated under the laws of Abu Dhabi." (*Id.* ¶ 6.) Abu Dhabi Official #1 was a high-ranking official of both Foreign Agency A and Foreign Investment Firm A. (*Id.* ¶ 14.) Co-Conspirator #2 was a U.S. citizen and a high-ranking official of Foreign Investment Firm A. (*Id.* ¶ 8.)

Defendant Low Taek Jho, also known as Jho Low ("Low"), is a Malaysian national who advised on the creation of TIA and who "worked as an intermediary in relation to 1MDB and other foreign government officials on numerous financial transactions and projects involving [t]he Goldman Sachs Group" and others, although he did not hold a formal position at 1MDB and was never employed by the governments of Malaysia or Abu Dhabi. (*Id.* ¶ 1.)

b. The alleged scheme

i. Overview

The Superseding Indictment alleges that Ng, CC1, and other employees and agents of the Goldman Sachs Group used Low's "close personal relationships with government officials in Abu Dhabi and Malaysia, including Low's relationship with Malaysian Official #1," as part of a conspiracy to obtain and retain business from lMDB through the promise and payment of bribes and kickbacks to the officials from three bond offering transactions underwritten by Goldman and referred to internally at Goldman as "Project Magnolia," "Project Maximus," and "Project Catalyze."[2] (*Id.* ¶¶ 15–17, 24.) As part of the scheme and in order to get the deals, Ng, CC1, and other employees and agents of the Goldman Sachs Group also allegedly conspired to circumvent its internal accounting controls by concealing Low's involvement in the efforts to obtain and retain 1MDB business — efforts which, if known, may have triggered an investigation into the business relationship with Low and jeopardized the bond deals. (*Id.* ¶¶ 19–22.) The bond deals ultimately raised a total of approximately $6.5 billion for 1MDB and "earned Goldman approximately $600 million in fees and revenue[s]," resulting in large bonuses from Goldman for Ng and others and enhancing their professional reputations at Goldman. (*Id.*

[2] Ng argues that his "only meaningful role" in this criminal scheme "was that he introduced Low to [CC1] at a time when neither he nor anyone else knew Low was simply a criminal," and that CC1 "join[ed] forces with Low" to become "part of what in reality was a massive Ponzi scheme that Low commenced in 2007," rather than an FCPA bribery. (Def.'s Mem. 1–2; *see also id.* at 3, 5–14 (describing Low as "undisputed architect of what ended up being one of the largest criminal schemes in the history of civilization" and providing information about Low and CC1 that Ng alleges is missing from the Superseding Indictment).) Ng contends that the Government "steers clear" of many of these facts, which have been set forth "in scores of other filings by the U.S. Department of Justice," because, by casting the issue as a Malaysian-based fraud scheme rather than an FCPA violation concerning the Goldman Sachs Group, the United States "would have missed out on the massive payday from October 22, 2020, when the Goldman Sachs Group entered into [the DPA] and agreed to pay $2.9 billion." (*Id.* at 2.)

¶ 17.) Although the stated purposes of the $6.5 billion raised by the bond transactions was to support 1MDB projects for the benefit of the Malaysian people, Ng and others allegedly misappropriated more than $2.7 billion, distributing it in part as bribes and kickbacks to government officials and to themselves. (*Id.* ¶¶ 15, 18, 24.)

ii. Beginning of the scheme

Beginning in 2009, Ng, CC1, and others began to conspire to "circumvent the Goldman Sachs Group's internal accounting controls and win business for Goldman." (*Id.* ¶ 21.) In this regard, they collaborated on the creation of, and potential fundraising for, the TIA. (*Id.*) On January 15, 2009, a high-ranking official at TIA advised Low, Ng, and CC1 that it was "best to get [Low] involve[d] at every stage" of the TIA transaction. (*Id.* ¶ 63(a); *see also id.* ¶ 1 (stating that Low advised on the creation of the TIA).) On January 27, 2009, Ng and CC1 discussed via email whether to disclose Low's involvement in this transaction to the Intelligence Group at Goldman and decided not to disclose it.[3] (*Id.* ¶ 63(b).) Rather, while working on the deal, Ng

[3] Ng maintains that Goldman was "well aware" of his and CC1's efforts to "court[] Low" in January of 2009 "to secure work for Goldman," for several reasons. (*Id.* at 15.) First, "Ng logged it into the Client Interaction System, as he was supposed to." (*Id.* (first citing Complaint ¶ 23, *United States v. Leissner*, No. 18-CR-439 (E.D.N.Y. June 7, 2018), Docket Entry No. 1; and then citing GS-1MDB-00289094).) Second, regarding the January 27, 2009 decision not to disclose Low's involvement, the Intelligence Group had been asked three days prior to initiate a check to proceed with the TIA transaction, and Ng had in turn been asked to "advise on the question with regard to whether there was any finder," at which point he reached out to CC1, who was his supervisor at the time, stating that the Intelligence Group asked

> if we have a consultant do we run a check on [Low] now or later? We don't have a deal structure or know how much we are making yet. Is it possible to advise [the Intelligence Group] down the road we have a consultant or we should say there is one but we don't have the engagement terms etched out yet?

(*Id.* at 16 (first alteration in original) (quoting GS-1MDB-01967707).) In response, CC1 instructed Ng "leave [the Intelligence Group] to when we know how this structure works." (*Id.* (quoting GS-1MDB-01967707).) By February 5, 2009, the Intelligence Group completed its

and CC1 selectively disclosed to some of their coworkers that they were "working with Low as an intermediary to secure the deal," knowing that wider disclosure could have triggered steps to be taken by personnel in the Goldman Sachs Group's Compliance Group and Intelligence Group to investigate the business relationship with Low and possibly jeopardize the deal. (*Id.* ¶ 21.) Later in 2009, the Malaysian Ministry of Finance took control of TIA, creating 1MDB. (*Id.* ¶ 4.) During the TIA transaction and afterwards, Ng, CC1, Low, and others conspired to develop further business for Goldman, including with 1MDB. (*Id.* ¶ 22.) Notwithstanding Low's public denials about any involvement with 1MDB during this time, Ng, CC1, and others knew that Low remained close to various 1MDB officials and government officials in Malaysia and Abu Dhabi, including Malaysian Official #1, and they worked with him for that reason. (*Id.*)

iii. Low's attempts to become Goldman's client

Between September of 2009 and March of 2011, Ng, CC1, and others supported three attempts to make Low a formal client of Goldman, in part because they believed that Low "would work to deliver lucrative business deals, including from 1MDB, for the ultimate benefit of Goldman" and themselves. (*Id.* ¶ 23.) Ultimately, the attempts were unsuccessful because personnel in the Goldman Sach's Group's Compliance Group and Intelligence Group refused to approve the business relationship between Low and Goldman based in part on concerns they had about the source of Low's wealth.[4] (*Id.*) Although personnel within the Compliance Group and

---

review of TIA, writing "[f]rom a reputational perspective, we have not noted any show-stopping issues for the proposed transaction." (*Id.* (quoting GS-1MDB-00289134).)

[4] Ng contends that he "was the reason Goldman knew what it did," noting that he referred Low for a Private Wealth Management ("PWM") account at Goldman's Swiss Office in September of 2009 and told the PWM banker that Low was "currently our partner in a lot of transactions in Malaysia. Largely the Mideast and Malaysia relationship," and that "[h]e is close to Saudi, Kuwait and Abu Dhabi royal family who is chairman of mubadalla. Wealth probably

Intelligence Group communicated the rejection of Low's application to Ng,[5] CC1, and others, they continued to conspire with Low based on their belief that he would help deliver lucrative deals. (*Id.*)

iv. The three bond deals with 1MDB

Throughout approximately 2012 to 2014, Ng and others conspired to obtain and retain business from lMDB for Goldman through the promise and payment of bribes to government officials of Malaysia and Abu Dhabi — in particular, three bond offering transactions underwritten by Goldman for 1MDB and referred to internally at Goldman as "Project Magnolia," "Project Maximus," and "Project Catalyze." (*Id.* ¶¶ 16–17, 24.)

---

in the c.usd200mm." (*Id.* at 13, 16–17.) Ng's statements were forwarded to the Compliance Surveillance Strategy Group at Goldman, as well as to its Anti-Money Laundering Compliance Group, and Goldman began doing its due diligence on Low. (*Id.* at 16.) On March 13, 2010, in the course of conducting due diligence, a regional head of compliance at Goldman wrote an email to others in the department regarding Low, noting that "[o]f over [ten] senior well-placed sources interviewed, none was aware of [Low] nor could substantiate his claims. Several encouraged exercising caution — including . . . Ng, who advised caution considering what he knew and had heard." (*Id.* at 17–18 (quoting GS-1MDB-01366798); *see also id.* at 18 & n.10 (collecting several warnings Ng gave to Goldman regarding Low, including report titled "Red Flag Summary II" presented to highest levels of compliance within the institution noting that "Roger Ng advised caution in accepting [Low's] claims at face value" and that Ng "did not find [Low's] claims to be credible and recommended requiring very specific verification of all claims" (alterations in original)).)

[5] Ng maintains that Low's initial PWM application was rejected on June 25, 2010, "following a series of negative press articles and, notably, *no one at Goldman alerted Ng.*" (*Id.* at 19.) In addition, Ng maintains that the two additional attempts to make Low Goldman's client in 2011 were undertaken by his then-boss, CC1 — not him. (*See id.* at 19–20 ("There is no record of [CC1] informing Ng about his conversations with the senior employee [in which they concluded not to onboard Low for a project]. In fact, just a few days later, [CC1] referred Low for another PWM account at Goldman's Singapore Office. . . . Ultimately, Low's PWM-Singapore application was rejected."); *see also id.* at 25–26 (further discussing CC1's attempts to onboard Low).)

1. Project Magnolia

In early 2012, Low introduced Ng and CC1 to a high-ranking 1MDB official via email for purposes of discussing 1MDB's purchase of an asset. (*Id.* ¶ 25.) Shortly thereafter, Low, Ng, CC1, and 1MDB Officials #1 and #3 met in Malaysia to discuss 1MDB's proposed purchase of a Malaysian energy company ("Malaysian Energy Company A") and Goldman's ability to assist in obtaining financing for the purchase. (*Id.* ¶ 26.) At the meeting, it was agreed that Foreign Agency A — an entity wholly owned and controlled by the Abu Dhabi government — would need to guarantee the purchase to make the bond issuance acceptable to Goldman. (*Id.*) Ng and CC1, who were appearing on behalf of Goldman, understood Low to be acting as an intermediary between 1MDB, Malaysian Official #1, and other government officials from Abu Dhabi. (*Id.*)

In late February, at a follow-up meeting in London between Low, Ng, CC1, and 1MDB Official #3 — but not 1MDB Official #1 — Low explained that to obtain the necessary support for the financing and the guarantee from Foreign Agency A, "they would have to pay bribes to government officials in Malaysia and Abu Dhabi, including to Malaysian Official #1 and a high-ranking Abu Dhabi government official, to gain their approval for portions of the transaction."[6] (*Id.* ¶ 27.)

In March of 2012, 1MDB selected Goldman to be the sole bookrunner and arranger for the $1.75 billion bond deal — a transaction referred to internally at Goldman as "Project Magnolia." (*Id.* ¶ 29.) Following Goldman's formal engagement to work on Project Magnolia,

[6] Following the February 2012 meeting, Ng told another employee at Goldman about the plan to pay bribes to government officials in Malaysia and Abu Dhabi but understood and agreed with CC1 not to disclose this information to personnel within the Compliance Group, the Intelligence Group, or the committees that would review the proposed bond issuance. (Superseding Indictment ¶ 28.)

Ng continued to conspire with CC1 and others at Goldman to work with Low on the transaction, knowing that Low would pay bribes to government officials from Abu Dhabi to guarantee the transaction and that Low intended to use funds misappropriated from 1MDB's bond deal to pay the bribes to officials of both Malaysia and Abu Dhabi. (*Id.* ¶¶ 30–33.)

On March 23, 2012, Low met with a banker from a foreign financial institution in Los Angeles, California ("Foreign Financial Institution A"), during which meeting he explained Project Magnolia and discussed how proceeds from the bond deal would be sent to a shell company account at Foreign Financial Institution A owned and controlled by Low and another co-conspirator ("Shell Company Account #1"). (*Id.* ¶ 60(a).) Two days later, on March 25, 2012, Low, Ng, CC1, and others met in Los Angeles, California, and in New York, New York, to discuss, among other things, matters related to Project Magnolia. (*Id.* ¶ 60(b).) On April 21, 2012, Low, Ng, CC1, and others met with bankers from Foreign Financial Institution A in Singapore and discussed, among other things, "funds from Project Magnolia that would be sent to Shell Company Account #1." (*Id.* ¶ 60(c).) On May 20, 2012, CC1 asked "his close relative for the account details for a bank account in the name of" a shell company owned by the relative and controlled by both the relative and CC1 ("Holding Company #1 Account"). (*Id.* ¶ 35.) In May of 2012, near the closing of Project Magnolia, Ng continued to conspire with Low and CC1 to divert some of the funds from Project Magnolia into the bank accounts of shell companies that Ng, Low, and CC1 owned and controlled, and to keep some of these funds for their personal use. (*Id.* ¶ 34.)

On May 21, 2012, Project Magnolia closed, earning significant fees for Goldman and resulting in large year-end bonuses for Ng, CC1, and others who participated in obtaining and structuring the bond deal. (*Id.* ¶ 36.) After the deal closed, Goldman transferred part of the

proceeds via wire to 1MDB's wholly owned subsidiary from a place within the United States to a place outside of it, including through the Eastern District of New York. (*Id.* ¶ 37.) On May 22, 2012, approximately $577 million of the bond proceeds were transferred from the account of 1MDB's wholly owned subsidiary to Shell Company Account #1 — the shell company account owned and controlled by Low and a co-conspirator. (*Id.* ¶ 38.) Of the bond proceeds funneled into Shell Company Account #1, $295 million was then transferred to a foreign bank account in the name of another shell company owned and controlled by Low and a co-conspirator ("Shell Company Account #2"), (*id.* ¶ 39), and $133 million was transferred to an account at Foreign Financial Institution A opened in the name of a company owned and controlled by CC3, a close relative of Malaysian Official #1 ("Shell Company Account #3), (*id.* ¶ 41). Within the next three months, millions of the $295 million funneled into Shell Company Account #2 were transferred into Holding Company #1 Account via wire to and from the United States, and approximately $24 million of these funds were in turn transferred to a bank account owned by a relative of Ng.[7] (*Id.* ¶ 40.) In addition, between June 20, 2012, and November 20, 2012, $60 million of the $133 million funneled into Shell Company Account #3 were transferred to an account at a U.S. financial institution in Los Angeles, California, owned and controlled by a motion picture company owned in part by CC3 ("Holding Account #2"). (*Id.* ¶ 41.) The motion picture

[7] Ng notes that "[t]he Government alleges that $24 million was subsequently transferred from [an account owned and controlled by CC1 and his close relative] to an account owned by Ng's relatives." (Def.'s Mem. 20 (citing Indictment ¶ 40).) However, Ng argues, "this money was never transferred to Ng . . . [and] the Government does not allege that the money coming to Ng's in-laws was Ng's 'cut' or profits from Project Magnolia." (*Id.*) Instead, Ng contends that this money concerned unrelated business arrangements between Ng and CC1. (*See id.* at 20, 114–16.)

company's funds were used, among other things, to assist in the production of the film "The Wolf of Wall Street." (*Id.*)

2. Project Maximus

In May of 2012, as Project Magnolia was closing, Low, Ng, CC1, and others began to plan a second bond transaction known as "Project Maximus" to raise capital for 1MDB to purchase a second Malaysian power generation company.[8] (*Id.* ¶ 42.) As before, 1MDB awarded this bond offering, which was structured similarly to the first but with an indirect guarantee from Foreign Agency A, to Goldman. (*Id.*) Project Maximus closed on October 17, 2012, raising approximately $1.75 billion for a 1MDB wholly owned subsidiary and resulting in substantial revenues and other fees for Goldman. (*Id.* ¶ 45.) Goldman transferred part of the proceeds of Project Maximus via wire to 1MDB's subsidiary from a place within the United States to and through a place outside of it, including through the Eastern District of New York. (*Id.*) Thereafter, some of the proceeds from the bond offering were diverted and transferred via wire to a place in the United States from and through a place outside of the United States, and from a place in the United States to and through a place outside of the United States, including through the Eastern District of New York. (*Id.*) Specifically, as before, hundreds of millions of dollars in bond proceeds were transferred to and through a series of shell company accounts owned and controlled by Low and others. (*Id.* ¶¶ 46–49.) Ng knew that some of the proceeds from Project Maximus were transferred by Low to Holding Company Account #1, and, thereafter, Low, Ng, CC1, and others caused some of these funds to be transferred to the

[8] Ng argues that, although he "was part of the deal team for Magnolia, he had a minor role in Maximus," and "[t]here is no allegation that [he] or anyone associated with him received any money from Maximus." (*Id.* at 20–21.)

accounts of 1MDB officials or their relatives, or to the accounts of shell companies owned and controlled by them, including 1MDB Officials #1 and #2. (*Id.* ¶ 50.)

3. Project Catalyze

In November of 2012, shortly after Project Maximus closed and despite having raised over $3 billion in the prior eleven months, 1MDB sought to raise an additional $3 billion through a third bond issuance known as "Project Catalyze" and purportedly designed to fund 1MDB's portion of a joint venture with Foreign Investment Firm A. (*Id.* ¶ 51.) Goldman was engaged on the project in early 2013, (*id.*), and the bond issued on March 19, 2013, (*id.* ¶ 53), again earning Goldman substantial revenues and fees, (*id.* ¶ 51). At Low's direction, some of the approximately $3 billion raised by this bond issuance was transferred through a series of transactions to Holding Company #1 Account via wire "to a place in the United States from and through a place outside of the United States, and from a place in the United States to and through a place outside of the United States." (*Id.* ¶ 53.) "Some of these funds were further transferred via wire to accounts in the name of entities . . . owned and controlled by 1MDB officials," including 1MDB Officials #2 and #3. (*Id.*) In addition, more than $4 million of these funds were also transferred via wire to a bank account owned by a relative of Ng. (*Id.*)

As with the prior two bond deals, days after Project Catalyze closed, Low and other co-conspirators transferred approximately $1.2 billion in bond proceeds to a bank account at Foreign Financial Institution D in the name of another shell company. (*Id.* ¶ 54.) This time, Low caused a client account to be opened in the name of that shell company at Art Auction House #1, an auctioneer of high-end artworks based in New York, New York. (*Id.*) In May of 2013, at auctions held at Art Auction House #1 in New York, Low acquired five works of art for approximately $58.3 million in the name of the shell company. (*Id.*) Between July and

September of 2013, $79 million of additional funds traceable to Project Catalyze were transferred to Art Auction House #1 to acquire additional works.[9] (*Id.*)

v. Energy Initial Public Offering

Following the closing of Project Catalyze through the end of 2014, Ng, CC1, and Goldman sought to obtain and worked to execute several additional transactions with 1MDB, focusing on a proposed initial public offering ("IPO") of 1MDB's energy assets. (*Id.* ¶ 55.) During this time, Low and CC1, among others, continued to pay bribes and kickbacks to certain Malaysian and 1MDB officials to influence them to award a role for Goldman in the IPO.[10] (*Id.*)

II. Procedural background

a. Indictment and Ng's arrest in Malaysia

On October 3, 2018, a grand jury returned an Indictment against Ng, charging him with two counts of conspiracy to violate the FCPA and one count of conspiracy to commit money

---

[9] Ng contends that he had "no role whatsoever in Catalyze" and that, although "[t]he Government alleges that [CC1] . . . directed approximately $4 million of [bond proceeds from Project Catalyze] to the account of Ng's relatives," this money "was never transferred to Ng." (*Id.* (citing Indictment ¶ 53).)

[10] Ng adds that, by April of 2014, Goldman became aware of "serious red flags indicating something [was] very wrong with the accounting at 1MDB," as evidenced by emails shared within Goldman's legal department discussing the fact that KPMG had ceased being 1MDB's auditor, that the extended deadline for 1MDB to file its yearly financial statement had passed without the 1MBD making any filing, and that 1MDB's new accounting firm, Deloitte, refused to comment on the non-filing. (*Id.* at 21–22.) In addition, in May of 2014, "high-level members of the [Goldman] Legal and Compliance Divisions became aware of information that Low had a significant financial connection to 1MDB," however, despite knowing "that Low had been financially backed by 1MDB even prior to the first bond deal, and despite knowing that 1MDB's highly-regarded accounting firm quit and that [1MDB] was having significant accounting issues at that time, [Goldman] nonetheless pushed full-speed-ahead for the highly lucrative 1MDB energy IPO." (*Id.* at 21–22.) Then, in early 2015, "the whistle [was blown] on Low," and by late July of 2015, "the highest echelons of Goldman . . . were managing the fallout from news articles that increasingly placed Goldman at the heart of the 1MDB scandal." (*Id.* at 23.)

laundering in violation of 18 U.S.C. § 1956 *et seq*.[11] (Indictment ¶¶ 58–65.) On October 30, 2018, Malaysian authorities arrested Ng in Malaysia pursuant to a provisional arrest warrant from the United States based on the Indictment. (Def.'s Reply 3.) In November of 2018, the United States formally requested Ng's extradition from Malaysia pursuant to the Extradition Treaty between the United States and Malaysia. (Gov't Sur-Reply 4; Extradition Treaty Between the Government of the United States of America and the Government of Malaysia, Malay.-U.S., Aug. 3, 1995, T.I.A.S. No. 97-602, annexed to Gov't Sur-Reply as Ex. B, Docket Entry No. 59-2 [hereinafter Extradition Treaty].) During extradition proceedings in Malaysia, a judge of the Sessions Court in Kuala Lumpur, Malaysia, ruled that based on the U.S. filings, including the Indictment, Ng would be incarcerated on the United States matter pending his extradition. (Def.'s Reply 3.)

In early 2019, the parties discussed potential avenues for Ng's transfer to the United States outside the formal extradition process, including the possibility that Ng would waive the rights afforded to him as a Malaysian citizen under the Extradition Treaty. (Gov't Sur-Reply 4.) Ng expressed concern that by coming to the United States outside of the formal extradition process, he would be giving up the "rule of specialty" protections afforded under the treaty.[12] (*Id.*) As part of his proposed appearance in the United States outside of formal extradition, Ng requested that the Government afford him the same protections he would be provided through

[11] The remaining facts in this portion of the Memorandum and Order are drawn from the parties' briefs and are undisputed unless otherwise noted. (*See* Def.'s Reply 3–5; Gov't Sur-Reply 4–5.)

[12] As further discussed below, Article 16 of the Extradition Treaty between the United States and Malaysia sets forth the rule of specialty and provides, in relevant part, that "[a] person extradited under this treaty may not be detained, tried, or punished in the Requesting State except for: (a) the offense for which extradition has been granted or any lesser offense proved by the facts on which the first mentioned extradition was grounded . . . ." (Extradition Treaty art. 16.)

formal extradition, explicitly calling it a "rule of specialty agreement." (*Id.* (citing Email from Def.'s Counsel dated Jan. 29, 2019, annexed to Gov't Sur-Reply as Ex. C., Docket Entry No. 59-3).) Ng told the Government that if he were to waive extradition, he would want an agreement providing that the Government could not materially change the Indictment after he waived extradition. (Def.'s Reply 3.) The Government stated that it would seek approvals and present Defense counsel with a letter setting forth the protections it was prepared to offer in this regard. (*Id.* at 4.)

On February 12, 2019, while *en route* to Malaysia, Defense counsel received an email from the Government attaching the "final approved letter" (the "February 2019 Letter"). (*Id.*) The February 2019 Letter closely tracked the Extradition Treaty's rule-of-specialty provision, stating:

> The U.S. Attorney's Office for the Eastern District of New York and the Money Laundering and Asset Recovery Section and Fraud Section of the U.S. Department of Justice's Criminal Division ("the Offices") write to confirm our understanding regarding your client Ng[,] . . . with regard to his potential waiver of extradition to the United States in connection with the above-referenced criminal case. To the extent your client knowingly and willfully waives extradition to the United States no later than February 15, 2019 ("the Deadline"), the Offices agree that your client will not be detained, tried or punished at the request of our Offices except for (1) the offenses charged in the Indictment returned on October 3, 2018 in the above referenced case, or any lesser included offense proved by the facts on which this indictment was grounded . . . .

(February 2019 Letter 1, annexed to Def.'s Reply as Ex. 2, Docket Entry No. 58-2.) Defense counsel met with Ng in a prison in Kuala Lumpur, and Defense counsel, Malaysian counsel, and Ng discussed the terms and promises of the February 2019 Letter. (Def.'s Reply 4.)

On February 15, 2019, Ng, Defense counsel, and Malaysian Counsel appeared in court in Kuala Lumpur. (*Id.* at 5.) The parties dispute whether Ng knowingly and willfully waived extradition or whether he instead "consented" to extradition to the United States. (*Compare id.*,

and Def.'s Reply to Sur-Reply 3, *and* Agnifilo Affirmation (stating that Ng waived extradition, that Ng's Malaysian counsel specifically informed the court that Ng "has agreed to a waiver of the committal/extradition proceedings," and that this was "reported in the Malaysia press"), *with* Gov't Sur-Reply 4 (arguing that Ng consented to extradition).)[13] On May 3, 2019, Ng was released to the custody of U.S. law enforcement agents, who transported him to Brooklyn, New York, where he made his initial appearance in the Eastern District of New York on May 6, 2019. (*Id.*; *see also* Min. Entry dated May 6, 2019, Docket Entry No. 16.)

b. Rule 16 discovery, resolution of related cases, and the November 2020 Letter

i. Rule 16 discovery

Since Ng's arraignment on May 6, 2016, the Government has provided him "with voluminous discovery pursuant to Rule 16," totaling "millions of pages." (Gov't Opp'n 65.) On September 16, 2020, Ng requested that the Government also provide "all materials in the possession, custody, and control of the government pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny[,] including *Giglio v. United States*, 405 U.S. 150 (1972), and *United States v. Bagley*, 473 U.S. 667 (1985), the Fifth and Sixth Amendments to the Constitution of the United States, and other applicable law." (Def.'s *Brady* Letter dated Sept. 15, 2021, at 4, annexed to Def.'s Mem. as Ex. 1, Docket Entry No. 46-1.) In response, on October 15, 2020, the Government referred Ng "to the material already produced in discovery," noting that it "will also

[13] The Sessions Court's February 15 Order and Warrant of Committal describe Ng as having "consent[ed] to the waiver of the committal proceedings." (*See* Feb. 15, 2019 Order 3, , annexed to Gov't Sur-Reply as Ex. D, Docket Entry No. 59-4 ("[Ng] consented to the waiver of the committal proceedings . . . ."); Feb. 15, 2019 Warrant of Committal Where the Fugitive Criminal Consents to a Waiver of the Committal Proceedings ("Warrant of Committal") 3, annexed to Gov't Sur-Reply as Ex. E, Docket Entry No. 59-5 ("Ng . . . , after having been advised in accordance with the provisions of paragraph 22(1)(b) of the Extradition Act 1992, consent[ed] to the waiver of the committal proceedings.").)

continue to produce discovery to which [Ng] is entitled and that is in the [G]overnment's possession, custody[,] and control," and that it "understands and will comply with its continuing obligation to produce exculpatory material as defined by *Brady* and its progeny, and, before trial, . . . will furnish materials discoverable pursuant to [18 U.S.C. § 3500], as well as impeachment materials."[14] (Gov't *Brady* Resp. dated Oct. 15, 2020, at 5, annexed to Def.'s Mem. as Ex. 2, Docket Entry No. 46-2.)

ii. Resolution of related cases — Leissner's allocution and the DPA

On August 28, 2018, Tim Leissner pled guilty to conspiracy to violate the FCPA and conspiracy to commit money laundering. *See generally* Transcript, *United States v. Leissner*, 18-CR-439 (E.D.N.Y. Nov. 9, 2018), Docket Entry No. 30. The Court asked Leissner to "tell me in your own words what you did to make you guilty" of these counts. *Id.* at 35. Leissner responded that he "wrote a statement," and the Court allowed him to read it. *Id.* at 35–40. Leissner's script matched — often word for word — central parts of the Indictment and now Superseding Indictment that is pending against Ng.

On October 22, 2020, the Goldman Sachs Group and its subsidiary Goldman Sachs (Malaysia) Sdn. Bhd. ("Goldman Malaysia") each waived indictment, and the Government filed a one-count information charging conspiracy to violate the FCPA's anti-bribery provisions as to each. To resolve the criminal charges against them, the Goldman Sachs Group entered into the DPA with the Government and Goldman Malaysia entered a guilty plea. *See* Minute Entry, *United States v. Goldman Sachs Grp., Inc.*, No. 20-CR-437 (E.D.N.Y. Oct. 22, 2020); Minute

[14] On December 10, 2020, the Court issued a Rule 5(f) Order to confirm the prosecution's disclosure obligations under *Brady* and its progeny and to summarize the possible consequences of violating those obligations as to Ng. (Rule 5(f) Order, Docket Entry No. 56.)

Entry, *United States v. Goldman Sachs (Malaysia) Sdn. Bhd.*, No. 20-CR-438 (E.D.N.Y. Oct. 22, 2020); (*see also* DPA, annexed to Gov't Opp'n as Ex. A, Docket Entry No. 54-1).

Paragraph 4 of the DPA, titled "Relevant Considerations," indicates that the DPA was entered into based on, among other things, the fact that the Goldman Sachs Group cooperated with the Government's investigation by "collecting and producing voluminous evidence located in other countries; making regular factual representations and investigative updates to the [Government]; and voluntarily making foreign-based employees available for interviews in the United States." (*Id.* ¶ 4(b).) The DPA indicates that the Goldman Sachs Group "did not receive full credit for its cooperation" because it "was significantly delayed in producing relevant evidence, including recorded phone calls in which [its] bankers, executives, and control functions personnel discussed allegations of bribery and misconduct relating to the conduct set forth in the Statement of Facts." (*Id.* ¶ 4(c).) However, the Goldman Sachs Group "ultimately provided . . . all relevant facts known to it, including information about the individuals involved." (*Id.* ¶ 4(d).)

Under paragraph 5 of the DPA, titled "Future Cooperation and Disclosure Requirements," the Goldman Sachs Group remains obliged to "cooperate fully with the [Government] in any and all matters relating to the conduct described in [the DPA] and the Statement of Facts and other conduct under investigation by the [Government] at any time" during the term of the DPA, subject to certain limitations. (*See id.* ¶ 5.) The Goldman Sachs Group also has a continuing obligation to:

> truthfully disclose all factual information with respect to its activities, those of its branches, representative offices, subsidiaries and affiliates, and those of its present and former directors, officers, employees, agents, and consultants, including any evidence or allegations and internal or external investigations, about which [it] has any knowledge or about which the [Government] may inquire.

(*Id.* ¶ 5(a).) The Goldman Sachs Group's "obligation of truthful disclosure includes, but is not limited to, the obligation . . . to provide to the [Government], upon request, any document, record, or other tangible evidence about which the [Government] may inquire." (*Id.*) Paragraph 5 also requires the Goldman Sachs Group to "use its best efforts to make available for interviews or testimony, as requested by the [Government], present or former officers, directors, employees, agents and consultants of the [Goldman Sachs Group]." (*Id.*) "This obligation includes, but is not limited to, sworn testimony before a federal grand jury, in federal trials or at any other proceeding, all meetings requested by the [Government], and interviews with domestic or foreign law enforcement and regulatory authorities." (*Id.* ¶ 5(c).) It also includes the obligation to identify "witnesses who, to the knowledge of [the Goldman Sachs Group], may have material information regarding the matters being investigated or prosecuted." (*Id.*)

Under paragraph 23 of the DPA, the Goldman Sachs Group:

> expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for [the Goldman Sachs Group], make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by [the Goldman Sachs Group] set forth above or the facts described in the Statement of Facts.

(DPA ¶ 23.)

iii. The November 2020 Letter

On October 30, 2020, following the Government's October 15, 2020 response to Ng's initial request for *Brady* material, in which the Government referred him to the material it had already produced pursuant to Rule 16, and also following Leissner's allocution and the Government and the Goldman Sachs Group's October 22, 2020 entry into the DPA, Ng filed his motion in this case, requesting, among other things, that the Court compel the Government to promptly provide all Rule 16, *Brady*, and *Giglio* material in its possession, (Def.'s Mem. 91–

116), including the material Ng had previously requested, as well as all communications between the Government and Leissner regarding Leissner's allocution and all materials covered by paragraphs 4 and 5 of the DPA, (*id.* at 91–114). About two weeks later, on November 13, 2020, the Government sent Ng a thirteen-page letter summarizing "certain representations and arguments made by legal counsel for [the] Goldman [Sachs] Group, its affiliates and subsidiaries . . . in the course of [their] interactions with the [G]overnment" during the Government's investigation and plea discussions leading up to the DPA.[15] (November 2020 Letter 1–2.)

c. Ng's motion and the Superseding Indictment

As noted above, on October 30, 2020, Ng moved to dismiss the Indictment and for other relief, including production of *Brady* and other materials. (Def.'s Mot.) The Government opposed the motion on December 4, 2020, (Gov't Opp'n), and a grand jury returned a superseding indictment on December 9, 2020, (Superseding Indictment). In his reply filed on December 22, 2020, Ng responded to the Government's opposition and replied to the November 2020 Letter and the Superseding Indictment. (Def.'s Reply.) On January 13, 2021, the

[15] As discussed below, Ng believes the November 2020 Letter to be the Government's "legally inadequate response" to his initial motion, in which he requested to know "what Goldman has said in presentations to the Government over the past four years and how [its] story has changed over time," (Def.'s Reply 1), and he argues that the letter details unproduced *Brady* and Rule 16 material, (*id.* at 1, 38–51). The Government maintains that the letter summarizes representations and arguments made in "advocacy materials" drafted and provided to the Government by Goldman's counsel over a period of four years, and that it "began compiling the representations and arguments" that the letter summarizes "prior to the resolution of the criminal investigation of Goldman" and had intended to provide the November 2020 Letter "shortly after the [DPA] became public," after which time it "moved expeditiously to complete its review of the [a]dovacy [m]aterials and finalize the [November 2020 Letter]." (Gov't Sur-Reply 19–20 & n.8.) The Government argues that while the representations and arguments the letter summarizes could be subject to disclosure, Ng is not entitled to the advocacy materials themselves and the Government has already provided him with the actual evidence on which they were based. (*Id.* at 17–24.)

Government filed a sur-reply to Ng's reply, (Gov't Sur-Reply), and on January 22, 2021, Ng filed a reply to the Government's Sur-Reply, (Def.'s Reply to Sur-Reply).

As Ng notes, the Superseding Indictment makes several changes to Counts One and Three of the Indictment ("conspiracy to violate the FCPA — bribery" and "conspiracy to commit money laundering," respectively). (Def.'s Reply 2–3.) With respect to Count One, the original Indictment alleged that Ng was an "employee and agent of an issuer," but the Superseding Indictment adds the allegation that Ng is "a stockholder thereof acting on behalf of such issuer." (*Compare* Indictment ¶¶ 2, 59(a), *with* Superseding Indictment ¶¶ 2, 59(a).) In addition, the Superseding Indictment also discloses the identity of the "issuer," changing "U.S. Financial Institution #1" to "The Goldman Sachs Group, Inc." (*Compare* Indictment ¶¶ 1, 3, and *passim*, *with* Superseding Indictment ¶¶ 1, 3, and *passim*.) With respect to Count Three, the Superseding Indictment inserts the statutory citation "Title 18, United States Code, Section 1956(c)(7)(B)(iv)" and adds the crime of "bribery of a public official" as a potential "offense against a foreign nation" that could form the specified unlawful activity underlying a money laundering offense. (*Compare* Indictment ¶ 65(a), *with* Superseding Indictment ¶ 65(a).)

III. Discussion

a. Standards of review

i. Rule 7(c)

Indictments must contain both "a plain, concise, and definite written statement of the essential facts constituting the offense charged" and a "citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." Fed. R. Crim. P. 7(c)(1); *United States v. Harris*, 712 F. App'x 108, 109 (2d Cir. 2018) (quoting Fed. R. Crim. P. 7(c)(1)). An indictment is to be "read . . . 'to include facts which are necessarily implied by the specific

allegations' therein." *United States v. Faison*, 393 F. App'x 754, 757 (2d Cir. 2010) (quoting *United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002)). "[C]ommon sense and reason are more important than technicalities" and the indictment "need not be perfect." *United States v. Stringer*, 730 F.3d 120, 124 (2d Cir. 2013) (quoting *United States v. De La Pava*, 268 F.3d 157, 162 (2d Cir. 2001)); *Faison*, 393 F. App'x at 757 ("[I]t is not necessary to allege facts with technical precision, but rather, to outline the essential elements [required by Rule 7(c)(1)]."). "Under the Fifth Amendment's Grand Jury Clause, there are 'two constitutional requirements for an indictment.'" *United States v. Vickers*, 708 F. App'x 732, 735 (2d Cir. 2017) (quoting *United States v. Lee*, 833 F.3d 56, 69 (2d Cir. 2016)). "An indictment is sufficient if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *United States v. Stringer*, 730 F.3d 120, 124 (2d Cir. 2013) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)); *see also United States v. Dupree*, 870 F.3d 62, 70 (2d Cir. 2017) ("An indictment that does not set out all of the essential elements of the offense charged is defective." (quoting *United States v. Gonzalez*, 686 F.3d 122, 127 (2d Cir. 2012))).

ii. Rule 12(b)(3)(B)

Pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, a defendant may move to dismiss an indictment for various defects, including "a failure to state an offense" and a "lack of specificity." Fed. R. Crim. P. 12(b)(3)(B); *United States v. O'Brien*, 926 F.3d 57, 83 (2d Cir. 2019); *United States v. Aleynikov*, 676 F.3d 71, 75–76 (2d Cir. 2012) ("[A] federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute." (citing *United States v. Pirro*, 212 F.3d 86, 91–92 (2d Cir. 2000))). Courts

must accept as true the allegations in an indictment for purposes of evaluating a motion to dismiss. *See United States v. Velastegui*, 199 F.3d 590, 592 n.2 (2d Cir. 1999); *United States v. Moses*, No. 19-CR-6074, 2021 WL 100547, at *6 (W.D.N.Y. Jan. 12, 2021) ("In reviewing the facial sufficiency of an indictment, the facts alleged therein must be assumed to be true, and '[c]ontrary assertions of fact by the defendants will not be considered.'" (alteration in original) (quoting *United States v. Goldberg*, 756 F.2d 949, 950 (2d Cir. 1985))). As a result, the Second Circuit "ha[s] consistently upheld indictments that do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Ghayth*, 709 F. App'x 718, 723 (2d Cir. 2017) (quoting *Pirro*, 212 F.3d at 92).

iii. Rule 18

"Both the Sixth Amendment and [Rule 18 of the] Federal Rule[s] of Criminal Procedure . . . require that defendants be tried in the district where their crime was 'committed.'" *United States v. Purcell*, 967 F.3d 159, 186 (2d Cir. 2020) (quoting *United States v. Ramirez*, 420 F.3d 134, 138 (2d Cir. 2005)). "When 'a defendant is charged with multiple crimes in a single indictment, the government must satisfy venue with respect to each charge.'" *Id.* (quoting *United States v. Davis*, 689 F.3d 179, 185 (2d Cir. 2012)). The Second Circuit has "instructed that '[v]enue may lie in more than one place if the acts constituting the crime and the nature of the crime charged implicate more than one location.'" *United States v. Thompson*, 896 F.3d 155, 171 (2d Cir. 2018) (alteration in original) (quoting *United States v. Lange*, 834 F.3d 58, 68 (2d Cir. 2016)). Nevertheless, "the venue requirement . . . demand[s] 'some sense of venue having been freely chosen by the defendant.'" *United States v. Kirk Tang Yuk*, 885 F.3d 57, 69 (2d Cir. 2018) (quoting *Davis*, 689 F.3d at 186). Although not a "formal constitutional test," *United States v. Saavedra*, 223 F.3d 85, 93 (2d Cir. 2000), the Second Circuit occasionally supplements

the venue inquiry with a "substantial contacts" test, *Kirk Tang Yuk*, 885 F.3d at 70. "Venue provisions should be narrowly construed." *United States v. Hoskins*, No. 12-CR-238, 2020 WL 914302, at *11 (D. Conn. Feb. 26, 2020) (citing *United States v. Cabrales*, 524 U.S. 1, 1 (1998)).

"The government bears the burden of proving venue, but need only establish it by a preponderance of the evidence." *Purcell*, 967 F.3d at 186 (quoting *United States v. Tzolov*, 642 F.3d 314, 318 (2d Cir. 2011)). "Where venue is challenged on a pre-trial motion to dismiss, the government's burden is limited to showing that the indictment alleges facts sufficient to support venue." *United States v. Delgado*, No. 19-CR-34, 2020 WL 2924482, at *2 (D. Vt. June 3, 2020) (first citing Fed. R. Crim. P. 12(b)(3)(A)(i); then citing Fed. R. Crim. P. 18; and then citing *United States v. Peterson*, 357 F. Supp. 2d 748, 751 (S.D.N.Y. 2005)). Pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, "[i]f the proof at trial fails to support venue in this district, [a] defendant may move for a judgment of acquittal at the close of the government's case." *Id.* (citing *United States v. Bronson*, No. 05-CR-714, 2007 WL 2455138, at *4 (E.D.N.Y. Aug. 23, 2007)).

b. The Superseding Indictment is the controlling indictment

Ng argues that the Superseding Indictment should be dismissed because it is prohibited by a written contract between himself and the Government — namely, the February 2019 Letter, in which the Government promised Ng that if he waived extradition, it would provide him with the protections provided by the rule of specialty that otherwise would have been available to him under the Extradition Treaty. (Def.'s Reply 3–9.) Specifically, Ng argues that the Government promised him that if he waived extradition, it would not try him except for "the offenses charged in the [I]ndictment . . . or any lesser included offense proved by the facts on which [it] was grounded," and that he relied on this promise when he waived extradition. (*Id.* at 6.) Ng also

argues that, "[b]y agreeing to not change the offense, the Government agreed to not add or change facts that impact on how it intends to prove that [he] violated a particular law," (*id.* at 8), but the Superseding Indictment adds new facts and thus changes the offenses charged, in violation of the Government's promise, (*id.* at 2–3, 8). In addition, Ng argues that because he relied on the Government's promise in relinquishing his rights under the Extradition Treaty, the February 2019 Letter "should be analyzed as would a written plea agreement" — that is, as a "unique contract[] in which special due process concerns for fairness and the adequacy of procedural safeguards obtain" — and construed strictly against the Government, such that any material change to the Indictment would be a constitutional violation, rather than changes that merely run afoul of the rule of specialty. (*Id.* at 6–7 (quoting *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996)); *see* Def.'s Reply to Sur-Reply 2.)

The Government argues that the Superseding Indictment is not prohibited by the February 2019 Letter and complies with the Government's obligations to Ng and Malaysia for two reasons. (Gov't Sur-Reply 3–16.) First, the Government argues that by the express terms of the February 2019 Letter, because "[Ng] consented to his extradition, as opposed to waiving extradition," the Extradition Treaty rather than the February 2019 Letter controls his presence in the United States. (*Id.* at 3, 9.) Second, the Government argues that the changes made to the Superseding Indictment do not violate the rule of specialty, and because the purpose of the February 2019 Letter was to provide Ng with the same rule-of-specialty protections he would have had under the Extradition Treaty, even if the February 2019 Letter controls, the Government has complied with its obligations. (*Id.*)

For the reasons explained below, the Court finds that Ng waived extradition, the February 2019 Letter therefore applies, and the Government has complied with its obligations under the letter.

i. Ng waived extradition and therefore the February 2019 Letter controls the parties' dispute

"Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial and punishment." *Austin v. Healey*, 5 F.3d 598, 600 (2d Cir. 1993) (quoting Restatement (Third) of the Foreign Relations Law of the U.S. subch. B introductory note (Am. L. Inst. 1987)). The extradition law of many states, including the United States and Malaysia, "provides that requests for extradition may be granted only pursuant to a treaty." Restatement (Third) of the Foreign Relations Law of the U.S. § 475 cmt. b; (Extradition Treaty). Under extradition law:

> A state party to an extradition treaty is obligated to comply with the request of another state party to that treaty to arrest and deliver a person duly shown to be sought by that state . . . for trial on a charge of having committed a crime covered by the treaty within the jurisdiction of the requesting state . . . .

Restatement (Third) of the Foreign Relations Law of the U.S. § 475. A defendant "waives" extradition when he or she voluntarily consents to return to the requesting jurisdiction outside of the formal extradition process. *See United States v. Vega*, No. 07-CR-707, 2012 WL 1925876, at *8 (E.D.N.Y. May 24, 2012) ("When a criminal defendant waives extradition, or when the requested country voluntarily transfers a defendant to the requesting country without following the formal procedures of the treaty, the defendant has not been 'extradited' under that treaty." (citing *United States v. Herbert*, 313 F. Supp. 2d 324, 330 (S.D.N.Y. 2004))). "Moreover, where a defendant is not transferred pursuant to an extradition treaty, he cannot assert any rights conferred by the treaty. Thus, a criminal defendant's surrender to United States jurisdiction or a

requested country's voluntary transfer of a defendant's custody forecloses a rule of speciality [sic] defense." *Id.* (first citing *United States v. DiTommaso*, 817 F.2d 201, 212 (2d Cir. 1987) (noting that the rule of specialty is limited "to cases involving a formal extradition pursuant to treaty" and finding the rule inapplicable where the defendant waived extradition and thus had not been extradited); then citing *United States v. Vreeken*, 603 F. Supp. 715, 721 (D. Utah 1984) (noting that extradition "does not include a voluntary return to the requesting state," and thus the rule of specialty is inapplicable where a defendant waives extradition), *aff'd on other grounds*, 803 F.2d 1085 (10th Cir. 1986); and then citing *Herbert*, 313 F. Supp. 2d at 328–30 (finding that the defendant could not raise procedural violations of an extradition treaty where he was voluntarily transferred without reliance on the specific, formal procedures required by the extradition treaty)).

Article 17 of the Extradition Treaty between Malaysia and the United States — which is titled "Waiver of Extradition Proceedings" and is the only provision of the Extradition Treaty that discusses waiver — provides that "[i]f the person sought [i.e., Ng] consents to return to the Requesting State [i.e., the United States] after personally being advised by a competent judicial authority of the effect of such consent under the law of the Requested State [i.e., Malaysia], the Requested State may surrender him without further proceedings." (Extradition Treaty art. 17.) Although a defendant who waives extradition normally "cannot assert any rights conferred by the treaty," including a rule-of-specialty defense, *Vega*, 2012 WL 1925876, at *8, paragraph two of Article 17 further provides that "[t]he Requested State may require that surrender pursuant to this Article shall be subject to Article 16," (Extradition Treaty art. 17). Article 16 sets forth the rule of specialty and provides in relevant part that "[a] person extradited under this treaty may not be detained, tried, or punished in the Requesting State except for: (a) the offense for which

extradition has been granted or any lesser offense proved by the facts on which the first mentioned extradition was grounded." (*Id.* art. 16.)

Paragraph 22(1)(b) of Malaysia's Extradition Act 1992 — the Malaysian law that governs "[w]aiver of committal proceedings by [a] fugitive criminal" — provides that:

> (1) When the fugitive criminal is brought before the Sessions Court he may inform the Court that he consents to a waiver of the committal proceedings before the Court and the Court shall . . .
>
> (b) upon being satisfied that such consent is given voluntarily, advise the fugitive criminal that the effect of so consenting will be that —
>
> (i) he will be committed to prison;
>
> (ii) he will not be entitled to apply under section 36 for a writ of *habeas corpus* to review the validity of the decision to commit him to prison;
>
> (iii) upon his return to the country which made the requisition for his return, he shall be tried for the extradition offence in respect of which his extradition was requested or he may be tried for any lesser offence proved by the facts on which that extradition offence was grounded;
>
> (iv) upon his return to that country, he may also be tried for any other extradition offence in respect of which the Minister so consents under section 10.

(Extradition Act 1992 § 22(1)(b), annexed to Gov't Sur-Reply as Ex. G, Docket Entry No. 55-7.)

Pursuant to Article 17 of the Extradition Treaty, Ng was advised by a "competent judicial authority" — the Malaysian Session Court — of the effect under Malaysia's Extradition Act 1992 — of waiving formal extradition proceedings and voluntarily returning to the United States. (Warrant of Committal 3 (noting that "Ng . . . , after having been advised in accordance with the provisions of paragraph 22(1)(b) of the Extradition Act 1992, consent[ed] to the waiver of the committal proceedings").) Because Ng was advised of the effect under Malaysian law of waiving extradition proceedings and nevertheless voluntarily did so, he waived extradition and was committed to prison to await the warrant of the Minister surrendering him without further

proceedings pursuant to Article 17 of the Extradition Treaty and section 22(2) of the Extradition Act 1992. (*See* Extradition Act 1992 § 22(2) ("If, after the fugitive criminal has been advised in accordance with paragraph (1)(*b*), the fugitive criminal again consents to the waiver, the Court shall commit the fugitive criminal to prison to await the warrant of the Minister . . . ."); Warrant of Committal (committing Ng "into custody of the . . . [p]rison" following his "consent to the waiver of the committal proceedings"); Temporary Surrender Warrant of the Minister for Return of Fugitive Criminal, annexed to Gov't Reply as Ex. F, Docket Entry No. 59-6 (stating that Ng was delivered into the prison's custody by the Warrant of Committal and ordering that he be further delivered into the United States' custody).)

The Government argues that Ng did not "waive" extradition but rather "consented to" extradition "as part of the formal extradition process." (Gov't Sur-Reply 10.) In support, the Government points to the Warrant of Committal filed in Malaysia, which states that Ng, "having been advised in accordance with the provision of paragraph 22(1)(b) of the Extradition Act 1992, consent[s] to the waiver of the committal proceedings" and shall be held in custody "safely until [he is] delivered pursuant to the provisions of the said Act." (*Id.* (quoting Warrant of Committal).) Although the Warrant of Committal contains the word "waiver," the Government argues that its "reference to paragraph 22 of the Extradition Act was an express reference to the rule-of-specialty protections that would be afforded to [him] in light of his consent to extradition." (*Id.*) In other words, the Government argues that because Ng was advised that he would retain the Treaty's rule-of-specialty protections, outlined in section 22(1)(b)(iii) of the Extradition Act above, if he "consent[ed] to a waiver of the committal proceedings," he must have consented to extradition rather than waived it, in which case the rule-of-specialty protections would not be available to him. (*Id.*)

The Government's argument fails for two reasons. First, although Article 17 of the Extradition Treaty describes waiver in terms of "consent[ing] to return to the Requesting State," and although the Extradition Act 1992 and various Malaysian documents the Government highlights similarly describe waiver in terms of "consent[ing] to a waiver of the committal proceedings," in this context, "waiver" and "consent" are not distinct concepts with different legal effects. (Extradition Treaty art. 17; Extradition Act 1992 § 22(1).) As discussed above, waiver *is* consent — a defendant waives extradition under Article 17 of the Extradition Treaty, titled "Waiver of Extradition Proceedings," by "consent[ing] to return to the Requesting State" and, under the Extradition Act 1992, this means "consent[ing] to a waiver of the committal proceedings." (Extradition Treaty art. 17; Extradition Act 1992 § 22(1).) Therefore, Ng waived the formal extradition proceedings and thus waived extradition.

Second, although section 22(1)(b)(iii) of the Extradition Act 1992 recites the rule of specialty and therefore might seem to suggest, as the Government argues, a distinction between "consent[] to a waiver of the committal proceedings," (Extradition Act 1992 § 22(1)), where the protections remain available, and waiver of extradition, where they do not, the Government overlooks an important aspect of Article 17. While paragraph one of Article 17 provides that a defendant must be advised of the effect under Malaysian law — namely, section 22(1)(b) of the Extradition Act 1992 — of waiving extradition, and while part of being advised of the effect under Malaysian law includes a recitation of the rule of specialty, *see* Extradition Act § 22(1)(b)(iii), this is not due to any distinction between consent and waiver but rather due to the fact that Malaysia retains the right under the Extradition Treaty to nevertheless require that the rule of specialty apply in some cases in which a waiver of proceedings occurred. As noted above, although the default rule under Article 16 is that the rule of specialty applies only to

"person[s] extradited under this treaty," paragraph two of Article 17 further provides that "[t]he Requested State *may require* that surrender pursuant to this Article shall be subject to Article 16 [i.e., the rule of specialty]." (Extradition Treaty art. 17 (emphasis added).) As the Department of State explained in its letter submitting the Treaty to then-President Bill Clinton and "recommend[ing] that the Treaty . . . be transmitted to the Senate for its advice and consent," Article 17 "permits surrender to the Requesting State without further proceedings if the person sought provides written consent thereto. The Requested State may require that such surrender shall be subject to the rule of specialty set out in Article 16." Letter of Submittal, S. Treaty Doc. No. 104-26, at ix (1996). In its report considering the Treaty, the Committee on Foreign Relations further noted that:

> United States practice has long been that the rule of specialty does not apply when a fugitive waives extradition and voluntarily returns to the Requested State. However, Malaysian law and policy differ; Malaysia might wish the rule of specialty to apply in some cases in which a waiver of proceedings occurred. Thus, paragraph 2 permits the Requested State to require that the rule of specialty in article 16 apply to surrenders pursuant to article 17.

S. Exec. Doc. No. 104-30, at 20 (1996) (footnote omitted) (citing Extradition Act 1992 § 22). In Malaysia, "[t]he Minister for Home Affairs maintains this authority." *Id.* at 19 n.51 (citing Extradition Act 1992 § 8(e)). In this case, neither the Minister's Temporary Surrender Warrant nor any other document in the record before the Court indicates an intent on the part of Malaysia to require that the rule of specialty apply to the surrender of Ng pursuant to Article 17. *See S.E.C. v. Marimuthu*, 552 F. Supp. 2d 969, 972 (D. Neb. Mar. 17, 2008) (stating, in the sole case involving Malaysia and the rule of specialty, that "[t]he protection of the rule of specialty exists only to the extent that the surrendering country wishes" (quoting *S.E.C. v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1337 (9th Cir. 1994))). Accordingly, Ng waived extradition and the rule-of-specialty protections he otherwise would have been entitled to under the Extradition Treaty. In

doing so, he satisfied his obligations under the February 2019 Letter, and thus the February 2019 Letter controls his presence in the United States.

ii. The Government has complied with its obligations under the February 2019 Letter — the Superseding Indictment does not violate the rule of specialty

Ng argues that the Court should treat the February 2019 Letter like a plea agreement and strictly construe it against the Government because he relied on it to his detriment in waiving extradition. (Def.'s Reply 6.) He contends that "the difference between analyzing the changes to the [I]ndictment under the [Extradition] Treaty's [r]ule of [s]pecialty . . . or as a written promise . . . is that the language of a written promise would be strictly construed against the prosecution because the Government knows the defendant is relying to his detriment on that written promise." (Def.'s Reply to Sur-Reply 3.)

The Government argues that the purpose of the February 2019 Letter was to provide Ng with the rule-of-specialty protections that he was concerned about forfeiting by waiving extradition, and, "[i]n order to grant the same protection afforded by the rule of specialty, the February [2019] Letter tracked the language of the Extradition Treaty's '[r]ule of [s]pecialty' provision faithfully." (Gov't Opp'n 12.) In addition, because the February 2019 Letter merely promised rule-of-specialty protection, and because the Government merely added facts to the Superseding Indictment and did not change the statutory charges on which Ng was extradited, which is consistent with the rule of specialty, the Government argues that "under the controlling law in this Circuit, . . . the Superseding Indictment violated neither the rule of specialty contained in the Extradition Treaty nor its mirrored provision in the February [2019] Letter." (Gov't Sur-Reply 12–13.) The Government also notes that "the terms of the letter did not include an agreement 'to not add or change facts' impacting how the [G]overnment intends to prove Ng's guilt." (*Id.* at 15.) Rather, "the February [2019] Letter noted that [Ng] would not be detained,

tried[,] or punished except for 'the offenses charged' in the . . . Indictment," and "the Superseding Indictment . . . charges [Ng] with the exact same offenses as the . . . Indictment." (*Id.*)

On the record before the Court, there can be no dispute that the purpose of the February 2019 Letter was to afford Ng the rule-of-specialty protections he would have been provided through formal extradition. (*Id.* at 4 (citing Email from Def.'s Counsel dated Jan. 29, 2019 (explicitly calling it a "rule of specialty agreement"))); *see* Def.'s Reply 4 ("One topic discussed related to a legal doctrine known as the '[r]ule of [s]pecialty.' Specifically, the undersigned told the [Department of Justice ('DOJ')] that if Ng was to waive extradition, he would want an agreement providing that the DOJ could not change the Indictment after Ng waived extradition."); Agnifilo Affirmation ¶¶ 7–8 ("[W]e discussed with the Government that Mr. Ng should not lose the right commonly known as the [r]ule of [s]pecialty. The Government said that it would draft a letter agreement providing Mr. Ng the protections afforded him under the [r]ule of [s]pecialty as provided by the U.S./Malaysian Extradition Treaty."). In addition, as the Government notes, the February 2019 Letter tracks the language of the Extradition Treaty's rule-of-specialty provision, as outlined below:

The February Letter	Extradition Treaty, Article 16 "Rule of Specialty"
[T]he Offices agree that your client will not be detained, tried or punished at the request of our Offices except for (1) the offenses charged in the indictment returned on October 3, 2018 in the above-referenced case, or any lesser included offense proved by the facts on which this indictment was grounded, and (2) any offense committed after the waiver of extradition and initial appearance in the Eastern District of New York.	A person extradited under this treaty may not be detained, tried, or punished in the Requesting State except for: (a) the offense for which extradition has been granted or any lesser offense proved by the facts on which the first mentioned extradition was grounded; [and] (b) any offense committed after the extradition of the person.

(Gov't Sur-Reply 13; February Letter 1; Extradition Treaty art. 16.) Thus, the Court is not persuaded by Ng's argument that it should analyze the February 2019 Letter like a plea agreement, strictly construing it against the Government such that *any* material change to the Indictment would be a violation of his constitutional rights. The issue before the Court is whether the changes to the Indictment violate the rule-of-specialty protection Ng bargained for — not whether the February 2019 Letter should be construed as a plea agreement to preclude any changes to the factual allegations in the Indictment, thus granting him greater protection than the Extradition Treaty's rule of specialty.

"The rule of specialty is a principle of international law that prohibits extraditing countries from prosecuting a defendant on charges other than those for which he was specifically extradited." *United States v. Restrepo*, 547 F. App'x 34, 45 (2d Cir. 2013) (citing *United States v. Levy*, 25 F.3d 146, 159 (2d Cir. 1994)); *United States v. Cuevas*, 496 F.3d 256, 262 (2d Cir. 2007); *Ficcioni v. Att'y Gen.*, 462 F.2d 475, 481 (2d Cir. 1972); *United States v. Paroutian*, 299 F.2d 486, 490–91 (2d Cir. 1962); *United States v. Masefield*, No. 02-CR-441, 2005 WL 236443, at *2 (S.D.N.Y. Feb. 1, 2005) ("[The rule of specialty] generally requires that an extradited

defendant be charged only for the crimes on which extradition has been granted." (first citing *Levy*, 25 F.3d at 159; and then citing *Ficcioni*, 462 F.2d at 481)); *see also United States v. Rauscher*, 119 U.S. 407, 424 (1886) (setting forth the principle of specialty). Where a defendant is not extradited but rather voluntarily waives his right to extradition, the rule of specialty does not apply. *See, e.g.*, *DiTommaso*, 817 F.2d at 212 (stating that rule of specialty is "limit[ed] to cases involving a formal extradition pursuant to treaty"); *United States v. Trujillo*, 871 F. Supp. 215, 219 (D. Del. 1994) ("[T]he Doctrine of Specialty applies to *extradited* individuals. In this case, [the defendant] was not extradited. . . . [T]he Doctrine of Specialty, therefore, has no application here."); Extradition Treaty art. 16 (providing that the rule of specialty applies to "[a] person extradited under this treaty").

"The basis of this rule . . . is comity. It is designed to protect the extraditing government against abuse of its discretionary act of extradition." *Paroutian*, 299 F.2d at 490; *see also Masefield*, 2005 WL 236443, at *2 ("'Enforcement of the principle of specialty is founded primarily on international comity' and is premised on the notion that '[t]he requesting state must "live up to whatever promises it made in order to obtain extradition because preservation of the institution of extradition requires the continuing cooperation of the surrendering state."'" (alteration in original) (quoting *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995))); *see also United States v. Biba*, No. 09-CR-836, 2017 WL 11380497, at *2 (E.D.N.Y. Mar. 6, 2017) ("[T]he basis for the rule of specialty set forth in [*Rauscher*] is not a concern about protecting the rights of a defendant, but rather comity . . . ." (citing *Paroutian*, 299 F.2d at 490–91)). Therefore, "the test whether trial is for a 'separate offense' should be not some technical refinement of local law, but whether the extraditing country would consider the offense actually tried 'separate.'" *Paroutian*, 299 F.2d at 490–91. Thus, the Second Circuit "has consistently

found that the government is not limited strictly to charges described in an extradition warrant but rather may include [in a superseding indictment] additional facts and additional charges as long as the statutory charge is the same." *Masefield*, 2005 WL 236443, at *2 (collecting cases). "Put simply, the [g]overnment may present additional facts or amplified allegations [in a superseding indictment], 'so long as [they are] . . . *directed* to the charge contained in the request for extradition.'" *Id.* (third alteration in original) (quoting Restatement (Third) of Foreign Relations Law of the United States § 477 cmt. c); *see Biba*, 2017 WL 11380497, at *2 (same).

Although the Superseding Indictment adds several factual allegations, it is substantially the same as the original Indictment and the statutory charges remain the same. In addition, "the Malaysian government has been apprised of the contents of the Superseding Indictment and ha[s] raised no objection." (Gov't Sur-Reply 11 n.5.) Therefore, the Superseding Indictment violates neither the rule of specialty nor the provision in the February 2019 Letter, which mirrors the language in the Extradition Treaty. *See Ficcioni* , 462 F.2d at 481–82 (finding no violation where the defendant was extradited on an indictment alleging a conspiracy spanning 1968 to 1969 and superseding indictment alleged a conspiracy spanning from 1970 to 1972 and additional substantive offenses); *Paroutian*, 299 F.2d at 490–91 (finding no violation where a defendant was extradited from Lebanon for narcotics trafficking but ultimately was tried for two separate counts (receipt and concealment of heroine) not covered by the original indictment and noting that "the Lebanese, fully apprised of the facts as they were, would [not] consider that [the defendant] was tried for anything else but . . . trafficking in narcotics"); *United States v. Rossi*, 545 F.2d 814, 815 (2d Cir. 1976) (per curiam) (finding no violation where extradition was tied to a conspiracy spanning from 1969 to 1972 but the indictment alleged a conspiracy spanning from 1965 to 1973); *United States v. Sturtz*, 648 F. Supp. 817, 819 (S.D.N.Y. 1986) ("A superseding

indictment which charges offenses of the same character as the crime for which the fugitive was extradited does not offend the doctrine." (citing *Rossi*, 545 F.2d at 815)); *see also United States v. Puentes*, 50 F.3d 1567, 1576 (11th Cir. 1995) (finding no violation where superseding indictment extended the conspiracy period by three years); *United States v. Andonian*, 29 F.3d 1432, 1435–37 (9th Cir. 1994) (finding no violation where the superseding indictment added overt acts to conspiracy charge on which defendant was extradited, as well as substantive counts); *United States v. Abello-Silva*, 948 F.2d 1168, 1174–76 (10th Cir. 1991) (finding no violation where the superseding indictment contained additional facts).

Accordingly, the Superseding Indictment complies with the protections promised in the February 2019 Letter, is valid, and is the controlling indictment.[16]

c. The Superseding Indictment sufficiently alleges venue in the EDNY

Ng argues that the Superseding Indictment should be dismissed for lack of venue because it fails to allege that he (1) acted in furtherance of a crime charged in this district, i.e., it does not sufficiently allege venue in this district, (2) reasonably foresaw an act in furtherance of a crime in this district based on his electronic communications, and (3) had substantial contacts with this district. (Def.'s Reply 12–20.)

The Government argues that (1) the Superseding Indictment alleges that multiple acts occurred in this district, (2) Ng's foreseeability arguments are meritless, and (3) the substantial

[16] Because the Superseding Indictment was filed after the filing of Ng's memorandum in support of his motion to dismiss and the Government's opposition to the motion to dismiss, (Def.'s Mem.; Gov't Opp'n), and Ng "move[s] to dismiss the Superseding Indictment" based on similar arguments as those offered to dismiss the Indictment, (Def.'s Reply 5 n.1), the Court construes the parties' arguments in their briefing papers as applicable to the Superseding Indictment.

contacts test does not apply "in light of the alleged overt acts committed in this [d]istrict." (Gov't Opp'n 13–18 & n.5.)

"[O]ffense[s] . . . begun in one district and completed in another . . . may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). When "the charged crime is a conspiracy, . . . 'any district in which an overt act in furtherance of the conspiracy was committed' is properly designated as the 'district where the offense was committed,' so long as the act was performed (1) 'by any conspirator,' and (2) was undertaken 'for the purpose of accomplishing the objectives of the conspiracy.'" *Kirk Tang Yuk*, 885 F.3d at 69 (quoting *Tzolov*, 642 F.3d at 319–20); *see also United States v. Dunnigan*, No. 17-CR-119, 2020 WL 3957961, at *2 (W.D.N.Y. July 13, 2020) ("Conspiracy is a continuing offense under § 3237." (citing *United States v. Tannenbaum*, 934 F.2d 8, 12 (2d Cir. 1991))).

The Court addresses Ng's venue arguments based on (1) sufficiency, (2) foreseeability based on electronic communication, and (3) substantial contacts in turn.

i. Sufficiency

Ng argues that "[t]he Eastern District of New York appears exactly five times in the [Superseding] Indictment"[17] and that the threadbare facts are insufficient to confer venue. (Def.'s Mem. 31 (citing Indictment ¶¶ 37, 45, 63(e), 63(f)).) Ng also argues that the Superseding Indictment fails to sufficiently allege venue "because electrical transmissions of three wire transactions and two phone calls [that] passed below New York harbor (considered part of both the Eastern and Southern Districts of New York) on their way to and from Manhattan" is

[17] Contrary to Ng's assertion, the Eastern District of New York appears ten times in both the Indictment and Superseding Indictment. (Indictment ¶¶ 37, 45 (twice), 59, 60, 62, 63, 63(e), 63(f), 65; Superseding Indictment ¶¶ 37, 45 (twice), 59, 60, 62, 63, 63(e), 63(f), 65.)

insufficient to confer venue in the Eastern District of New York. (Def.'s Reply 12.) In support, Ng asserts that "[t]he Government's contention that an electrical impulse relating to a financial wire or phone call passing through a [d]istrict can alone give rise to venue is not supported by a single case." (*Id.*)

The Government argues that "the [Superseding] Indictment expressly alleges that the[] relevant wires and electronic communications made in furtherance of the scheme passed through the Eastern District of New York," which is sufficient to defeat a motion to dismiss for lack of venue. (Gov't Opp'n 13.) In support, the Government argues that "every wire transfer or wire communication to and through [Goldman], its bank accounts, or accounts owned or controlled by [Ng] and [his] co-conspirators that furthered the scheme were . . . essential" and that "[b]ecause . . . those communications and wires passed through the Eastern District of New York, venue is proper [in this district]." (*Id.*)

Courts in the Second Circuit engage in "the practice of deferring a ruling on the propriety of the prosecution's choice of venue to trial." *Delgado*, 2020 WL 2924482, at *2. "[I]n a pre-trial motion to dismiss, indictments that 'allege[] that the offense occurred "in [this district] and elsewhere"' are sufficient to defeat the motion." *United States v. Griffith*, No. 20-CR-15, 2020 WL 4369650, at *2 (S.D.N.Y. July 29, 2020) (first alteration in original) (quoting *United States v. Szur*, No. 97-CR-108, 1998 WL 132942, at *9 (S.D.N.Y. Mar. 20, 1998)); *see also United States v. Ohle*, 678 F. Supp. 2d 215, 231 (S.D.N.Y. 2010) (noting that the government "need only allege that criminal conduct occurred within the venue, 'even if phrased broadly and without a specific address or other information'" (quoting *Bronson*, 2007 WL 2455138, at *4)); *United States v. Stein*, 429 F. Supp. 2d 633, 643 (S.D.N.Y. 2006) (concluding that "as long as the indictment alleges venue, a pretrial motion to dismiss based on contrary allegations by the

defendant must be denied"). Indeed, such broad statements are sufficient "to show 'substantial contact with the district'" at the motion to dismiss stage. *Delgado*, 2020 WL 2924482, at *3 (quoting *United States v. Riley*, No. 13-CR-339, 2014 WL 53440, at *3 (S.D.N.Y. Jan. 7, 2014)). "Unless the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial . . . the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss the indictment." *United States v. Perez*, 575 F.3d 164, 166–67 (2d Cir. 2009) (quoting *United States v. Alfonso*, 143 F.3d 772, 776–77 (2d Cir. 1998)). However, "the Supreme Court[] [warns] that provisions implicating venue are to be narrowly construed." *Ramirez*, 420 F.3d at 146 (citing *United States v. Johnson*, 323 U.S. 273, 276 (1944)); *see also United States v. Brennan*, 183 F.3d 139, 144 (2d Cir. 1999) (finding lack of venue where it was alleged that mail was "*likely* to have passed through" a district (emphasis added)). There is a "restrictive construction of venue provisions," which "should go in the direction of constitutional policy even though not commanded by it." *Ramirez*, 420 F.3d at 146 (quoting *Brennan*, 183 F.3d at 146–47).

Actions of co-conspirators are sufficient to confer venue. *See United States v. Kim*, 246 F.3d 186, 193 (2d Cir. 2001) (concluding that venue was appropriate in the Southern District of New York because of "the wire communications to and from Manhattan" where the defendant "knew [that] the fraudulent invoices would be paid by a bank in New York" as "he was the one approving the invoices for payment"); *United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994) (concluding that although the defendant never had contact with the Southern District of New York, her co-conspirator "made numerous telephone calls to an undercover agent's beeper in Manhattan," received telephone calls from the agent, and "knew that the agent was calling from Manhattan," which was sufficient to confer jurisdiction).

In addition, venue is proper in any district where electronic communications are sent or received. *See Lange*, 834 F.3d at 70 ("Venue is also proper in the district where an electronic communication was received." (citing cases)); *Kim*, 246 F.3d at 192–93 (finding venue proper in the Southern District of New York where out-of-district defendant caused wire transmissions into and out of the district); *United States v. Royer*, 549 F.3d 886, 895 (2d Cir. 2008) (noting that "[r]eceipt of electronic transmissions in a district is sufficient to establish venue activity there"); *United States v. Teman*, 465 F. Supp. 3d 277, 314 (S.D.N.Y. 2020) (finding venue in the Southern District of New York proper where the defendant's mobile deposits occurred in Manhattan and "resulted in electronic communications being sent from Manhattan to Bank of America servers in Texas as part of the process by which the checks were negotiated"); *United States v. Kenner*, No. 13-CR-607, 2019 WL 6498699, at *9 (E.D.N.Y. Dec. 3, 2019) (finding venue proper where funds were wired "to an account within" the Eastern District of New York); *United States v. Kubitshuk*, No. 16-CR-711, 2017 WL 3531553, at *4 (S.D.N.Y. Aug. 17, 2017) (finding venue proper in the Southern District of New York where defendants received benefits "wired from" offices in Manhattan).

Venue is also appropriate in any district through which electronic communications are routed. *See United States v. Brown*, 293 F. App'x 826, 829 (2d Cir. 2008) (affirming venue as appropriate in the Southern District of New York where a wire transfer was automatically routed through a bank's Manhattan branch, even though it was not processed in Manhattan); *Peterson*, 357 F. Supp. 2d at 752 (denying motion to dismiss for lack of venue in the Southern District of New York where the government represented that the defendant "caused illegal proceeds of his insurance fraud scheme to be cleared through New York [banks] for transmission to a bank account in the Cayman Islands"); *Ohle*, 441 F. App'x at 802 (finding venue proper in the

Southern District of New York where the defendant "directed others to send [wire transfers] from the United States to Bermuda and back because they passed through New York correspondent banks"); *United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir. 1987) (finding venue in the Eastern District of Pennsylvania proper where "the wire transfer of funds from New York to Wilmington . . . passed through the Federal Reserve Bank in Philadelphia").

"[V]enue lies both in the district where a telephonic communication in furtherance of a crime was made and where it was received." *Lange*, 834 F.3d at 70; *see also United States v. Abdallah*, 528 F. App'x 79, 83 (2d Cir. 2013) (concluding that a phone call from the Eastern District of New York to the defendant in Texas was sufficient to establish venue in the Eastern District of New York); *United States v. Christo*, 413 F. App'x 375, 376 (2d Cir. 2011) (stating that "the overt act can be something as simple as a phone call in furtherance of the conspiracy" (citing *United States v. Rommy*, 506 F.3d 108, 120 (2d Cir. 2007))); *Rommy*, 506 F.3d at 120 (finding venue for drug conspiracy proper where conspirators made calls into the district and noting that "[i]n cases involving telephone calls between co-conspirators in different districts, we have ruled that venue lies 'in either district as long as the calls further the conspiracy'" and collecting cases (quoting *United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999))); *United States v. Gilboe*, 684 F.2d 235, 239 (2d Cir. 1982) (finding that faxes and telephone calls between Hong Kong and Manhattan established venue in the Southern District of New York); *Kenner*, 2019 WL 6498699, at *5 ("Indeed, phone calls into or out of a district can establish venue in that district so long as they further the ends of the conspiracy.").

The Superseding Indictment alleges that (1) Goldman transferred part of the proceeds of the Project Magnolia bond offering to 1MDB's wholly owned subsidiary "from a place within the United States to and through a place outside the United States, including through the Eastern

District of New York," (2) "Goldman transferred part of the proceeds of [the] Project Maximus" bond offering to 1MDB's subsidiary "from a place within the United States to and through a place outside the United States, including through the Eastern District of New York," (3) "some of the proceeds" of the Project Maximus bond offering "were diverted and transferred via wire to a place in the United States from and through a place outside the United States, and from a place in the United States to and through a place outside the United States, including through the Eastern District of New York," (4) Ng was involved in a "meeting . . . attended by committee members and others located in New York, New York[,] using Goldman's telecommunication facilities, which transited through the Eastern District of New York," (5) a co-conspirator stated falsely that Low was not involved in Project Maximus at a "meeting . . . attended by committee members and others located in New York, New York[,] using Goldman's telecommunication facilities, which transited through the Eastern District of New York," (6) Ng committed and caused the commission of overt acts "[i]n furtherance of the conspirac[ies] [to commit bribery and circumvention of internal accounting controls in violation of the FCPA] and to effect its objects, within the Eastern District of New York and elsewhere," and (7) Ng conspired to commit money laundering "within the Eastern District of New York and elsewhere." (Superseding Indictment ¶¶ 37, 45, 60, 62–63, 65.) At the motion-to-dismiss stage, these allegations are sufficient to establish venue in the Eastern District of New York. *See Griffith*, 2020 WL 4369650, at *2 ("The indictment alleges that [the defendant] conspired to violate the [statute] 'in the Southern District of New York . . . .' Therefore, the indictment is facially sufficient to survive this motion, and venue is an issue of fact to be resolved by the jury at trial." (citing *Szur*, 1998 WL 132942, at *9)); *Dunnigan*, 2020 WL 3957961, at *2 (same); *Delgado*, 2020 WL 2924482, at *3 ("The indictment charges that the conspiracy with others was

committed in the District of Vermont[,] [which] is sufficient."); *United States v. Teman*, No. 19-CR-696, 2019 WL 6998634, at *1 (S.D.N.Y. Dec. 20, 2019) (denying motion to dismiss for lack of venue as premature where the indictment stated that "each charged count alleges that the offense in question occurred in [the Southern District of New York] (and elsewhere)"); *United States v. Blondet*, No. 16-CR-387, 2019 WL 5690711, at *1 (S.D.N.Y. Nov. 4, 2019) (concluding that an indictment that alleged that the defendant engaged in racketeering activity "in the Southern District of New York and elsewhere" was sufficient); *United States v. Dupigny*, No. 18-CR-528, 2019 WL 2327697, at *4 (S.D.N.Y. May 30, 2019) ("[T]he [s]uperseding [i]ndictment alleges that [the defendant] committed the offenses 'within the Southern District of New York and elsewhere.' That general allegation is sufficient to support venue at this stage, as innumerable courts in this [d]istrict have held."); *United States v. Bellomo*, 263 F. Supp. 2d 561, 579 (E.D.N.Y. 2003) (concluding that an indictment alleging that offenses occurred "within the Eastern District of New York and elsewhere" was sufficient); *Szur*, 1998 WL 132942, at *9 (same).

Contrary to Ng's assertion that "there has never been any other case holding venue appropriate based on the kind of 'pass through' alleged as the sole basis of venue in this case," (Def.'s Reply 14), courts in this Circuit have routinely found that "passing through" a district is sufficient to confer venue. In *United States v. Duque*, 123 F. App'x 447, 449 (2d Cir. 2005), "the government presented evidence that [the defendant] flew from JFK airport to Aruba via a flight path over Jamaica Bay, a body of water in Queens, New York[,] and within the Southern District of New York," which was sufficient to establish venue in the Southern District of New York. Similarly, in *Kirk Tang Yuk*, 885 F.3d at 71–72, the government informant "drove over the Verrazano-Narrows Bridge from Staten Island to Brooklyn, passing over the channel known

as 'the Narrows' and through the jurisdiction of the Southern District of New York," and the court found that this transit was sufficient to establish venue in the Southern District of New York. Likewise, in *Tzolov*, 642 F.3d at 320, the court agreed that venue was proper in the Eastern District because the use of JFK and travel through the Eastern District of New York "to attend meetings with the investors were overt acts in furtherance of the conspiracies" and "the principle in [Second Circuit] decisions [is] that venue for a conspiracy may be laid in a district through which conspirators passed in order to commit the underlying offense." *See also United States v. Woolaston*, No. 18-CR- 212, 2020 WL 91488, at *4 (S.D.N.Y. Jan. 7, 2020) (finding sufficient evidence of venue in the Southern District of New York based on a single trip from New Jersey to Queens because it was "practically impossible to travel to Queens without passing through Manhattan, the Bronx, or the Verrazzano-Narrows Bridge").

Ng's reliance on *Brennan* is misplaced. (*See* Def.'s Reply 13 (arguing that "*Brennan* disposed of this 'pass-through' theory" (quoting *Brennan*, 183 F.3d at 144)).) In *Brennan*, although the government argued that "venue was proper because the mailings underlying each count of [a mail fraud] conviction 'traveled through' the Eastern District," at trial, "[t]he sole basis on which the government relie[d] for establishing venue in the Eastern District [of New York was] the fact that letters mailed in Manhattan (in the Southern District of New York) to other parts of the country or to Europe or received in Manhattan from Europe or other parts of the country *are likely to have passed through* the John F. Kennedy or LaGuardia airports in the Eastern District of New York." *Brennan*, 183 F.3d at 144, 146 (emphasis added). The Second Circuit concluded that because the government could not show at trial that the mail passed through the EDNY, only that it was likely to have done so, venue was insufficient in the Eastern District of New York. *Id.* at 146.

The Superseding Indictment sufficiently alleges venue by stating that "Goldman transferred part of the proceeds of the Project Magnolia bond offering via wire to 1MDB's wholly-owned subsidiary, from a place within the United States to and through a place outside of the United States, including *through* the Eastern District of New York," (Superseding Indictment ¶¶ 37, 42, 45 (emphasis added)), and that Ng made false statements in a "meeting [that] was attended by committee members and others located in New York, New York[,] using Goldman's telecommunication facilities, which *transited through* the Eastern District of New York," (*id.* ¶ 63(e) (emphasis added)).

Unlike *Brennan*, which involved the insufficiency of the government's evidence at trial, *Brennan*, 183 F.3d at 144, 146, the Superseding Indictment contains sufficient allegations to withstand a motion to dismiss. Ng's attempt to distinguish *Kirk Tang Yuk*, *Tzolov*, and *Duque* fails and his arguments regarding the details on how the telecommunication or wires passed through the Eastern District of New York, (Def.'s Reply 12–14), are premature. The Court's role at this stage is not to weigh the sufficiency of the Government's evidence. *See Kirk Tang Yuk*, 885 F.3d at 71 (reviewing the district court's "determination that the evidence was sufficient to support a finding that venue was proper" following a jury trial); *Tzolov*, 642 F.3d at 320 (same); *Kim*, 246 F.3d at 188 (same); *Naranjo*, 14 F.3d at 146 (same).

If ultimately the Government cannot prove venue at trial, Ng can move for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure based on lack of venue. However, because the Superseding Indictment alleges that electrical communications and wires passed through and/or transited through the Eastern District of New York, the Court denies the motion to dismiss the Superseding Indictment for lack of venue based on Ng's sufficiency argument. (Superseding Indictment ¶¶ 37, 45, 59–60, 62–63, 65.)

ii. Foreseeability based on electronic communication

Ng argues that the Superseding Indictment fails to sufficiently allege venue because "[a]ll of the actions that the Government alleges touched the Eastern District [of New York] were completely unforeseeable to Ng or to any of his co-conspirators." (Def.'s Mem. 34.) In support, Ng argues that it was unforeseeable "that attending a virtual meeting with people in the Southern District while he was overseas" or conducting "wire transfers" would "have any effect in the Eastern District [of New York]." (*Id.* at 35.) He asserts that while he "might have foreseen that such communications would originate in the Southern District [of New York], where Goldman's headquarters is located," he could not have foreseen that the alleged actions touched the Eastern District of New York. (*Id.*)

The Government argues that based on "[Ng's] years-long employment by a bank headquartered in New York, along with his numerous contacts with individuals operating in New York as alleged in the [Superseding] Indictment, there is no question that venue in this District was foreseeable to him." (Gov't Opp'n 16.) In support, the Government argues that "Manhattan is an island, surrounded on all sides by the waters of New York County, all of which, as the defendant concedes, Congress has expressly made part of the Eastern District of New York." (*Id.* at 17.)

In the Second Circuit, "it must have been 'reasonably foreseeable' to each defendant charged with the conspiracy that a qualifying overt act would occur in the district where the prosecution is brought." *Kirk Tang Yuk*, 885 F.3d at 69 (first quoting *Rommy*, 506 F.3d at 123; and then citing *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003)); *United States v. Abdullaev*, 761 F. App'x 78, 83 (2d Cir. 2019) (noting that in "a conspiracy prosecution," venue is also proper where "it is foreseeable that such an act would occur in the district of venue"

(quoting *Svoboda*, 347 F.3d at 484)). "Actual knowledge that an overt act was committed in the district of prosecution is not required, however: venue will lie if a reasonable jury could find that it was 'more probable than not' that the defendant 'reasonably could have foreseen' that part of the offense would take place in the district of prosecution." *Kirk Tang Yuk*, 885 F.3d at 69–70 (quoting *Davis*, 689 F.3d at 189).

As discussed above, "the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss the indictment." *Perez*, 575 F.3d at 166–67 (quoting *Alfonso*, 143 F.3d at 776–77). Similarly, whether it was foreseeable to Ng that electrical communication and wires would pass through and/or transit through the Eastern District of New York, (Superseding Indictment ¶¶ 37, 45, 59–60, 62–63, 65), is a factual question reserved for trial, *see United States v. Murgio*, 209 F. Supp. 3d 698, 721 (S.D.N.Y. 2016) (rejecting the defendant's argument "that wire transfers through the Southern District of New York are insufficient to confer venue because the [g]overnment . . . failed to show that it would be reasonably foreseeable to [him] that the wire transfers would pass through this district" as "argument . . . hinges on the factual question of what was, or was not, reasonably foreseeable to [the defendant]" and is "reserved for trial"); *United States v. Louissaint*, No. 12-CR-6081, 2016 WL 3145145, at *10 (W.D.N.Y. June 3, 2016) (recommending that the defendants' venue challenge be denied as the "factual dispute[]" regarding "whether defendants could reasonably foresee the use of the wires . . . make the issue of venue inappropriate for pretrial determination").

Accordingly, the Court denies the motion to dismiss the Superseding Indictment for lack of venue based on Ng's foreseeability argument.

iii. Substantial contacts

Ng argues that "since he has been 'transported beyond seas' to face charges in Brooklyn, a place he does not know[,] the 'substantial contacts test'" governs, and the Superseding Indictment fails to satisfy the test. (Def.'s Mem. 29–30 (quoting *United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985)).)

The Government argues that the "'substantial contacts' . . . inquiry does not apply here in light of the alleged overt acts committed in this [d]istrict." (Gov't Opp'n 15 n.5 (quoting *Kirk Tang Yuk*, 885 F.3d at 69–70).)

The Second Circuit has "occasion[ally] . . . supplemented [the] venue inquiry with a 'substantial contacts' test that takes into account a number of factors . . . includ[ing] the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of the [venue] for accurate factfinding." *Kirk Tang Yuk*, 885 F.3d at 70 (first, third, and fourth alteration in original) (quoting *Lange*, 834 F.3d at 71). "When an overt act in furtherance of a criminal conspiracy has been committed in the district, however, this supplemental inquiry has no relevance." *Id.* "Virtually all the caselaw designates the site of the defendant's acts as a proper venue . . . because the alleged criminal acts provide substantial contact with the district." *Reed*, 773 F.2d at 481. Thus, "[a] defendant who is participating in a conspiracy that is being conducted, in part, in the district of prosecution necessarily has sufficient 'substantial contacts' to justify a finding of venue that is otherwise proper." *Kirk Tang Yuk*, 885 F.3d at 70 (citing cases); *see also Lange*, 834 F.3d at 75 (finding that the defendants had substantial contacts with the Eastern District of New York based in part on the fact that "some of [their] co-conspirators' acts occurred in the [district]"); *Tzolov*, 642 F.3d at 321 (concluding that the defendant's contacts were sufficiently "substantial" where the defendant "committed overt

acts in furtherance of the conspiracies" in the district of prosecution); *Saavedra*, 223 F.3d at 93 (noting that the substantial contacts test "is helpful in determining whether a chosen venue is unfair or prejudicial to a defendant," "especially in those cases where the defendant's acts *did not* take place within the district selected as the venue for trial" (emphasis added)); *Naranjo*, 14 F.3d at 147 ("Though *Reed* refers to a 'substantial contacts rule' for determining venue, it is clear that the panel regarded the locale of the defendant's acts as a sufficient basis for establishing venue . . . ." (citation omitted)). "[T]he 'substantial contacts' test applies 'only if the defendant argues that his prosecution in the contested district will result in a hardship to him, prejudice to him, or undermine the fairness of his trial.'" *United States v. Rasheed*, 981 F.3d 187, 194 (2d Cir. 2020) (quoting *United States v. Rutigliano*, 790 F.3d 389, 399 (2d Cir. 2015)).

The Superseding Indictment sufficiently alleges that Ng and his co-conspirators "committed overt acts in furtherance of the conspiracies in the Eastern District." (Superseding Indictment ¶¶ 37, 42, 45 ("Goldman transferred part of the proceeds of the Project Magnolia bond offering via wire to 1MDB's wholly-owned subsidiary, from a place within the United States to and through a place outside of the United States, including through the Eastern District of New York."); *id.* ¶ 63 (noting that Ng made false statements in a "meeting [that] was attended by committee members and others located in New York, New York[,] using Goldman's telecommunication facilities, which transited through the Eastern District of New York")); *see Tzolov*, 642 F.3d at 321 (noting that "flights out of JFK" satisfied the substantial contacts test and the conspiracy charges on that basis were neither "unfair [n]or prejudicial"); *United States v. DiScala*, No. 14-CR-399, 2018 WL 1187394, at *25 (E.D.N.Y. Mar. 6, 2018) (noting that the government's burden to show substantial contacts "is satisfied when allegations are made that criminal conduct occurred within the venue, even if phrased broadly" and that "at the pre-trial

stage, the government only has to show that the indictment alleges facts sufficient to support venue") (first citing *Murgio*, 209 F. Supp. 3d at 721; then citing *Ohle*, 678 F. Supp. 2d at 231; and then citing *United States v. Barrett*, 153 F. Supp. 3d 552, 561 n.5 (E.D.N.Y. 2015)); *United States v. Asante*, No. 15-CR-230, 2017 WL 3431403, at *4 (W.D.N.Y. Aug. 10, 2017) (finding that the substantial contacts test did not warrant dismissal where "the conduct constituting the offense charged . . . was alleged to have happened by propelled force in the Western District of New York"); *Kubitshuk*, 2017 WL 3531553, at *4 (finding that the substantial contacts test did not warrant dismissal where the indictment alleged that the defendants' "offenses occurred 'in the Southern District of New York and elsewhere'" and the defendants received "wired benefits" in the district). Thus, the Superseding Indictment sufficiently alleges substantial contact with the district at this stage. *See Riley*, 2014 WL 53440, at *3 (concluding that an indictment that alleged that an individual "used a prime broker located in New York, New York, among other things, to trade shares . . . in the Southern District of New York and elsewhere" was sufficient to show substantial contacts at the pre-trial stage).

Accordingly, the Court denies the motion to dismiss the Superseding Indictment for lack of venue based on Ng's substantial contacts argument.

d. Count One — Conspiracy to commit bribery under the FCPA

In his initial memorandum of law, filed before the Government superseded the Indictment, Ng argued that the Court should dismiss Count One of the Indictment because it failed to allege essential elements of the crime charged. (*See* Def.'s Mem. 37–43.) In support, Ng argued that Count One did not allege that he was an agent or employee of an actual issuer of U.S. securities, as required, but rather created "U.S. Financial Institution #1" as "an artificial combination of different business entities, one of which [i.e., the Goldman Sachs Group] is an

issuer of U.S. securities and others of which (including Ng's actual employers [i.e., the Goldman Sachs Group's subsidiaries]) are not." (*Id.* at 37.) Ng argued that, in doing so, "the Government relieve[d] itself of having to prove the statutory element that Ng must be an employee or an agent of an issuer." (*Id.*) In addition, Ng argued that the "the Indictment [was] both inconsistent and . . . imprecise in how it describe[d] his employment," referring to him sometimes as an agent and at other times as an employee of U.S. Financial Institution #1 but always failing to describe "what made Ng an agent or employee of an 'issuer,'" as it did not allege which specific entity he worked for or whether that entity was an issuer and thus would not allow the jury to decide whether he was an agent or employee of an issuer. (*Id.* at 39–41.) In his reply to the Government's opposition, Ng argues that the Government superseded the indictment only four days after serving its opposition to change Count One based on his arguments, "chang[ing] the identity of the 'issuer' . . . from a made-up '[U.S.] Financial Institution [#1]' to 'The Goldman Sachs Group, Inc.,'" (Def.'s Reply 2–3 (citing Superseding Indictment ¶ 1 and *passim*)), and adding the allegation that Ng is also "a stockholder thereof acting on behalf of such issuer," (*id.* at 2 (citation omitted) (first quoting Indictment ¶ 59(a); and then quoting Superseding Indictment ¶ 59(a))).

In its opposition to Ng's motion, the Government argued that Count One satisfied the pleading requirements of Rule 7 and the Constitution because "it not only track[ed] the statutory language — which is all that is required — but it also provide[d] additional specific information regarding [Ng's] criminal scheme" and thus "fairly inform[ed] Ng of the charge against him and enable[d] him to 'plead an acquittal or conviction in bar of future prosecutions for the same offense.'" (Gov't Opp'n 20 (quoting *Alfonso*, 143 F.3d at 776). *See generally id.* at 19–24.) The Government also argued that the Indictment did not "reliev[e] it[] of having to prove the

statutory element that [Ng] must be an employee or agent of an issuer" by using the term "U.S. Financial Institution #1" because whether that term referred solely to the Goldman Sachs Group or to a larger group of entities that included the Goldman Sachs Group, Ng was on notice that he was being charged with conspiracy to violate the FCPA as an employee and agent of the issuer Goldman Sachs Group. (*Id.* at 23.) In addition, the Government argued that it "is axiomatic that in a criminal trial an indictment is not evidence," and thus the Indictment's allegations "in no way relieve[d] the [G]overnment of its burden to prove to the jury that [Ng] was, in fact, an employee or agent of an 'issuer' under the FCPA." (*Id.* at 23–24 (quoting *United States v. Juwa*, 508 F.3d 694, 701 (2d Cir. 2007))). In its sur-reply, the Government argues that it did not "change[] the identity of the 'issuer,'" (Gov't Sur-Reply 13 n.7 (quoting Def.'s Reply 2)), because it "disclosed to [Ng] in pre-trial discovery that [the Goldman Sachs Group] was the issuer and repeated that fact in its opposition," (*id.* (citing Gov't Opp'n 1); *see also* Gov't Opp'n 21).

"The FCPA explicitly lays out several different categories of persons over whom the government may exercise jurisdiction." *United States v. Hoskins*, 902 F.3d 69, 84 (2d Cir. 2018). As relevant here, "the statute prohibits a company issuing securities regulated by federal law (an 'issuer') from using interstate commerce in connection with certain types of corrupt payments to foreign officials." *Id.* (citing 15 U.S.C. § 78dd-1(a)); *see also* 15 U.S.C. § 78c(a)(8) (defining "issuer" as "any person who issues or proposes to issue any security"). In addition, "the prohibitions on issuers . . . also apply to 'any officer, director, employee, or agent of' the entity, 'or any stockholder thereof acting on behalf of' the entity." *Hoskins*, 902 F.3d at 85 (first quoting 15 U.S.C. § 78dd-1(a); and then quoting 15 U.S.C. § 78dd-2(a)); *see also* 15 U.S.C. § 78dd-1(a) (making it unlawful "for any issuer which has a class of securities registered

pursuant to section 78*l* of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer" to corruptly use means of interstate commerce in furtherance of a bribery scheme).

Count One of the Indictment charged Ng with conspiring to violate the FCPA under 15 U.S.C. §§ 78dd-1, 78ff(a), and 78ff(c)(2)(a) in violation of the conspiracy statute, 18 U.S.C. § 371. (Indictment ¶ 59(a).) In support, the Indictment alleged that "U.S. Financial Institution #1 was a global investment banking, securities and investment management firm" that "conducted its activities primarily through various subsidiaries and affiliates (collectively 'U.S. Financial Institution #1'), including those that employed [Ng]," and that it "had a class of securities registered pursuant to [15 U.S.C. § 78*l*] . . . and was required to file reports with the U.S. Securities and Exchange Commission under [15 U.S.C. § 78o(d)]," making it "an 'issuer' within the meaning of [15 U.S.C. § 78dd-l(a)]." (*Id.* ¶ 3.) In addition, the Indictment alleged that Ng was "employed as a Managing Director by various subsidiaries, and acted as an agent and employee, of U.S. Financial Institution #1 . . . from approximately 2005 to May 2014," making Ng "an 'employee' and 'agent' of an 'issuer' within the meaning of [15 U.S.C. § 78dd-1(a)]." (*Id.* ¶ 2.) The Superseding Indictment repeats these allegations, substituting the Goldman Sachs Group for U.S. Financial Institution #1 and adding that Ng was also a stockholder of the Goldman Sachs Group's. (Superseding Indictment ¶ 59(a).)

Ng's arguments with respect to Count One have been mooted by the Superseding Indictment, which, as discussed above, controls, and which, as Ng notes, substitutes the Goldman Sachs Group for "U.S. Financial Institution #1" and adds the specific allegation that Ng is a stockholder of the Goldman Sachs Group acting on its behalf. (Def.'s Reply 2–3;

Superseding Indictment ¶¶ 2–3, 59(a).) Because the Superseding Indictment specifically names the Goldman Sachs Group as the issuer and alleges that Ng is not only an employee and agent of the Goldman Sachs Group but also owned stock in it, and because the Superseding Indictment otherwise tracks the statutory language, it fairly informs Ng of the charge against him and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. (*See* discussion *infra* II.f.1.)[18]

Accordingly, the Court finds that Count One of the Superseding Indictment sufficiently tracks the language of 15 U.S.C. § 78dd-1(a) and denies Ng's motion to dismiss this count.

e. Count Two — Conspiracy to circumvent internal accounting controls

Ng argues that the Court must dismiss Count Two because the Superseding Indictment fails to allege that he conspired to circumvent a set of internal accounting controls cognizable under the FCPA. (Def.'s Mem. 44–52.) In support, he argues that (1) the statutory text and objectives of the FCPA's internal accounting control provision demonstrate that the provision applies only to the transactions and assets of an "issuer," but Count Two's allegations relate only to transactions and assets that belonged to non-issuer 1MDB at the time of the violations, rather than to the Goldman Sachs Group,[19] (*id.* at 45–49; Def.'s Reply 21–22); (2) prior applications of the internal accounting control provision "do not square" with the allegations in Count Two, (Def.'s Mem. 49–52); and (3) because the alleged bribes did not relate to a Goldman Sachs

[18] Ng repeats his argument that tracking the statute is insufficient with respect to all three counts. The Court addresses this argument in more detail below.

[19] Ng also notes that, like Count One, Count Two "fails to identify the precise 'issuer' whose accounting controls were allegedly circumvented" and "is silent regarding what specific company employed [Ng] and what factual connection that company might have to an actual 'issuer' of U.S. securities." (Def.'s Mem. 44 n.21.) As discussed above, because the Superseding Indictment identifies the Goldman Sachs Group as the issuer, this argument is moot.

Group transaction or its assets, the internal accounting controls provision is unconstitutionally vague as applied and Count Two must be dismissed, (*id.* at 52–56).

The Government argues that (1) the Superseding Indictment sufficiently alleges relevant "transactions," "assets," and "internal accounting controls" of the Goldman Sachs Group, (Gov't Opp'n 27–32); (2) Ng's challenges relate to the sufficiency of the evidence and adequacy of the pleading of the Superseding Indictment and are therefore fact questions for the jury, (*id.* at 32–33), and (3) Ng's argument that the internal accounting controls provisions of the FCPA are unconstitutionally vague as applied is both premature and fails on the merits, (*id.* at 33–36).[20]

The FCPA provides that it is unlawful for any person to knowingly and willfully circumvent a system of internal accounting controls. *See* 15 U.S.C. §§ 78m(b)(5), 78ff(a); *see also United States v. Wittig*, 568 F. Supp. 2d 1284, 1293 (D. Kan. 2008) ("In order to prove conspiracy to circumvent internal controls, the government must show that the conspirators agreed to commit an offense that requires knowing and willful circumvention of internal controls instituted to satisfy SEC requirements.").

Under the FCPA's "internal accounting controls" provision, every issuer is required to:

> (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that —
> (i) transactions are executed in accordance with management's general or specific authorization;

[20] The Government also argues that Count Two properly tracks the statutory language, which satisfies the pleading requirements of Rule 7. (Gov't Opp'n 26–27.) Ng argues that whether Count Two tracks the statutory language may pertain to Rule 7's pleading requirements but is irrelevant to whether Count Two states an offense under Rule 12(b)(3)(B)(v). (Def.'s Reply 23–24.) The Second Circuit has explained that "to state an offense [under 12(b)(3)(B)(V)], an indictment 'need only track the language of the statute and, if necessary to apprise the defendant of the nature of the accusation against him, state time and place in approximate terms,'" *United States v. Frias*, 521 F.3d 229, 235 (2d Cir. 2008) (quoting *United States v. Flaharty*, 295 F.3d 182, 198 (2d Cir. 2002)). As the Government argues, Count Two tracks the statutory language and also states the time and place in approximate terms. (Superseding Indictment ¶¶ 61–63.)

(ii) transactions are recorded as necessary
  (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and
  (II) to maintain accountability for assets;
(iii) access to assets is permitted only in accordance with management's general or specific authorization; and
(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. § 78m(b)(2)(B). "Reasonable assurances" means a degree of assurance that "would satisfy prudent officials in the conduct of their own affairs." *Id.* § 78m(b)(7).

While the FCPA's internal accounting controls provision is "supportive of accuracy and reliability in the auditor's review and financial disclosure process, this provision should not be analyzed solely from that point of view." *S.E.C. v. World-Wide Coin Invs. Ltd.*, 567 F. Supp. 724, 749–50 (N.D. Ga. 1983). Rather, "[t]he internal controls requirement is primarily designed to give statutory content to an aspect of management stewardship responsibility, that of providing shareholders with reasonable assurances that the business is adequately controlled." *Id.* (discussing § 78m(b)(2)(B)); *see also S.E.C. v. Dauplaise*, No. 05-CV-1391, 2006 WL 449175, at *9 (M.D. Fla. Feb. 22, 2006) (quoting *World-Wide Coin Invs., Ltd.*, 567 F. Supp. at 750) (same). "The internal accounting controls element of a company's control system is that which is specifically designed to provide reasonable, cost-effective safeguards against the unauthorized use or disposition of company assets and reasonable assurances that financial records and accounts are sufficiently reliable for purposes of external reporting." *Dauplaise*, 2006 WL 449175, at *9 (quoting *World-Wide Coin Invs., Ltd.*, 567 F. Supp. at 750); *see also In re Ikon Office Sols., Inc.*, 277 F.3d 658, 672 n.14 (3d Cir. 2002) ("'Internal accounting controls' refers to the mechanism by which companies monitor their accounting system (their

individualized method of processing transactions) for errors and irregularities in order to safeguard company assets and ensure that records are sufficiently reliable." (citing *World-Wide Coin Invs., Ltd.*, 567 F. Supp. at 750)). "Internal controls safeguard assets and assure the reliability of financial records, one of their main jobs being to prevent and detect errors and irregularities that arise in the accounting systems of the company. Internal accounting controls are basic indicators of the reliability of the financial statements and the accounting system and records from which financial statements are prepared." *World-Wide Coin Invs., Ltd.*, 567 F. Supp. at 750; *see also Monroe v. Hughes*, 31 F.3d 772, 773 (9th Cir. 1994) (defining "internal controls" as "the procedures used by the company to assure the reliability of its financial records").

"Although not specifically delineated in the Act itself, the following directives can be inferred from the internal controls provisions":

> (1) Every company should have reliable personnel, which may require that some be bonded, and all should be supervised. (2) Account functions should be segregated and procedures designed to prevent errors or irregularities. The major functions of recordkeeping, custodianship, authorization, and operation should be performed by different people to avoid the temptation for abuse of these incompatible functions. (3) Reasonable assurances should be maintained that transactions are executed as authorized. (4) Transactions should be properly recorded in the firm's accounting records to facilitate control, which would also require standardized procedures for making accounting entries. Exceptional entries should be investigated regularly. (5) Access to assets of the company should be limited to authorized personnel. (6) At reasonable intervals, there should be a comparison of the accounting records with the actual inventory of assets, which would usually involve the physical taking of inventory, the counting of cash, and the reconciliation of accounting records with the actual physical assets.

World-Wide Coin Invs., Ltd., 567 F. Supp. at 750–51. "Examples of internal controls include manual or automated review of records to check for completeness, accuracy and authenticity; a

method to record transactions completely and accurately; and reconciliation of accounting entries to detect errors." *McConville v. U.S. S.E.C.*, 465 F.3d 780, 790 (7th Cir. 2006); *S.E.C. v. RPM Int'l, Inc.*, 282 F. Supp. 3d 1, 34 (D.D.C. 2017) (same); *S.E.C. v. Patel*, No. 07-CV-39, 2009 WL 3151143, at *25 (D.N.H. Sept. 30, 2009) (same); *see also S.E.C. v. E-Smart Techs., Inc.*, 82 F. Supp. 3d 97, 109–10 (D.D.C. Feb. 12, 2015) (citing examples of internal accounting control weaknesses, including, *inter alia*, lack of policy on conflicts of interest, lack of high-level supervision and review, lack of training on company procedures, poor communication among staff and consultants that led to inaccurate information, and inconsistencies in supporting documentation).

The Superseding Indictment alleges that "[i]n or about and between January [of] 2009 and May [of] 2014," Ng "knowingly and willfully conspir[ed] to . . . circumvent and cause to be circumvented a system of internal accounting controls at [the] Goldman Sachs Group" in violation of 15 U.S.C. §§ 78m(b)(2)(B), 78m(b)(5), and 78ff(a). (Superseding Indictment ¶ 62; *id.* ¶¶ 19–23.) In support, it alleges that the Goldman Sachs Group is an "issuer" under the FCPA, (*id.* ¶ 3), and that the Goldman Sachs Group used its own assets to purchase the bonds at issue in the three bond transactions discussed, (*id.* ¶ 24 (stating that the bonds were "underwritten" by the Goldman Sachs Group)). It further alleges that in order to secure the bond deals, Ng and others conspired to circumvent the Goldman Sachs Group's internal accounting controls by concealing Low's involvement in procuring the deals from the Goldman Sachs Group's Compliance Group and Intelligence Group — which were responsible for overseeing and enforcing the Goldman Sachs Group's internal accounting controls — to prevent any investigation into the business relationship with Low that might jeopardize the deals and "to prevent [them] from attempting to stop Goldman from participating in the lucrative

transactions." (*Id.* ¶¶ 19–23.) Ng allegedly concealed Low's involvement despite knowing that Low played a central role in the bond transactions and that he intended to use funds misappropriated from the bond deals to pay bribes promised to foreign officials. (*Id.* ¶ 20.) The Superseding Indictment also alleges that, later, members of the conspiracy used the same funds to pay bribes to the foreign officials and kickbacks to themselves, after laundering the funds through multiple shell companies owned and controlled by the co-conspirators. (*See, e.g.*, *id.* ¶¶ 25–27; 37–41.)

Accepting these allegations as true, the Court finds that the Superseding Indictment sufficiently states an offense under 15 U.S.C. § 78m(b)(2)(B). Ng's arguments to the contrary are unavailing.

First, Ng argues that the Court must dismiss Count Two because "the FCPA's internal accounting control provision applies only to the transactions and assets of the issuer," but none of Count Two's allegations relate to an internal accounting of a Goldman Sachs Group transaction or assets, as the Goldman Sachs Group did not directly pay bribes with its own assets; rather, they relate to bribes that were paid from assets that belonged to non-issuer 1MDB at the time. (Def.'s Mem. 48; Def.'s Reply 20.) As the Government observes, "[a]t the core of [Ng's] argument is his . . . assertion that the 'bribes did not involve any of [the] Goldman [Sachs] Group's funds and therefore had nothing to do with [the Goldman Sachs Group's] internal accounting controls.'" (Gov't Opp'n 28 (quoting Def.'s Mem. 48).) However, the relevant "transaction" and use of "assets" are the Goldman Sachs Group's purchase of the bonds with its own assets, which the Government alleges would not have been authorized by the groups at the Goldman Sachs Group that enforce its internal accounting controls had Ng and others not concealed Low's involvement in the bond transactions. In addition, as the Government also

notes, the internal accounting controls provision does not strictly require that the issuer's assets be used, as subsection 78m(b)(2)(B)(i) makes no mention of "assets" but rather focuses on "transactions." (*Id.* at 29.) Nor does the plain language of the statute support Ng's assertion that internal accounting controls can only be implicated in transactions where an issuer uses its own assets to pay a bribe directly. (*Id.* at 30.) Because the Superseding Indictment alleges that Ng and others conspired to conceal information from the groups at the Goldman Sachs Group responsible for enforcing the internal accounting controls, and that, had the concealed information been known, it would have triggered an investigation in accordance with those controls that likely would have prevented the authorization of the bond transactions and access to the assets used to purchase the bonds, (Superseding Indictment ¶¶ 19–23), the allegations in Count Two are sufficient to state an offense under these sections. *See SEC v. Lucent Techs., Inc.*, No. 04-CV-2315, 2005 WL 1683741, at *2 (N.J.D. July 18, 2005) (finding "allegation that [a corporate executive] lied to the chief accountant about the existence of . . . side agreements sufficiently supports the claim that [the executive] knowingly circumvented [a corporation's] system of internal accounting controls").

Second, Ng argues that the Superseding Indictment fails to identify an internal accounting control that was violated, instead identifying the compliance and legal groups within the Goldman Sachs Group as internal controls, though they are not "accounting related." (Def.'s Mem. 49.) In the civil context, courts have dismissed claims that a defendant conspired to circumvent internal accounting controls where the SEC failed to specifically allege which controls were violated. *See, e.g.*, *S.E.C. v. Rio Tinto PLC*, No. 17-CV-7994, 2019 WL 1244933, at *19 (S.D.N.Y. Mar. 18, 2019) ("The SEC has not alleged sufficient facts concerning [the company's] internal controls for the [c]ourt to conclude that they may have been violated."

(citing *McConville*, 465 F.3d at 790)); *Patel*, 2009 WL 3151143, at *26 (dismissing civil claim that the defendant circumvented internal accounting controls where amended complaint did not specify "anything . . . that might qualify as an internal accounting control"); *S.E.C. v. Berry*, 580 F. Supp. 2d 911, 924–25 (N.D. Cal. May 7, 2008) ("[W]hile the complaint implies that certain controls were insufficient or circumvented, it does not state them. To the extent the SEC wishes to rely on this alternate theory . . . , it must plead the factual allegations to support it.").

However, in the criminal context, allegations that track the language of the statute are generally sufficient to state an offense under Rule 12(b)(3)(B), *see Ghayth*, 709 F. App'x at 723, and questions such as whether "transactions" or "assets" of the issuer were involved, and whether the controls at issue are internal "accounting" controls, are matters for the jury to decide, *see World-Wide Coin Invs., Ltd.*, 567 F. Supp. at 751 (noting that because "there are no specific standards by which to evaluate the sufficiency of controls" and "any evaluation is inevitably a highly subjective process in which knowledgeable individuals can arrive at totally different conclusions[,] [a]ny ruling . . . with respect to the applicability of . . . the internal accounting control provision[] should be strictly limited to the facts of each case"); *see also United States v. Eichman*, 756 F. Supp. 143, 146 (S.D.N.Y. 1991) ("A motion to dismiss is not a device for the summary trial of the evidence; it is addressed only to the facial validity of the indictment." (citing *United States v. Winer*, 323 F. Supp. 604, 605 (E.D. Pa. 1971))).

Third, Ng argues that prior applications of the internal accounting controls provision "do not square" with the allegations in Count Two. (Def.'s Mem. 49.) Specifically, he argues that "the Government's theory of Count Two is . . . inconsistent with the Government's own Resource Guide To The U.S. Foreign Corrupt Practices Act," which "limits application of the internal accounting controls provision to accounting controls regarding 'the firm's assets.'" (*Id.*

at 49–50.) In support, Ng argues that "there has *never* been a criminal case where a defendant was convicted for violating his company's internal accounting controls when it was undisputed that his company did not engage in a transaction concerning its own funds," and therefore "every existing criminal violation of the internal accounting controls provision . . . involved an affirmative falsification of some record, document or piece of information that was maintained by the issuer and involved the company's assets, such that it could be reflected on the issuer's financial statement." (*Id.* at 50.)

As discussed above, the Superseding Indictment alleges that Goldman Sachs Group underwrote the 1MDB bond transactions. (Superseding Indictment ¶ 24.) Therefore, this is not a case, as Ng suggests, that does not involve a transaction by the firm or use of the firm's assets. In addition, as the Government argues, Ng's suggestion that the circumvention of internal accounting controls must be attended by the falsification of an accounting document[21] appears to conflate the "books and records" provision of the FCPA with the "internal accounting controls" provision of the FCPA under which he is charged. *See Hoskins*, 902 F.3d at 86 (describing the

[21] (*See, e.g.*, Def.'s Mem. 43–44 (arguing that "[t]hose who conspire to pay bribes generally use their company's funds, and conceal the nature of the payments by describing them in the company's books and records as legitimate business expenses"); *id.* at 48 (arguing there is no internal accounting issue because Low was never paid as part of a Goldman Sachs Group transaction or from the Goldman Sachs Group's assets, and thus "the Government has failed to allege how [the Goldman Sachs Group's] funds, assets or financial resources (*i.e.*, the type of financial data that would be reflected in a financial statement) are implicated"); *id.* (arguing that because the bribes were paid from 1MDB's funds and not the Goldman Sachs Group's assets, "[t]he Government has . . . not alleged how the prospect of Low bribing foreign officials with money not belonging to, or otherwise appearing on the books of, [the] Goldman [Sachs Group] impacts upon [the Goldman Sachs Group's] accounting controls"); *id.* at 48 (arguing that "the Government fails to identify any funds, assets or transactions of or relating to [the] Goldman [Sachs] Group that were falsified, altered or impacted in any way so as to effect the company's accounting controls"); *id.* at 50 (arguing that "every existing criminal violation of the internal accounting controls provision . . . involved an affirmative falsification of some record, document or piece of information that was maintained by the issuer and involved the company's assets, such that it could be reflected on the issuer's financial statement").)

FCPA's "books and records" and "internal accounting controls" provisions as "two classes of rules"). Under the FCPA's "books and records" provision, every issuer must "make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." 15 U.S.C. §§ 78m(b)(2)(A). While the falsification of a book or record is a common feature of violations of this provision, the "internal accounting controls" provision has no such requirement. Rather, subsections 78m(b)(2)(B)(i) and (iii) of the internal accounting provision, for example, only require that issuers maintain a system of controls sufficient to provide reasonable assurances that "transactions are executed in accordance with management's general or specific authorization," 15 U.S.C. § 78m(b)(2)(B)(i), and that "access to assets is permitted only in accordance with management's general or specific authorization," *id.* § 78m(b)(2)(B)(iii). Thus, the focus in these sections "is not on actual entries into the books and records" but on "management control." (Gov't Opp'n 30); *see Lewis on Behalf of Nat'l Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316, 1332–33 (N.D. Cal. 1985) ("The purpose of [s]ection 13(b)(2), enacted as part of the FCPA, was to deter bribery of foreign officials by American corporations. Congress believed that almost all such bribery was covered up in the corporation's books, and that to require proper accounting methods and internal accounting controls would discourage corporations from engaging in illegal payments."). As the leading case on the internal accounting controls provision — and the main authority cited by the parties — noted, "while [this provision] is supportive of accuracy and reliability in the auditor's review and financial disclosure process, [it] should not be analyzed solely from that point of view." *World-Wide Coin Invs. Ltd.*, 567 F. Supp. at 749–50. Rather, "[t]he internal controls requirement is primarily designed to give statutory content to an aspect of management stewardship responsibility, that of providing shareholders with reasonable assurances that the

business is adequately controlled." *Id.* at 750. Thus, the Superseding Indictment's allegations that Ng concealed Low's involvement in the bond deals in order to ensure that the Goldman Sachs Group would authorize them is consistent with the Government's Resource Guide, which states that the focus is not only on maintaining controls to ensure accurate accounting but also on "maintain[ing] a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over the firm's assets." Resource Guide to the U.S. Foreign Corrupts Practices Act 38 (2d ed. July 2020).

Finally, Ng argues that because Count Two's allegations "do not relate to a Goldman [Sachs Group] transaction or assets," the statue is unconstitutionally vague as applied, as it (1) fails to give sufficient notice of prohibited conduct because "a person of ordinary intelligence reading the FCPA's internal accounting control provision would believe that it applies only to accounting of an issuer's transactions and assets," and (2) is prone to "subjective" enforcement because once the provision "is untethered from accounting, there is no limit to how far prosecutors can expand the term." (Def.'s Mem. 54–55.) The Government argues that Ng's void-for-vagueness argument is premature because not all the facts regarding the Goldman Sachs Group's internal accounting controls and Ng's co-conspirators' knowing and willful circumvention of them can be determined at this stage. (Gov't Opp'n 35.) In addition, the Government argues that Ng's void-for-vagueness argument fails on its merits because (1) the internal accounting controls provision gives sufficient notice to Ng that his concealment of Low's involvement in the bond deals was related to a transaction or asset of [the Goldman Sachs Group's] — namely, its underwriting of the bond deals — and (2) the internal accounting controls provision is not prone to subjective enforcement because it ties the allegations against Ng to the Goldman Sachs Group's underwriting of the bond deals. (*Id.* at 36.)

To ensure that persons are not denied liberty without due process, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Beckles v. United States*, 580 U.S. ---, ---, 137 S. Ct. 886, 892 (Mar. 6, 2017) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *United States v. Dawkins*, 999 F.3d 767, 787 (2d Cir. 2021) (same). "The doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." *United States v. Napout*, 963 F.3d 163, 181 (2d Cir. 2020) (quoting *United States v. Halloran*, 821 F.3d 321, 337–38 (2d Cir. 2016)). "Under the 'fair notice' prong, a court must determine 'whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" *Id.* (quoting *Halloran*, 821 F.3d at 337–38); *Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018). "The arbitrary enforcement prong requires that a statute give 'minimal guidelines' to law enforcement authorities, so as not to 'permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010) (quoting *Kolender*, 461 U.S. at 358).

"[V]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *United States v. Coppola*, 671 F.3d 220, 235 (2d Cir. 2012) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)); *Arriaga v. Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008) (same); *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc) ("[W]hen . . . the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' i.e., 'in light of the specific facts of the case at hand and not with regard to the statute's facial

validity.'" (quoting *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993))); *see also United States v. Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." (citing *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29 (1963))).

Ng's void-for-vagueness argument is based on the premise that the allegations in the Superseding Indictment "do not relate to a Goldman [Sachs] Group transaction or assets." (Def.'s Mem. 54–55.) However, as discussed above, the Court finds otherwise because the relevant "transactions" and uses of "assets" are the Goldman Sachs Group's purchase of the bonds with its own assets, which the Government alleges would not have been authorized by the groups at the Goldman Sachs Group that enforce its internal accounting controls had Ng and others not concealed Low's involvement in the bond transactions. Accordingly, because the internal accounting controls provision gives sufficient notice to Ng that his concealment of Low's involvement in the bond deals was related to a transaction or asset of the Goldman Sachs Group's — namely, its underwriting of the bond deals — the provision is not prone to subjective enforcement because it ties the allegations against Ng to the transactions and assets used to conduct them.

Accordingly, the Court finds that Count Two of the Superseding Indictment sufficiently states an offense under 15 U.S.C. § 78m(b)(2)(B).

f. Count Three — Conspiracy to commit money laundering

Ng argues that he is improperly charged with conspiracy to commit money laundering because the charge (1) fails to detail the Malaysian statute he allegedly violated, (2) fails to state a design to conceal funds, and (3) fails to provide facts to support the object of the conspiracy. (Def.'s Mem. 60; Def.'s Reply 24–25.)

The Government contends that "the [Superseding] Indictment properly alleges [that] . . . [Ng] conspired to commit money laundering." (Gov't Opp'n 37.)

Section 1956(h) states that "[a]ny person who conspires to commit any [money laundering offense] shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956. "Conspiring to launder money requires that two or more people agree to violate the federal money laundering statute, and that the defendant 'knowingly engaged in the conspiracy with the specific intent to commit the offenses that [are] the objects of the conspiracy.'" *United States v. Garcia*, 587 F.3d 509, 515 (2d Cir. 2009) (alteration in original) (quoting *United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008)). However, proof of an overt act in furtherance of the conspiracy is not required. *See United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015) ("[Section] 1956(h) does not require proof of an overt act." (quoting *Whitfield v. United States*, 543 U.S. 209, 219 (2005))); *United States v. Evergreen Int'l*, 206 F. App'x 71, 77 (2d Cir. 2006) (same). In addition, "[c]harges relating to money laundering need not be pled with 'great particularity,' but they must contain 'all essential elements of the offenses.'" *United States v. Walters*, 963 F. Supp. 2d 125, 132–33 (E.D.N.Y. 2013) (quoting *Bernstein v. Misk*, 948 F. Supp. 228, 236 n.2 (E.D.N.Y. 1997)).

The Court addresses whether the conspiracy to commit money laundering charge violates the Fifth and Sixth Amendments based on an alleged (1) failure to detail the Malaysian statute at issue, (2) failure to state a design to conceal funds, and (3) failure to provide facts to support the object of the conspiracy.

i. Constitutional requirements

Ng argues that a motion to dismiss pursuant to Rules 7 and 12(b)(3)(B)(iii) is appropriate because the Superseding "Indictment is deficient." (Def.'s Mem. 60.) In support, Ng argues that (1) the conspiracy to commit money laundering charge "offends several bedrock Constitutional rights, including the Grand Jury clause of the Fifth Amendment, the Double Jeopardy clause of the Fifth Amendment, and the Sixth Amendment right to be 'informed of the nature and cause of the accusation,'" (Def.'s Reply 25–26), and that (2) even if the charge tracks the language of 18 U.S.C. § 1956(c)(7)(B), it is insufficient under *United States v. Russell*, 369 U.S. 749, 752 (1962) and *Pirro*, 212 F.3d at 93, (*id.* at 26–28; Def.'s Mem. 58–59).

The Government argues that Count Three is constitutional, that Ng's "challenges rest on a misreading of the [Superseding] Indictment, the law, or both," (Gov't Opp'n 39), and that the conspiracy to commit money laundering charge tracks the statute, which is sufficient to overcome a motion to dismiss, (*id.* at 40).

A deficient indictment "offends both the Fifth and Sixth Amendments." *Pirro*, 212 F.3d at 92. The Fifth Amendment requires that a defendant "be[] tried on the evidence presented to the grand jury" and "the grand jury act[] properly in indicting him," *id.* (citation omitted), that "an indictment contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury," *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999) (quoting *United States v. Abrams*, 539 F. Supp. 378, 384 (S.D.N.Y. 1982)), and that an indictment contain "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). "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without

court amendment." *Gonzalez*, 686 F.3d at 127 (quoting *United States v. Miller*, 471 U.S. 130, 139 (1985)).

In the Second Circuit, "the general rule [is] that an accusation tracking the statutory language is sufficient to give notice, protect against double jeopardy[,] and assure consideration by the trial jury of the same accusation made in the grand jury." *United States v. Awan*, 459 F. Supp. 2d 167, 176 (E.D.N.Y. 2006), *aff'd*, 384 F. App'x 9 (2d Cir. 2010). "When the charges in an indictment have stated the elements of the offense and provided even minimal protection against double jeopardy," the Second Circuit has "repeatedly refused, in the absence of any showing of prejudice, to dismiss . . . charges for lack of specificity." *Stringer*, 730 F.3d at 124 (quoting *Walsh*, 194 F.3d at 45). Pursuant to the Sixth Amendment, a defendant must "be informed of the nature and cause of the accusation." U.S. Const. amend. VI; *Gonzalez*, 686 F.3d at 127.

Rule 12(b)(3)(B)(iii) requires that a motion to dismiss for lack of specificity "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(B)(iii); *see also United States v. Spero*, 331 F.3d 57, 62 (2d Cir. 2003) ("If [the defendant] had been truly concerned that the lack of specificity in the indictment would prejudice his defense, he could have raised an objection prior to trial . . . ."); *United States v. Crowley*, 236 F.3d 104, 108 (2d Cir. 2000) (noting that "a claim that an indictment is insufficiently specific 'must be raised prior to trial'").

As a preliminary matter, the Court is not persuaded by Ng's argument that the Superseding Indictment must satisfy the arguably more stringent sufficiency standard set forth in *Russell*, 369 U.S. at 765, in order to protect Ng's Fifth and Sixth Amendment rights. (*See* Def.'s

Mem. 42–43.) In *Russell*, the defendants were charged under a federal statute that made it a crime for a witness before a congressional committee to refuse to answer questions pertinent to the committee's inquiry. *Russell*, 369 U.S. at 752. In overturning a conviction stemming from the defendant's "refus[al] to answer some questions of a [s]enate subcommittee," the Supreme Court noted that the indictment "did not even purport to inform him in any way of the identity of the topic under subcommittee inquiry." *Id.* at 767–68. In explaining the scope of *Russell*, the Second Circuit in *Stringer*, 730 F.3d at 125, noted that *Russell* is "a [fifty] year-old precedent, which is one of the very rare cases in which an indictment that tracked the statutory language and furnished the pertinent dates was held insufficient." *Id.* The *Stringer* Court noted that *Russell* should not be construed "as a broad requirement applicable to all criminal charges that the indictment specify how each essential element is met" but rather, pursuant to the Supreme Court's decision in *United States v. Resendiz-Ponce*, 549 U.S. 102, 127 (2007), *Russell* only stands for the proposition that "for certain statutes specification of how a particular element of a criminal charge will be met (as opposed to categorical recitation of the element) is of such importance to the fairness of the proceeding that it must be spelled out in the indictment, *but there is no such universal requirement*." 730 F.3d at 126 (emphasis added) (first citing *Resendiz-Ponce*, 549 U.S. at 107–10; and then citing *Hamling*, 418 U.S. at 118); *see also United States v. Wey*, No. 15-CR-611, 2017 WL 237651, at *5 (S.D.N.Y. Jan. 18, 2017) (distinguishing *Russell*, declining to "depart from the usual sufficiency framework," and upholding an indictment where the defendant "cite[d] no authority — and the [c]ourt [was] aware of none — to support application of *Russell* to the statutes under which [he was] charged" (citing *Stringer*, 730 F.3d at 126–27)); *United States v. D'Amico*, 734 F. Supp. 2d 321, 334 (S.D.N.Y. 2010) (distinguishing *Pirro* where "more factual detail was needed just to plead the essential elements

of the charged offense" and *Russell* where the indictment was vague because "[t]here [wa]s no similar defect in the [i]ndictment"); *United States v. Bitzur*, No. 96-CR-572, 1996 WL 665621, at *2–3 (S.D.N.Y. Nov. 18, 1996) (concluding that *Russell* was inapposite because an indictment need not delve into the elements of fraud, which were "ancillary to — rather than the 'core of criminality' of — the money laundering charge" and that "[w]hile the government will have to show at trial that the proceeds were obtained 'with the intent to promote the carrying on of' a violation of [a statute], that showing is a matter of proof, not of the indictment's sufficiency"); *see also United States v. Cheever*, No. 05-CR-10050, 2006 WL 1360519, at *7 (D. Kan. May 18, 2006) (contrasting *Russell* where the court "was concerned with the ambiguity caused by statutory language using 'generic terms,'" *Russell*, 369 U.S. at 765, with "the relevant portions of the [instant] indictment . . . [which] charge[d] [the] defendant with murder[,] . . . ma[de] clear whom he murdered, and when the offense occurred").

Ng's reliance on *Pirro*, 212 F.3d at 95, and *United States v. Biba*, 395 F. Supp. 3d 227, 237 (E.D.N.Y. 2019) is also misplaced. In *Pirro*, the indictment failed to state a specific tax-related offense for which the defendant was liable. 212 F.3d at 86. In concluding that the indictment failed to sufficiently allege that the defendant made an omission that amounted to a material falsehood and that the defendant was not adequately informed of the nature of the charge against him, the Second Circuit noted that federal tax law is peculiarly "esoteric," that there was a lack of clarity in the tax law as to whether the defendant improperly failed to disclose information, and that the indictment should have specified the duty to disclose because the indictment alleged the omission of a fact that the defendant "might not have been required to report." *Id.* at 95.

In *Biba*, the indictment "failed to charge [the defendant] properly for brandishing a firearm" and did not "include any allegation that [the defendant] 'brandished' a firearm under [18 U.S.C.] § 924(c)(1)(A)(ii), which would subject [the defendant] to [a] minimum term of imprisonment of seven years, two years more than the five-year minimum prison term required if a firearm were not brandished." 395 F. Supp. 3d at 237. The court dismissed the charge as deficient, noting that "the theory for denial articulated by the government, that a [d]efendant's filing of a motion to dismiss charges that are not sufficiently alleged in an indictment proves, *ipso facto*, satisfactory notice of such charges, cannot be one a [d]efendant is required to meet, because it seemingly would preclude all challenges to an indictment's sufficiency." *Id.* at 239.

Unlike in *Pirro* and *Biba*, Ng has not identified any defect by which the Superseding Indictment fails to "descend into the particular" or improperly relies on "generic terms," as in *Pirro*, 212 F.3d at 95, nor has Ng shown that the Superseding Indictment omits an element that increases the mandatory minimum sentence comparable to that in *Biba*, 395 F. Supp. 3d at 237. To the contrary, the Superseding Indictment pleads all of the essential elements of conspiracy to commit money laundering and includes sufficient allegations to put Ng on notice as to the conspiracy to commit money laundering. *See United States v. Valdez*, No. 20-CR-115, 2021 WL 1317548, at *5 (S.D.N.Y. Apr. 9, 2021) (concluding that contrary to the defendant's argument, *Pirro* was inapposite because the instant indictment tracked the statutory language, indicated the time and location of the crime and that the "defects [the defendant] . . . allege[d] [were] premature sufficiency of the evidence arguments" (citing *United States v. Gatto*, 295 F. Supp. 3d 336, 350 (S.D.N.Y. 2018)), *as amended* (Apr. 9, 2021); *United States v. Avenatti*, 432 F. Supp. 3d 354, 363–64 (S.D.N.Y. 2020) (distinguishing *Pirro* because "[w]hile [it] indicate[s] that, under certain circumstances, a defendant may properly challenge the legal sufficiency of an

indictment on a motion to dismiss," the instant charge alleged "a violation of a 'known legal duty'[,] . . . tracks the language of the honest services wire fraud statutes[,] and alleges [sufficient] conduct" (citing *Pirro*, 212 F.3d at 91)); *Gatto*, 295 F. Supp. 3d at 349–50 (concluding that the defendants' reliance on *Pirro* is misplaced because unlike *Pirro*, the "issue of sufficient notice [wa]s not implicated in th[e] indictment" as the indictment "include[d] the prospective basketball players among the alleged conspirators" and "it should surprise no one that knowingly making a false representation in order to get financial aid from a university could give rise to criminal liability"); *United States v. Mostafa*, 965 F. Supp. 2d 451, 460 n.11 (S.D.N.Y. 2013) (distinguishing *Pirro* because "rather than involving the intricacies of tax law, the offenses [t]here allege material support to terrorists and terrorism" and there was "little doubt that [the] defendant's assistance to members of al Qaeda, including hostage takers in Yemen and aspiring jihadist training camp founders, would have been known to [the] defendant to constitute criminal activities"); *United States v. Reddy*, No. 301-CR-58, 2002 WL 1334823, at *6 (S.D.N.Y. June 18, 2002) (distinguishing *Pirro* because the indictment was "determined to be insufficient because allegations pertaining to a material element of the offense charged were ambiguous" and the instant indictment was unambiguous and alleged "facts describing the manner in which [the defendants] allegedly misled [an organization], together with citations of the relevant statute" and finding that the instant "provide[d] [the defendant] with adequate notice of the nature of the charges against him"); *see also United States v. Black*, 469 F. Supp. 2d 513, 536–37 (N.D. Ill. 2006) (concluding that the defendant's reliance on *Pirro* was "unavailing" because the indictment "failed to allege an essential element of the tax violation charged" and "the charge did not rest on a clear violation of the law" (citing *Pirro*, 212 F.3d at 93)).

The parties concede that the Superseding Indictment tracks 18 U.S.C. § 1956, (Def.'s Mem. 60; Gov't Opp'n 40), and the Court finds that this renders dismissal improper pursuant to Rule 7 and Rule 12(b)(3)(B)(iii), *see United States v. Williams*, No. 13-CR-419, 2021 WL 620906, at *3 (E.D.N.Y. Feb. 17, 2021) ("As required by Rule 7(c)(1), [the indictment] tracks the language of the statute and therefore satisfies Rule 7(c)(1)'s pleading requirement."); *United States v. Velentzas*, No. 15-CR-213, 2019 WL 3252961, at *7 (E.D.N.Y. July 16, 2019) (denying motion to dismiss pursuant to Rule 12(b)(3)(B)(iii) where "[t]he language of the indictment track[ed] the language of the statute, which is sufficient for purposes of specificity"); *see also United States v. Russo*, No. 20-CR-23, 2021 WL 1723250, at *3 (E.D.N.Y. Apr. 30, 2021) ("It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as [they] . . . fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." (alteration in original) (quoting *Hamling*, 418 U.S. at 117–18)); *Valdez*, 2021 WL 1317548, at *5 (upholding an indictment that tracked the language of the statute and stated the date and city of the crime); *United States v. Griffith*, 515 F. Supp. 3d 106, 113 (S.D.N.Y. 2021) ("Th[e] indictment tracks the language of the [International Emergency Economic Powers Act] and accompanying regulations. As such, it meets the threshold of providing notice of the charged offense, its approximate time frame[,] and sufficient detail of the subject matter to enable the defendant to plead double jeopardy[,] . . . [and it] satisfies the Fifth and Sixth Amendments."); *United States v. Frey*, No. 19-CR-537, 2021 WL 215722, at *3 (E.D.N.Y. Jan. 21, 2021) ("Each of the counts cite to[] and track the language of [s]ection 1591, identifies the elements of the offense, and provides the date and district in which it is said to have occurred. As such, it is adequately pled, justifying a trial on the merits." (citation and footnote omitted)); *United States v. Halkbank*, No. 15-CR-867, 2020

WL 5849512, at *9 (S.D.N.Y. Oct. 1, 2020) (finding that an indictment sufficiently alleged a conspiracy to commit bank fraud by tracking the language of the relevant statute and stating "the time and place in approximate terms of the alleged crime"); *Walters*, 963 F. Supp. 2d at 133 (concluding that an indictment for money laundering, which stated that the defendants "intentionally conspired to, and did, make deposits, withdrawals[,] and transfers of funds . . . derived from the specified unlawful activities of extortion and wire fraud," "contain[ed] all elements of the offenses and [was] sufficient to withstand [the defendants'] motion"); *United States v. Kaczowski*, 882 F. Supp. 304, 308 (W.D.N.Y. 1994) (concluding that an indictment that tracked the language of section 1956 was sufficient and that "[t]o the extent that [the defendant] challenged the sufficiency of the evidence against him, that argument is more appropriately addressed to the trial court after the completion of the [g]overnment's affirmative case, and [w]as therefore premature").

Accordingly, the Court finds that the Superseding Indictment sufficiently tracks 18 U.S.C. § 1956 and includes sufficient allegations to put Ng on notice as to the conspiracy to commit money laundering and therefore denies Ng's motion to dismiss Count Three based on constitutional challenges.

ii. Citation to the Malaysian statute

Ng argues that Count Three of the Superseding Indictment charging conspiracy to commit money laundering should be dismissed because "it does not sufficiently cite the statute that [Ng] is alleged to have violated" and "[t]here is no statutory number or statutory title or even a description of a particular Malaysian offense that [Ng] violated to be guilty of" the charge. (Def.'s Mem. 62–63.) In support, Ng asserts that he lacks notice of "[w]hat Malaysian law . . . the grand jury f[ou]nd that he violated to be properly indicted of" conspiracy to commit money

laundering, (*id.* at 63), that "the Government's position completely reads the Grand Jury's critical role out of the criminal process" by failing to present all elements to the Grand Jury, (Def.'s Reply 28–29 (citing *Russell*, 369 U.S. at 760)), and that a bill of particulars would be insufficient to cure any deficiency, (Def.'s Mem. 63).

The Government argues that the conspiracy to commit money laundering charge tracks the statute, which is sufficient to overcome a motion to dismiss, and that even if this were insufficient, indictments in the Second Circuit "uniformly use the language used here, noting the country, but not the specific foreign statutes, at issue." (Gov't Opp'n 40 (citing cases).) The Government asserts that "pursuant to Rule 26.1 [of the Federal Rules of Criminal Procedure], the [G]overnment will, at the appropriate time, submit the relevant elements of the Malaysian law to the Court, and request jury instructions in line with those elements be charged to the jury." (*Id.* at 40–41.)

"The money laundering statute criminalizes the transfer of funds 'with the intent to promote the carrying on of specified unlawful activity.'" *United States v. Ho*, 984 F.3d 191, 202 (2d Cir. 2020) (quoting 18 U.S.C. § 1956(a)(2)(A)); *see also United States v. Prevezon Holdings LTD. (Prevezon Holdings LTD. I)*, 122 F. Supp. 3d 57, 69–70 (S.D.N.Y. 2015) (quoting 18 U.S.C. § 1956). An indictment for money laundering must include a specified unlawful activity such as "an offense against a foreign nation involving . . . (iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978); [or] (iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official." 18 U.S.C. § 1956(c)(7)(B). However, "[a] money-laundering indictment need not provide elements and other details of the 'specified unlawful activity.'" *United States v. Raniere*, 384 F. Supp. 3d 282,

307 (E.D.N.Y. 2019) (citing cases); *see also United States v. Arden*, No. 98-CR-379, 2009 WL 1971392, at *6 (E.D. Pa. July 7, 2009) ("Money laundering charges do not demand that the indictment also allege all of the elements of the 'specified unlawful activity,' that is, the underlying crime." (citing *United States v. Lazarenko*, 564 F.3d 1026, 1033 (9th Cir. 2009))), *aff'd*, 433 F. App'x 127 (3d Cir. 2011); *United States v. McGauley*, 279 F.3d 62, 70–71 (1st Cir. 2002) ("[W]e do not require the indictment to specify the predicate offense underlying a money laundering charge." (quoting *United States v. Mankarious*, 151 F.3d 694, 703 (7th Cir. 1998))); *see also United States v. Cherry*, 330 F.3d 658, 667–68 (4th Cir. 2003) ("[D]etails about the nature of the unlawful activity underlying the [section 1957] [money laundering] need not be alleged." (third alteration in original) (citing *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995))); *United States v. Caldwell*, 302 F.3d 399, 413 (5th Cir. 2002) (finding that an indictment sufficiently charged a defendant with section 1957 money laundering even though it did not allege elements of the specified unlawful activity); *Echavarria-Olarte v. Reno*, 35 F.3d 395, 398 (9th Cir. 1994) (rejecting the argument that a conspiracy indictment was insufficient for failure to allege the "substantive offense statute which was the object of the alleged conspiracy," and upholding the indictment, which cited only to "offenses within this subchapter" but which was accompanied by facts describing the specific offenses).

Although the Second Circuit has not addressed whether an indictment for money laundering under 18 U.S.C. § 1956(c)(7)(B) must allege the specific foreign law which is violated, the Ninth Circuit has concluded that such specificity is not required. *See Lazarenko*, 564 F.3d at 1033–34. In *Lazarenko*, the defendant, a Ukrainian public official, was charged with conspiracy, money laundering, wire fraud, and interstate transportation of stolen property. *Id.* at 1030. The indictment alleged that the defendant's "business relationships amounted to extortion

and that he defrauded the [Ukrainian] people by obtaining interests in companies, allocating privileges to cronies, and then failing to disclose his assets and wealth as required on [Ukrainian] financial disclosure form." *Id.* The defendant claimed that the indictment was deficient because it failed to state the Ukrainian law that was violated and "because the government must prove a violation of Ukrainian law to sustain a conviction." *Id.* at 1033. In finding that the indictment was legally sufficient and that "violation of Ukrainian law is the specified unlawful activity," the Ninth Circuit stated that "when bringing charges of money laundering, the government need not allege all the elements of the 'specified unlawful activity,' *i.e.*, the underlying offense" and "[n]othing in [the court's] case law supports requiring the government to plead a specific violation of foreign law in an indictment." *Id.* at 1033–34 (first quoting *United States v. Lomow*, 266 F.3d 1013, 1017 (9th Cir. 2001); and then citing *United States v. Golb*, 69 F.3d 1417, 1429 (9th Cir. 1995)). The court further stated that because "[t]he indictment provided detailed allegations regarding the basis for the charges, including dates, amounts, account numbers, and sources of the money," "it [cannot] be said that the omission of a citation to foreign law in the charges of wire fraud and interstate transportation of stolen property misled or prejudiced" the defendant. *Id.* at 1034 (citing Fed. R. Crim. P. 7(c)(3)). Finally, the court noted that during the trial, "the jury was [properly] instructed that it had to find a violation of [Ukrainian] law and was provided with the elements of the relevant [Ukrainian] statutes." *Id.*; *see also Vickers*, 708 F. App'x at 735–36 (concluding that although an indictment "did not specify the federal, state, or foreign sex abuse laws under which [the defendant] could be so charged," any such "error was harmless beyond a reasonable doubt because," *inter alia*, the defendant "received a bill of particulars specifying those laws" and there were jury instructions explaining such laws).

Similarly, in *United States v. Teyf*, No. 18-CR-452, 2020 WL 598660, at *2–3 (E.D.N.C. Feb. 6, 2020), a district court in the Fourth Circuit concluded that a defendant had notice of the section 1956 money laundering claim against him where the indictment alleged "an offense against a foreign nation (Russia) involving bribery of a public official and the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official" because "[f]urther embellishment by citation to a specific Russian law or the elements of the Russian criminal offense in the indictment [wa]s not necessary." *Id.* The court noted that the indictment was sufficient as it "expressly allege[d] that the property charged in the indictment was proceeds of specified unlawful activity" and "track[ed] the language of [section] 1956." *Id.* at *3.

Likewise, a district court in the Second Circuit addressed a similar issue in the context of 18 U.S.C. § 2422(b). *See United States v. Vogelbacher*, No. 12-CR-98, 2021 WL 1017126, at *2 (W.D.N.Y. Feb. 2, 2021), *report and recommendation adopted*, 2021 WL 978848 (W.D.N.Y. Mar. 15, 2021). The defendant in *Vogelbacher* was "charged with violating 18 U.S.C. § 2422(b) which makes it unlawful to use means of interstate commerce to entice a minor to engage in any sexual activity for which a person can be charged with a criminal offense." *Id.* Although the defendant argued that the indictment was deficient for failing to state "a specific New York Penal or Federal Law violation," the court concluded that the indictment, which tracked "the language of the statute, state[d] the approximate time and place of the alleged crime, and include[d] each of these essential elements," was sufficient on its face. *Id.*

While there is at least one instance where an indictment identified the specific foreign statute that was alleged to have been violated, *see* Indictment at 24–25, *United States v. Esquenazi*, No. 09-CR-21010, 2009 WL 10662554 (S.D. Fla. Dec. 4, 2009), Docket Entry No. 3 (noting that the defendant conspired to commit money laundering in "violation[] of the criminal

bribery laws of Haiti, The Republic of Haiti's Penal Code Article 137 and 140"), indictments in the Second Circuit generally note the country but not the specific statute alleged to have been violated, *see* Indictment at 42, *United States v. Boustani*, No. 18-CR-681 (E.D.N.Y. Dec. 19, 2018), Docket Entry No. 1 (violation of Mozambique law); Indictment at 12–13, *United States v. Ho*, No. 17-CR-779 (S.D.N.Y. Dec. 18, 2017), Docket Entry No. 24 (violation of Ugandan and Chadian law); Indictment at 8–10, *United States v. Ng Lap Seng*, No. 15-CR-706 (S.D.N.Y. Oct. 20, 2016), Docket Entry No. 38 (violation of Antiguan law). The Government's decision to add or omit the specific foreign law does not support a conclusion that such is required under 18 U.S.C. § 1956(c)(7)(B)(iv), and the Court is unaware of a case that dismissed an indictment for money laundering for failing to state the foreign statute which was violated. *See United States v. Thiam*, No. 17-CR-47, 2017 WL 1250426, at *3 (S.D.N.Y. Apr. 4, 2017) (although not addressing whether citing the specific foreign law is necessary, declining to dismiss an indictment that stated that the defendant violated the "laws of the Republic of Guinea"); *see also* Indictment ¶¶ 6, 8, *Thiam*, No. 17-CR-47 (S.D.N.Y. Jan. 18, 2017), Docket Entry No. 12.

Furthermore, the alleged facts support a reasonable belief that the Government will be able to prove violations of Malaysian law at trial, which protects Ng's Fifth and Sixth Amendment rights. The Superseding Indictment notes that 1MDB, "Malaysia's state-owned and state-controlled investment development company," (Superseding Indictment ¶ 1), "was created to pursue investment and development projects for the economic benefit of Malaysia and its people" but that "between approximately 2009 and 2014, billions of dollars were misappropriated and fraudulently diverted from 1MDB through various means, in part for the purpose of paying bribes to foreign officials," (*id.* ¶ 15). The Superseding Indictment states, *inter alia*, that Ng, a Malaysian national, (*id.* ¶ 2), (1) "conspired to obtain and retain business

from lMDB for Goldman through the promise and payment of bribes to government officials in Malaysia and Abu Dhabi," (2) "conspired to launder funds embezzled from lMDB, some of which were used to pay bribes to government officials in Malaysia and Abu Dhabi," and (3) "knew that Low intended to use funds misappropriated from 1MDB's bond deal to pay and cause to be paid bribes to foreign officials in Malaysia and Abu Dhabi," (*id.* ¶¶ 16, 33). *See Alfonso*, 143 F.3d at 776 (noting that the indictment "meets these basic pleading requirements by accurately stating the elements of the offense charged and the approximate time and place of the robbery that defendants allegedly conspired to commit, thereby providing sufficient detail to allow defendants to prepare a defense and to invoke the protection of the Double Jeopardy Clause"); *Prevezon Holdings LTD. I*, 122 F. Supp. 3d at 73 (denying a motion to dismiss a civil money laundering case that did not state the specific Russian law that was violated but merely noted that a "specified unlawful activity" occurred because the facts alleged "support[ed] a reasonable belief that the [g]overnment will be able to prove violations of foreign (Russian) law . . . at trial"); *United States v. King*, No. 98-CR-91, 2000 WL 362026, at *11 (W.D.N.Y. Mar. 24, 2000) (concluding that an indictment that alleged, *inter alia*, that the defendant "took elaborate steps to conceal the true facts concerning transfers of substantial sums of . . . funds" provided "sufficient notice of the factual basis on which the [g]rand [j]ury found [the defendant] acted with an intent to defraud" and "reasonably assure[ed] that the prosecution's theory at trial will not be at odds with the [g]rand [j]ury's decision to charge [the defendant] with wire fraud" and finding that the "[d]efendant's contentions that the [i]ndictment violate[d] his Fifth and Sixth Amendment rights . . . [were] without merit").

Accordingly, the Court finds that Ng has not shown that the Government's failure to specify the Malaysian statute alleged to have been violated renders the Superseding Indictment

defective and therefore denies Ng's motion to dismiss the Superseding Indictment on this ground.[22]

iii. Design to conceal funds

Ng argues that Count Three fails to allege that he "conspired to move funds internationally with the 'design,' or purpose, to 'conceal or disguise' those funds" and "does not inform [him] of which activities or transactions he must be prepared to defend against." (Def.'s Mem. 57.) In support, Ng asserts that although the Superseding Indictment "describe[s] numerous international transfers of money," it "fails the requirements of" *United States v. Ness*, 565 F.3d 73, 78 (2d Cir. 2009), *Garcia*, 587 F.3d at 515, *United States v. Maher*, 108 F.3d 1513, 1526 (2d Cir. 1997), and *United States v. Roberts*, 650 F. Supp. 2d 219, 220, 222 (E.D.N.Y. 2009) because it "makes no allegation regarding either the purpose of any funds' transportation, nor of [Ng's] knowledge of that purpose (aside, again, from the bare recital of statutory text)." (*Id.* at 70.)

The Government argues that the Superseding Indictment tracks the statute and sufficiently alleges a conspiracy to conceal and disguise funds and that Ng cites to cases that "are

[22] Ng proffers two additional arguments, which the Court declines to address as moot. First, in his memorandum in support of his motion, filed before the Superseding Indictment, Ng argues that the Indictment should be dismissed because "there is no . . . reference to the section that permits 'an offense against a foreign nation' to serve as a specified unlawful activity." (Def.'s Mem. 63.) Ng notes that "[b]y failing to provide notice that the Government is relying on [18 U.S.C. §] 1956(c)(7)(B)(iv) in the charging language, the charge plainly fails to advise . . . [Ng] of each and every element of the crime charged against him." (*Id.* at 64.) Because the Superseding Indictment cites 18 U.S.C. § 1956(c)(7)(B)(iv), the Court declines to address this argument as moot. Second, Ng argues that 15 U.S.C. § 78dd-3 "is not . . . cognizable as [a specified unlawful activity] because it did not exist at the time the FCPA was added to the list of [specified unlawful activities] in the money laundering statute." (*Id.* at 58.) As explained in the Second Circuit's decision in *United States v. Ho*, "a violation of section "78dd-3 constitutes specified unlawful activity under the money laundering statute." 984 F.3d 191, 202 (2d Cir. 2020).

about the sufficiency of the evidence at trial," which "did not purport to — and did not — change the long-settled law about the sufficiency of an indictment." (Gov't Opp'n 42.) In addition, the Government asserts that "although not required, the [Superseding] Indictment . . . alleges [Ng] knew, from the beginning of the scheme, that the purpose of diverting funds from the bond transactions 'into the bank accounts of shell companies that [he, his co-conspirators], and others beneficially owned and controlled' was, at least in part, to conceal that the 'diverted funds for their personal use' and '. . . to pay bribes to government officials in Malaysia and Abu Dhabi.'" (*Id.* at 31 (quoting Indictment ¶ 34).)

Section 1956(a)(2)(B)(i) "prohibits international transfer of funds from unlawful activity while 'knowing that such transportation is designed . . . to conceal.'" *Ho*, 984 F.3d at 206(quoting 18 U.S.C. § 1956(a)(2)); *see also Regalado Cuellar v. United States*, 553 U.S. 550, 568 (2008) (concluding that to sustain a conviction for money laundering, the government must introduce evidence that permits "a reasonable jury to conclude beyond a reasonable doubt that [a] petitioner's transportation was 'designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds'" (quoting 18 U.S.C. § 1956(a)(2)(B)(i))). The Supreme Court has rejected the notion that the money laundering statute "would apply whenever a person transported illicit funds in a secretive manner." *Regalado Cuellar*, 553 U.S. at 564–65. While the "secretive aspects of the transportation [are] employed to *facilitate* the transportation," that "secrecy [must be] the *purpose* of the transportation." *Id.* at 567. Thus, the government must provide "proof of both knowledge that the property involved represents the proceeds of unlawful activity and knowledge that the transaction is designed to conceal or disguise the proceeds." *United States v. Odiase*, 788 F. App'x 760, 762 (2d Cir. 2019) (citing *Huezo*, 546 F.3d at 178–79); *see also*

United States v. Real Prop. Known as Unit 5B of Onyx Chelsea Condo., No. 10-CV-5390, 2012 WL 1883371, at *6 n.2 (S.D.N.Y. May 21, 2012) ("[T]he Supreme Court's analysis [in *Regalado Cuellar*] would apply to [s]ection 1956(a)(1)(B) as well, given [c]ongress's use of the identical phrase in that section.").

Challenges to the sufficiency of evidence as to whether the transfer of funds is designed to conceal are appropriately made after the government has presented evidence at trial. *See Odiase*, 788 F. App'x at 762 ("The evidence presented *at trial* was sufficient to show both [the defendant's] knowledge that the proceeds were derived from unlawful activity and knowledge that the financial transaction she engaged in was for the purposes of concealing or disguising the funds." (emphasis added)); *United States v. Rodriguez*, 727 F. App'x 24, 29 (2d Cir. 2018) (reversing section 1956 money laundering trial conviction for failure to provide sufficient evidence of a "purpose to conceal"); *United States v. Tillman*, 419 F. App'x 110, 112 (2d Cir. 2011) (sustaining money laundering conviction where the defendant "allowed her coconspirators to make large deposits into her bank account, and into other accounts under her control; and, she made immediate withdrawals from her accounts after these deposits were made" because she "believed that she was allowing money belonging to [her coconspirator] to be deposited in accounts under her control so that [he] could avoid a restitution obligation").

The Superseding Indictment states that Ng transferred funds "knowing that such transportation, transmission[,] and transfer was *designed in whole and in part to conceal and disguise* the nature, location, source, ownership[,] and control of the proceeds of one or more specified unlawful activities." (Superseding Indictment ¶ 65 (emphasis added).) The Superseding Indictment tracks the statute, and, as explained, this is sufficient to proceed to trial.

Moreover, the Superseding Indictment provides facts to support a reasonable belief that the Government will be able to demonstrate that the transfer of funds was "designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." *Regalado Cuellar*, 553 U.S. at 564–65 (quoting 18 U.S.C. § 1956(a)(2)(B)(i)); *see also Real Prop. Known as Unit 5B of Onyx Chelsea Condo.*, 2012 WL 1883371, at *7 (declining to dismiss a civil money laundering charge where the "amended complaint trace[d] the money used to purchase the [a]partment back to the alleged bribe and ple[d] facts suggesting that the transfer of funds to the United States" was used to conceal the source and location of the money and these "allegations [were] adequate to support a reasonable belief that the [g]overnment will be able to demonstrate that the purchase of the [a]partment and the fund transfers were designed to conceal"). The Superseding Indictment alleges that "[a]lthough the stated purpose of the approximately $6.5 billion raised by the three bond transactions was to support lMDB projects for the benefit of the Malaysian people, more than $2.7 billion was instead misappropriated by . . . [Ng and his co-conspirators] and distributed, in part, as bribes and kickbacks to government officials in Malaysia and Abu Dhabi," (Superseding Indictment ¶ 18), "Goldman transferred part of the proceeds of the Project Magnolia bond offering via wire to 1MDB's wholly-owned subsidiary" with Ng and his co-conspirators knowing that "a large portion of the proceeds of the bond would be diverted to themselves and others, including foreign government officials, through shell companies beneficially owned and controlled by themselves and others," (*id.* ¶ 37, *see also id.* ¶ 53), and that Ng and his co-conspirators "knew that a large portion of the proceeds of Project Maximus would be illegally diverted to themselves and others, including foreign government officials, through shell companies beneficially owned and controlled by themselves and others," (*id.* ¶¶ 44–45); *United States v. Wiseberg*, 727 F. App'x 1, 6 (2d Cir.

2018) (noting that there was evidence of a conspiracy to conceal where the transferred funds knowingly "represented the proceeds of an illegal narcotics distribution conspiracy" and transited through a shell company and concluding that "a jury could conclude that the payments . . . [from a co-defendant to a shell company], which were then transferred to [another co-defendant], were 'designed in whole or in part to conceal or disguise the nature, source, location, ownership, or control of those proceeds'" (quoting *United States v. Henry*, 325 F.3d 93, 103 (2d Cir. 2003))); *United States v. Prevezon Holdings, Ltd. (Prevezon Holdings, Ltd. II)*, 251 F. Supp. 3d 684, 696 (S.D.N.Y. 2017) ("Moreover, if [the accounts] served as corporate shells for money laundering, that evidence is probative of a design to conceal because it may lead a jury to conclude that the [o]rganization 'funneled profits [from the Russian Treasury Fraud] to' those entities and 'other fictitious business accounts and then eventually to' [the defendant's] account." (second and third alterations in original) (quoting *United States v. Thayer*, 204 F.3d 1352, 1354 (11th Cir. 2000))); *Prevezon Holdings, Ltd. II*, 251 F. Supp. 3d at 696 (noting that the use of shell "companies and accounts may be considered as 'affirmative acts related to the commercial transaction — acts designed to quell the suspicions of third parties regarding the nature, location, source, ownership or control of the proceeds' of the [o]rganization's illegal conduct" (quoting *United States v. Kinzler*, 55 F.3d 70, 73 (2d Cir. 1995))); *Prevezon Holdings LTD. I*, 122 F. Supp. 3d at 74 ("[T]he other circumstances alleged in the complaint — the acceptance, with no questions asked, of almost $2 million in transfers from shell companies based on false wire descriptions — are enough to justify a reasonable belief that the [g]overnment will be able to prove [the intent to conceal funds] at trial."); *cf. Luis v. United States*, 578 U.S. ---, ---, 136 S. Ct. 1083, 1109 (Mar. 30, 2016) (Kennedy, J., dissenting) ("The true winners today are sophisticated criminals who know how to make criminal proceeds look

untainted. . . . [T]hey open bank accounts in other people's names and through shell companies, all to disguise the origins of their funds.").

Furthermore, the cases that Ng cites in support of his argument that the Superseding Indictment fails to allege a design to conceal funds are inapposite as they involve guilty pleas, trials, or convictions and, thus, involve challenges to the sufficiency of evidence. *See Ness*, 565 F.3d at 78 (reversing conviction under section 1956(a)(2)(B)(i) because the government's evidence "shows only an intent to conceal the transportation, not an intent to transport in order to conceal"); *Garcia*, 587 F.3d at 519 (reversing guilty plea for section 1956 money laundering conspiracy because "[w]hile th[e] transaction was effected covertly in an effort to conceal the transaction from the authorities, there [wa]s no indication from the record that the transaction itself was an effort to conceal anything about the money"); *Maher*, 108 F.3d at 1526 (concluding that the defendant's argument "that the government did not present sufficient evidence to establish that in fact the proceeds came from narcotics trafficking. . . . could have been made to a jury if defendants had not pleaded guilty"); *Roberts*, 650 F. Supp. 2d at 221–22 (granting judgment of acquittal for defendant charged with violating section 1956(a)(2)(B)(1) because "the evidence submitted by the government shows only an intent to conceal the transportation, not an intent to transport money in order to conceal it"). Because the Government has not "made what can fairly be described as a full proffer of the evidence it intends to present at trial" and "the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment," Ng is precluded from challenging the sufficiency of the evidence on concealment. *United States v. Wedd*, 993 F.3d 104, 121 (2d Cir. 2021) (quoting *Alfonso*, 143 F.3d at 776); *see also United States v. Augustine*, No. 18-CR-393, 2021 WL 1381060, at *3 (E.D.N.Y. Apr. 13,

2021) ("The government has also not made a full proffer of the evidence. Thus, it is not the appropriate time to address the sufficiency of the evidence.").

Accordingly, the Court finds that the Superseding Indictment sufficiently alleges a design to conceal funds in furtherance of a conspiracy to commit money laundering.

iv. Facts that support the three objects of the conspiracy

Ng argues that the "structure of [the conspiracy to commit money laundering charge], combined with the complete lack of independent allegations, makes it impossible to distinguish which allegations relate to one, as opposed to another, of the three different objects" of the conspiracy. (Def.'s Mem. 57.) In support, Ng argues that although he "is not making a merger argument," (*id.* at 75–76 (citing *United States v. Santos*, 553 U.S. 507, 514 (2008))), (1) "[e]ach of these three different statutes [at issue] contain different elements . . . but the Indictment provides exactly zero notice of what activities Ng did, or conspired to do, that fall within one type of money laundering versus the other," (*id.* at 58), (2) "[t]here is not a single, solitary additional allegation contained within [the charge]," "[t]he only allegations in [the charge] are incorporated by reference," and "[n]one of the allegations . . . that are incorporated . . . provide the type of notice needed," (*id.* at 61–62), and (3) it is "impossible to determine what object the Grand Jury found that [Ng] agreed to violate[,] to compare the Grand Jury's determinations to the petit jury's, . . . to provide notice to . . . Ng, or to protect him from Double Jeopardy," (Def.'s Reply 33).

The Government argues that "it plainly is not the law that . . . factual allegations must also say which objects they support" and Ng does not cite "a single case in support of his novel proposition." (Gov't Opp'n 44.) Further, the Government asserts that "while the [Superseding] Indictment does not expressly link factual allegations to objects (and it is not required to do so), it is obvious what allegations support what aspects of the scheme," that Ng "has not filed a

motion for a bill of particulars[] or otherwise sought clarity about what he is purportedly confused about," and that Ng can propose appropriate jury instructions at the appropriate time. (*Id.* at 45.)

"The offense of conspiring to launder money, in violation of 18 U.S.C. § 1956(h), requires proof that the defendant 'knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy.'" *Odiase*, 788 F. App'x at 762 (quoting *Huezo*, 546 F.3d at 180). "[A] defendant may properly be charged with participating in a single conspiracy with multiple objects." *United States v. Catapano*, No. 05-CR-229, 2008 WL 2222013, at *15 (E.D.N.Y. May 22, 2008), *report and recommendation adopted*, 2008 WL 3992303 (E.D.N.Y. Aug. 28, 2008); *see also United States v. Beech-Nut Nutrition Corp.*, 659 F. Supp. 1487, 1492 (E.D.N.Y. 1987) (denying motion to dismiss "a single conspiracy with multiple objects"). "[A]n indictment must be read to include facts which are necessarily implied by the specific allegations made." *Stavroulakis*, 952 F.2d at 693 (quoting *United States v. Silverman*, 430 F.2d 106, 111 (2d Cir.), *modified*, 439 F.2d 1198 (2d Cir. 1970)). Thus, an indictment can properly allege the objects of a conspiracy by incorporating paragraphs by reference. *See United States v. Greebel*, No. 15-CR-637, 2017 WL 3610570, at *3 (E.D.N.Y. Aug. 4, 2017) (declining to dismiss a conspiracy charge that incorporated allegations in preceding paragraphs by reference where the defendant argued that the count "does not identify the unlawful objective of the conspiracy, and that [the count] is therefore so unclear that [he] cannot prepare a defense").

The Court finds unpersuasive Ng's argument that factual allegations must specify which charge they support. (Def.'s Mem. 79–82.) Ng cites no relevant case for this novel

proposition,[23] and, in addition, the Government is not required in the Superseding Indictment to present the evidence through which it will attempt to prove that Ng violated 18 U.S.C. §§ 1956(a)(2)(A), 1956(a)(2)(B), or 1957(a). *See Beech-Nut Nutrition Corp.*, 659 F. Supp. at 1490 (denying motion to dismiss an indictment alleging a single conspiracy in violation of sections 331(a), 331(k) and 333(b) of the Federal Food, Drug and Cosmetic Act "for failure to specify the object of the conspiracy" and noting that "[w]hether the evidence adduced at trial supports the single conspiracy alleged in [the count] is a question which must be resolved at trial" (citing *United States v. Alessi*, 638 F.2d 466 (2d Cir. 1980))); *United States v. Smith*, 105 F. Supp. 3d 255, 262 (W.D.N.Y. 2015) ("At trial, the [g]overnment must prove that [the] [d]efendant knowingly and willfully became a member of the conspiracy. However, the [g]overnment is not required to include in the indictment detailed allegations regarding a defendant's knowledge of a conspiracy." (first citing *United States v. Williams*, 453 F. App'x 74, 78 (2d Cir. 2011); then citing *Wong Tai v. United States*, 273 U.S. 77, 81 (1927); and then citing *United States v.*

[23] Ng's reliance on *United States v. Rosenblatt* is misplaced. (Def.'s Mem. 80 (citing 554 F.2d 36, 38 (2d Cir. 1977)).) In *Rosenblatt*, the defendant was convicted of conspiracy to make false entries on postal records despite the government's stipulation that the defendant "did not know the truth about [his alleged co-conspirator's] activities." 554 F.2d at 38. The Second Circuit explained that although "both men agreed to defraud the United States, . . . neither agreed on the type of fraud" and concluded that a conviction was improper "because [the defendant] had no knowledge of such a plan; he neither intended nor agreed to commit that offense, or any other offense of which [the alleged co-conspirator] might have been guilty." *Id.* Unlike *Rosenblatt*, the Superseding Indictment specifically alleges that Ng and his co-conspirators conspired to commit money laundering in violation of 18 U.S.C. § 1956(h), each specifically agreeing to violate 18 U.S.C. §§ 1956(a)(2)(A), 1956(a)(2)(B), and 1957(a). (Superseding Indictment ¶ 65.) *See United States v. Greebel*, No. 15-CR-637, 2017 WL 3610570, at *5 (E.D.N.Y. Aug. 4, 2017) (explaining that unlike *Rosenblatt*, where the defendants were charged with a violation of the general conspiracy statute, the government charged both defendants with conspiracy to commit securities fraud). Moreover, unlike *Rosenblatt*, which involved post-conviction relief and the government's stipulation about the defendant's lack of knowledge, the Government is yet to provide evidence at trial as to whether Ng and his co-conspirators made "an agreement as to the same type of conduct." 554 F.2d at 41.

Wydermyer, 51 F.3d 319, 325–26 (2d Cir. 1995))); *see also Wey*, 2017 WL 237651, at *5 ("An indictment does not . . . 'have to specify evidence or details of how the offense was committed.'" (quoting *United States v. Coffey*, 361 F. Supp. 2d 102, 111 (E.D.N.Y. 2005))); *Coffey*, 361 F. Supp. 2d at 111 ("[T]he validity of an indictment is tested by its allegations, not by whether the [g]overnment can prove its case." (citing *Costello v. United States*, 350 U.S. 359, 363 (1956))).

Accordingly, the Court finds that the structure and allegations of Count Three are sufficient and denies Ng's motion to dismiss Count Three of the Superseding Indictment. *See Stringer*, 730 F.3d at 124 ("An indictment 'need not be perfect, and common sense and reason are more important than technicalities.'" (quoting *De La Pava*, 268 F.3d at 162)).

g. The Deferred Prosecution Agreement

Ng argues that the DPA should be modified because paragraph 23 and paragraph 5(c) of the DPA — which he defines as the "Silence Provision" and the "Witness Provision" respectively — will violate his constitutional rights at trial. (Def.'s Mem. 84–89.)

The Government argues that Ng's motion to modify the DPA is meritless "[b]ecause the DPA does not impair [Ng's] [c]onstitutional rights." (Gov't Opp'n 52, 61.)

The Court addresses each in turn.

i. The Silence Provision

Ng requests that the Court modify the Silence Provision "so that it specifically does not apply in the case against Ng," (Def.'s Mem. 89), because it "interfere[s] substantially with . . . witness's 'free and unhampered choice' to testify" and violates Ng's fundamental right to "establish a defense by presenting witnesses," (*id.* at 84–86 (first quoting *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir. 1988); and then quoting *United States v. Williams*, 205 F.3d 23, 29 (2d Cir. 2000)).) In support, Ng argues that (1) the Government's threat to prosecute the Goldman Sachs Group for any statements made in contradiction of the DPA will prevent

witnesses from coming forward with information that may be in Ng's interest, and (2) Ng will be unable to "fully defend" against Count Two because he will need to call members of Goldman's Firmwide Capital Committee, Business Integrity Group, and compliance department to testify about Goldman's internal accounting controls. (*Id.* at 86–87; Def.'s Reply 34–35.) In response to the Government's analysis under the witness-intimidation three-prong test in defense of these arguments, Ng asserts — without providing an alternate standard — that it is "remarkable" that the Government asks the Court to use the standard of criminal witness intimidation. (Def.'s Reply 34 n.5.) Ng argues that even under that test, the DPA violates his constitutional rights because (1) the DPA will prevent Ng from calling certain Goldman-affiliated witnesses to defend against Count Two, (*id.* at 34–35), (2) the Government acted in "bad faith" by shielding facts "with a [S]ilence [P]rovision that will prevent the truth from coming out at Ng's criminal trial," stating contradictory facts in the DPA, and refusing to provide "Ng with the exculpatory witnesses and materials that [the] Goldman [Sachs Group] provided to the Government as part of their DPA negotiations," (*id.* at 36–37), and (3) while cross-examination of Goldman's witnesses will be able to "demonstrate how the [S]ilence [P]rovision has biased their testimony, this inquiry will be insufficient to establish the true nature of [the Goldman Sachs Group's] internal controls" and "the jury will still not hear the underlying, exculpating truth," (*id.* at 38).

The Government argues that Ng has not met his burden to prove witness intimidation by "making a three-part showing of 'materiality, bad faith, and lack of fundamental fairness.'" (Gov't Opp'n 53 (quoting *Buie v. Sullivan*, 923 F.2d 10, 11 (2d Cir. 1990)).) In support, the Government asserts that (1) Ng fails to show that material and exculpatory evidence from witnesses could not reasonably be obtained by other means as Ng already has access to the evidence he deems exculpatory, "the DPA binds [the] Goldman [Sachs Group] itself, and not any

of its employees," and Ng merely "speculates that certain witnesses might be disinclined to offer certain testimony," (2) the Government did not act in bad faith as any concern can be "aired on cross-examination" and the DPA is "a standard agreement with a corporate entity," and (3) Ng cannot demonstrate an absence of fundamental fairness that would prejudice him at trial as he can probe witnesses about their knowledge of the DPA and the Silence Provision. (*Id.* at 54–58.)

"[A] criminal defendant is entitled . . . to a meaningful opportunity to present a complete defense, including the opportunity to call witnesses to aid in that defense: '[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.'" *Scrimo v. Lee*, 935 F.3d 103, 112 (2d Cir. 2019) (second alteration in original) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)); *see also Dawkins*, 999 F.3d at 788 (noting that "the Fifth and Sixth Amendments guarantee the right to present a defense" (citing *United States v. Stewart*, 433 F.3d 273, 310 (2d Cir. 2006))). "'[C]ourts have held that judicial or prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under certain circumstances, violate the defendant's right to present a defense' if amounting to bad faith." *United States v. Polanco*, 510 F. App'x 10, 12 (2d Cir. 2013) (quoting *Williams*, 205 F.3d at 30). In order to prove witness intimidation, a defendant needs to show (1) "that he was deprived of material and exculpatory evidence that could not be reasonably obtained by other means," (2) "bad faith on the part of the government," and (3) "the absence of fundamental fairness infected the trial."[24] *United States v. Lebedev*, 932 F.3d 40, 55 (2d Cir. 2019) (quoting

[24] Although Ng states that it is "remarkable that the Government asks the Court to examine its conduct by the standard of criminal witness intimidation," he offers no alternate standard to aid the Court's analysis. (Def.'s Reply 34 n.5.) Ng asserts that due to the Silence Provision, an "employee would be *dissuaded from testifying out of intimidation* that Goldman, and possibly the employee himself, could be then charged with a crime by the Government," (Def.'s Mem. 86 (emphasis added)), and cites to *United States v. Pinto*, 850 F.2d 927, 932 (2d

Williams, 205 F.3d at 30); *see also Rigas v. United States*, No. 02-CR-1236, 2020 WL 2521530, at *22 (S.D.N.Y. May 15, 2020) (noting the three-prong test and concluding that the defendant failed to show that the government caused witnesses to not testify or that the government acted in bad faith), *aff'd*, 848 F. App'x 464 (2d Cir. 2021).

The Silence Provision of the DPA provides that:

> [The Goldman Sachs Group] expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for [the Goldman Sachs Group], make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by [the Goldman Sachs Group] set forth above or the facts described in the Statement of Facts. Any such contradictory statement shall, subject to cure rights of [the Goldman Sachs Group] described below, constitute a breach of this [DPA], and [the Goldman Sachs Group] thereafter shall be subject to prosecution as set forth in Paragraphs 17–20 of this [DPA]. The decision whether any public statement by any such person contradicting a fact contained in the Statement of Facts will be imputed to [the Goldman Sachs Group] for the purpose of determining whether it has breached this [DPA] shall be at the sole discretion of the Offices. If the Offices determine that a public statement by any such person contradicts in whole or in part a statement contained in the Statement of Facts, the [o]ffices shall so notify [the Goldman Sachs Group], and [the Goldman Sachs Group] may avoid a breach of this [DPA] by publicly repudiating such statement(s) within five business days after notification. [The Goldman Sachs Group] shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Statement of Facts provided that such defenses and claims do not contradict, in whole or in part, a statement contained in the Statement of Facts. This Paragraph does not apply to any statement made by any present or former officer, director, employee,

---

Cir. 1988), for the proposition that "[u]nder certain circumstances, intimidation or threats that dissuade a potential defense witness from testifying may infringe a defendant's due process rights," *id.* at 85, and *United States v. Williams*, 205 F.3d 23, 29 (2d Cir. 2000) for the proposition that the Silence Provision "creates a constitutional issue . . . because it is 'elementary that criminal defendants have a right to establish a defense by presenting witnesses,'" *id.* Because Ng argues that the Silence Provision "will violate his [c]onstitutional rights by preventing Goldman['s] witnesses from telling the truth at trial out of fear that their truthful and exculpatory testimony will be deemed a violation of the DPA," (Def.'s Reply 33), the Court applies the standard for witness intimidation set forth in *Williams*, 205 F.3d at 29.

> or agent of [the Goldman Sachs Group] in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of [the Goldman Sachs Group].

(DPA ¶ 23.)

Ng fails to satisfy the three prongs to prove witness intimidation. First, Ng fails to show that "he was deprived of material and exculpatory evidence that could not be reasonably obtained by other means," *Lebedev*, 932 F.3d at 55, as his asserted deprivations are entirely speculative — the trial is yet to occur and Ng has not shown that he attempted to seek witnesses who indicated their refusal to testify. *See United States v. Chase*, No. 04-CR-135, 2005 WL 3263910, at *2 (D. Vt. 2005) (finding the defendant's witness intimidation claim to be without merit in part because he could not provide evidence of any witness being dissuaded from testifying); *United States v. Bin Laden*, 116 F. Supp. 2d 489, 494 (S.D.N.Y. 2000) (concluding that the defendant's speculation that he would be deprived of material and exculpatory evidence prior to trial was insufficient). Contrary to Ng's arguments that it is "possibl[e] the employee himself[] could be . . . charged with a crime by the Government," (Def.'s Mem. 86), the Silence Provision only binds the Goldman Sachs Group and does not control the behavior of individual employees, (DPA); *see Buie*, 923 F.2d at 11 (concluding the arrest of a defense witness did not violate the defendant's right to present a defense because the defendant "was able to obtain comparable evidence by other reasonably available means" (quoting *California v. Trombetta*, 467 U.S. 479, 489 (1984))).

Second, Ng fails to show "bad faith on the part of the [G]overnment," *Lebedev*, 932 F.3d at 55, and merely speculates that the DPA will encourage untruthful testimony at trial, which is insufficient. *See Bin Laden*, 116 F. Supp. 2d at 495 (holding that speculation alone is not enough to establish bad faith); *Buie*, 923 F.2d at 12–13 (noting that mere speculation about the motives

of the prosecutor was insufficient to establish bad faith). The Silence Provision contains standard language that is routinely included in DPAs with corporate entities, *see* Deferred Prosecution Agreement ¶ 20, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (E.D.N.Y. Dec. 22, 2017), *in* 7 Foreign Corrupt Practices Act Reporter § 40:26 (2d ed.); Deferred Prosecution Agreement ¶ 22, *United States v. Och-Ziff Cap. Mgmt. Grp. LLC*, No. 16-CR-516 (E.D.N.Y. Sept. 29, 2016), Docket Entry No. 11 (same), and there is no evidence that the Government entered into the DPA with the Goldman Sachs Group for reasons other than "resolv[ing] [the Goldman Sachs Group's] criminal exposure for its role in the criminal conduct detailed in the Indictment," (Gov't Opp'n 52).

Third, Ng fails to show that "the absence of fundamental fairness infected the trial," *Lebedev*, 932 F.3d at 55 (quoting *Williams*, 205 F.3d at 29), as a trial is yet to begin. *See United States v. Kleydman*, No. 18-CR-310, 2020 WL 6826270, at *5 (E.D.N.Y. Nov. 20, 2020) (denying motion to dismiss due to witness intimidation because the defendant was "unable to demonstrate that 'the absence of fundamental fairness infected the trial' before the trial has even taken place" (quoting *Lebedev*, 932 F.3d at 55)); *see also United States v. Afriyie*, 929 F.3d 63, 74 (2d Cir. 2019) (analyzing *post-trial* whether the defendant showed "bad faith or the absence of fundamental fairness"); *Davis v. Marshall*, No. 08-CV-2674, 2008 WL 5100302, at *17 (E.D.N.Y. Dec. 2, 2008) (concluding *post-trial* that a third-party plea agreement and testimony did not deny the petitioner's right to a fair trial judgment). Thus, Ng fails to satisfy the three prongs to prove witness intimidation.

Even if the Court reviewed Ng's claims without the *Williams* test, he nevertheless fails to show that the Silence Provision is unconstitutional. Indeed, at least one court has upheld a similar DPA provision. *See United States v. Stein*, No. 05-CR-888, 2006 WL 1063295, at *2

(S.D.N.Y. Apr. 5, 2006). In *Stein*, the defendant asserted that the government's DPA with a corporation "constitute[d] prosecutorial misconduct and deprive[d] [the defendant] of rights under the Fifth and Sixth Amendments" and alleged that the provisions of the DPA that prohibited the corporation's affiliates from making statements contradictory to the statement of facts would "[force] [the corporation's]-affiliated witnesses to sing out of the government's hymn book, regardless of the facts and their personal beliefs." *Id.* at *1. In denying the defendant's motion to dismiss, the court found that the government had a "legitimate interest" in making sure that the corporation did not gain the benefits of a deferred prosecution, while simultaneously being able to make statements that lessened its culpability; noted that there was "no basis to suppose that the DPA provisions . . . [would] be used to retaliate against [the corporation] should any of its employees cooperate with the defense in any appropriate way"; and classified any concern about a chilling effect on the corporation's employees as "speculative." *Id.* at *2. The Court is guided by the analysis in *Stein* and for similar reasons, is unpersuaded by Ng's contention that the DPA will cause witness intimidation.

Accordingly, the Court finds that the Silence Provision does not violate Ng's constitutional rights and declines to modify section 23 of the DPA.

ii. The Witness Provision

Ng requests that the Court modify the Witness Provision "to require [the] Goldman [Sachs Group] to make its employees available as defense witnesses to the same degree it makes its employees . . . available to the Government" because "the Government controls which, if any, Goldman employees will be trial witnesses" and "many of the key trial witnesses are foreign nationals who live and work in Southeast Asia and are therefore beyond this Court's subpoena power." (Def.'s Mem. 87–89.) In support, Ng argues that (1) "[w]hile the Government has unfettered access to these foreign witnesses, Ng does not," (2) "the Government will not only be

able to choose which Goldman witnesses will testify at trial but also control what these witnesses will say at trial," (3) Ng's "counsel is not able to travel to Malaysia to interview potential witnesses because of the country's [COVID]-19 restrictions," and (4) Ng "does not have the might of a DPA behind him to require Goldman's foreign witnesses to travel to the United States and testify in the Eastern District of New York in his defense" and that "[t]his reality has [c]onstitutional consequences." (*Id.* at 88–89.)

The Government contends that Ng's request fails because he "has tools available to him to compel witnesses to provide trial testimony, whether located in the United States or abroad" and "[h]e does not argue that those tools are insufficient." (Gov't Opp'n 59 (first citing Fed. R. Crim. P. 15, 17; and then citing 28 U.S.C. § 1783).) The Government further asserts that Ng "does not explain or cite any authority supporting his position that the Constitution requires that he and the [G]overnment have equal investigative or trial-related means to obtain evidence" and that "to the extent that [Ng] appears to rest his claim on *Williams* and similar cases, his claim[] fails for substantially the same reasons" as the Silence Provision claim. (*Id.* at 60 (citation omitted).)

Rule 17 of the Federal Rules of Criminal Procedure governs the issuance of subpoenas and states that the subpoena of a witness in a foreign country is governed by the Walsh Act, 28 U.S.C. § 1783. Fed. R. Crim. P. 17(e)(2). The Walsh Act authorizes courts to issue a subpoena to "a national or resident of the United States who is in a foreign country." 28 U.S.C. § 1783; *see also Blackmer v. United States*, 284 U.S. 421, 438 (1932) ("The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and to obey them."); *Teller v. Helbrans*, No. 19-CV-3172, 2019 WL 3779863, at *1

(E.D.N.Y. Aug. 12, 2019) (quoting 28 U.S.C. § 1783). However, the Walsh Act "does not authorize issuance of a subpoena" to a foreign national who resides abroad. *United States v. Brennerman*, No. 17-CR-155, 2017 WL 4513563, at *2 (S.D.N.Y. Sept. 1, 2017) (first citing *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Ams.*, 262 F.R.D. 293, 305 (S.D.N.Y. 2009); then citing *United States v. Korolkov*, 870 F. Supp. 60, 65 (S.D.N.Y. 1994); and then citing 9A Charles Alan Wright, Federal Practice and Procedure: Civil § 2454 (3d ed. 2017)); *see also Aenergy, S.A. v. Republic of Angola*, No. 20-CV-3569, 2021 WL 1998725, at *17 (S.D.N.Y. May 19, 2021) ("[S]ection 1783 only applies to 'a national or resident of the United States.'" (quoting 28 U.S.C. § 1783(a))). "[T]he Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it." *United States v. Yousef*, 327 F.3d 56, 114 n.48 (2d Cir. 2003) (quoting *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962)). "Otherwise, any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor." *Id.*; *see also United States v. Herbert*, No. 03-CR-211, 2005 WL 106909, at *1 (S.D.N.Y. Jan. 19, 2005) ("A [c]ourt's inability to subpoena a foreign witness does not implicate the compulsory process clause, even if that witness could provide testimony that is material and favorable to the defendant." (quoting *United States v. Korogodsky*, 4 F. Supp. 2d 262, 268 (S.D.N.Y. 1998))).

In addition to Rule 17 subpoena process, Rule 15 of the Federal Rules of Criminal Procedure "permits a witness to be deposed under 'exceptional circumstances' in order 'to preserve testimony for trial.'" *Trump v. Vance*, 591 U.S. ---, ---, 140 S. Ct. 2412, 2451 n.15 (July 9, 2020); *see also United States v. Mohamed*, No. 18-CR-603, 2020 WL 1545522, at *2 (E.D.N.Y. Apr. 1, 2020) ("A party may move that a prospective witness be deposed in order to

preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice." (quoting Fed R. Crim. P. 15(a)(1))). "Rule [15] is generally used when a witness may not be available to testify at trial, not simply when it would be burdensome or inconvenient for the witness to appear." *Trump*, 591 U.S. at ---, 140 S. Ct. at 2451 n.15. A movant "must show that (1) the prospective witness is unavailable for trial, (2) the witness' testimony is material, and (3) the testimony is necessary to prevent a failure of justice." *United States v. Spencer*, 362 F. App'x 163, 164 (2d Cir. 2010) (quoting *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001)); *see also United States v. Niftalijev*, No. 18-CR-678, 2020 WL 3472431, at *1 (S.D.N.Y. June 25, 2020) (quoting *Cohen*, 260 F.3d at 78). "Foreign witnesses who are not subject to the government's subpoena power and, despite the moving party's appropriate efforts, refuse to travel to this country to testify are routinely found unavailable." *Mohamed*, 2020 WL 1545522, at *2 (quoting *United States v. Al Fawwaz*, No. 98-CR-1023, 2014 WL 627083, at *1 (S.D.N.Y. Feb. 18, 2014)); *United States v. Abu Ghayth*, No. S14-98-CR-1023, 2014 WL 144653, at *2 (S.D.N.Y. Jan. 15, 2014) (same).

Under paragraph 5(c) of the DPA, the Goldman Sachs Group is obligated to:

> use its best efforts to make available for interviews or testimony, as requested by the [o]ffices, present or former officers, directors, employees, agents and consultants of [the Goldman Sachs Group]. This obligation includes, but is not limited to, sworn testimony before a federal grand jury, in federal trials or at any other proceeding, all meetings requested by the [o]ffices, and interviews with domestic or foreign law enforcement and regulatory authorities.

(DPA ¶ 5(c).) The Witness Provision contains standard language that is routinely included in prosecution agreements. *See* Non-Prosecution Agreement ¶ C, *United States v. WMT Brasillia S.A.R.L. (In Re Walmart Brasillia S.A.R.L.)*, No. 19-CR-192 (E.D. Va. June 20, 2019), *in* 8 Foreign Corrupt Practices Act Reporter § 42:42 (2d ed.) (containing similar language); Deferred

Prosecution Agreement ¶ 5(c), *United States v. Telia Co. AB*, No. 17-CR-581 (S.D.N.Y. Sept. 21, 2017), Docket Entry No. 6 (same); Deferred Prosecution Agreement ¶ 5(c), *United States v. VimpelCom Ltd.*, No. 16-CR-137 (S.D.N.Y. Feb. 22, 2016), Docket Entry No. 6 (same). Plea agreements, cooperation agreements, non-prosecution agreements, and DPAs, which are integral to the justice system, often include clauses that require cooperation with government investigations. *See United States v. Stein*, 435 F. Supp. 2d 330, 363 (S.D.N.Y. 2006) ("Hence, no one disputes the proposition that a willingness to cooperate with the government is an appropriate consideration in deciding whether to charge an entity."), *aff'd*, 541 F.3d 130 (2d Cir. 2008). These agreements with private parties often provide the Government with easier access to obtaining evidence but do not preclude the defense from obtaining such evidence. Ng requests that the Court modify the Witness Provision — an agreement between the Government and the Goldman Sachs Group — "to require [the Goldman Sachs Group] to make its employees available as defense witnesses to the same degree it makes its employees . . . available to the Government," (Def.'s Mem. 89), but fails to cite any case in support of his position that the Court has the authority — outside of its subpoena powers — to direct a third party private entity to provide its employees to the defense, and the Court finds none.

The Witness Provision does not prevent Ng from obtaining information via traditional means, including requesting a Rule 15 deposition or Rule 17 subpoena.[25] *See United States v.*

[25] Ng does not cite any case in support of his position that the Constitution requires that the Government and defense have equal access to obtaining evidence, and the Court finds none. *See United States v. Harvey*, No. 07-CR-103, 2008 WL 11395584, at *8 (D. Alaska Jan. 7, 2008) (noting a difference between "imbalance of discovery *disclosures*" and "equal *access* to evidence" and stating that the latter is not required). While the DPA requires that Goldman Sachs Group use its "best efforts" to make employees available to testify at interviews and trial, (DPA ¶ 5(c)) — which may provide the Government with easier *access* to foreign witnesses — the Government is mandated to *disclose* exculpatory evidence and 3500 material obtained from

Raheja, No. 19-CR-559, 2020 WL 7769725, at *1 (N.D. Ohio Dec. 30, 2020) (noting that although "the government can request . . . documents under the DPA" with a third party who agreed to "cooperate fully," the defendants also had "the right to request [documents] through a Rule 17(c) subpoena"). Although Ng argues that "many of the key trial witnesses are foreign nationals who live and work in Southeast Asia and are therefore beyond this Court's subpoena power," (Def.'s Mem. 87–88), Ng has not alleged that he sought their depositions pursuant to Rule 15, *see United States v. Ologeanu*, No. 18-CR-81, 2020 WL 1676802, at *5 (E.D. Ky. Apr. 4, 2020) (concluding that a defendant's constitutional right was not violated where he "ha[d] sought no letters rogatory and requested no Rule 15 depositions [of a witness outside the court's subpoena power] and thus . . . offer[ed] nothing but surmise regarding their efficacy"). Indeed, courts routinely grant depositions pursuant to Rule 15 where a witness is a not a United States citizen and resides outside the country. *See United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984) (concluding that a Rule 15 deposition was appropriate where the witnesses were "Swiss nationals in Switzerland" who refused to come to the United States and their testimony dealt with the defendant's "arrangements for transporting the stolen securities and secreting the proceeds from their sale"); *Mohamed*, 2020 WL 1545522, at *7 (granting Rule 15 motion where the defendants "made sufficient good faith efforts to secure the presence of the witnesses at trial under circumstances where there [was] no way to subpoena the witnesses, there [was] a travel

---

the foreign witnesses and Ng has the right to cross-examine these witnesses at trial. *See United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir. 1973) (noting that the *Brady* "assure[s] that [the defendant] will not be denied access to exculpatory evidence known to the government but unknown to him"); *United States v. Coppa (In re United States)*, 267 F.3d 132, 135, 145 (2d Cir. 2001) (noting that the government's duty under *Brady* "covers not only exculpatory material, but also information that could be used to impeach a key government witness" and that Section 3500 obligates the government to produce the witness statements of its witnesses that testify at trial (citing *Giglio*, 405 U.S. at 154)).

ban forbidding almost all travel by Somalis to the United States, the United States [was] apparently not processing Somali visas, . . . the United States [was] unwilling to otherwise secure the witnesses['] safe passage to the United States," and there was "a global pandemic which puts further health and safety restraints on travel"); *United States v. Little*, No. 12-CR-647, 2014 WL 1744824, at *2 (S.D.N.Y. Apr. 23, 2014) (granting Rule 15 motion where the witness "established that she is unavailable as a [United Kingdom] citizen who is unwilling to come to the United States to testify"); *Little*, 2014 WL 1744824, at *2 ("A Rule 15 deposition is proper for [the witness'] testimony. He is unavailable as a Swiss resident who has repeatedly refused to come to the United States to testify at [the defendant's] trial because the [g]overnment views him as a co-conspirator in the crime alleged. He cannot be compelled under Swiss law to appear or [be] extradited.").

To the extent that the COVID-19 pandemic may limit Ng's ability to confer with potential witnesses in-person, such circumstances are beyond the control of the Government and the Court and is not a violation of his constitutional rights. *See United States v. Beyle*, 782 F.3d 159, 170–71 (4th Cir. 2015) (concluding that there was no constitutional violation where "the witnesses proffered by [the defendant] [we]re foreign nationals located abroad" and the defendant's "inability to access the proffered witnesses arose primarily from the security situation in Somalia — a matter beyond the control of the . . . government" (citing *United States v. Moussaoui*, 382 F.3d 453, 463 (4th Cir. 2004))); *Ologeanu*, 2020 WL 1676802, at *4 (concluding that the defendant's constitutional right was not violated where the defendant "d[id] not allege that any [g]overnment misfeasance or nonfeasance denie[d] him the proof he seeks"). While the Court recognizes the impact of COVID-19 in restricting in-person contact and proceedings, Ng's counsel can conduct informational interviews via telephone or video

conferences which are generally sufficient, even if not perfect. *See United States v. Akhavan*, --- F. Supp. 3d ---, ---, 2021 WL 797806, at *7 (S.D.N.Y. Mar. 1, 2021) (granting Rule 15 motion to testify by video where the witness had an "increased risk of serious illness or death if he were to contract COVID-19"); *Rouviere v. DePuy Orthopaedics, Inc.*, 471 F. Supp. 3d 571, 574 (S.D.N.Y. 2020) (rejecting the plaintiffs' argument that an in-person deposition was required because the COVID-19 pandemic has made conducting court proceedings and depositions remotely the "new normal" and the technology used for conducting depositions by video has improved significantly); *Fields v. MTA Bus Co.*, 129 N.Y.S.3d 319, 324 (Sup. Ct. 2020) (noting that "virtual depositions do not cause undue hardship in light of the technology currently available and the serious health risks posed by the COVID-19 virus" (citing cases)).

Thus, the Court's inability to compel foreign nationals to testify at Ng's trial is not a violation of his constitutional rights. *See Yousef*, 327 F.3d at 114 n.48 (concluding that the "[d]istrict [c]ourt's inability to subpoena witnesses from the Philippines deprived the defendants of no constitutional right"); *Herbert*, 2005 WL 106909, at *1 ("There is no merit in [the defendant's] argument that the conviction should be overturned on the ground that he was devoid of compulsory process to procure unidentified evidence and witnesses from Belize and Colombia."); *see also Ologeanu*, 2020 WL 1676802, at *2–5 (concluding that a defendant's constitutional right was not violated where he alleged that "witness testimony and documentary proof necessary for him to present a constitutionally complete defense [we]re unavailable to him and beyond the [c]ourt's subpoena powers"); *United States v. Skaggs*, 327 F.R.D. 165, 171 (S.D. Ohio 2018) (declining to "tacitly recognize a Sixth Amendment right to the testimony of foreign nationals beyond th[e] [c]ourt's subpoena power" (first citing *United States v. Filippi*, 918 F.2d

244, 247 (1st Cir. 1990); then citing *Greco*, 298 F.2d at 251; and then citing *United States v. Zabaneh*, 837 F.2d 1249, 1259–60 (5th Cir. 1988))).

Accordingly, the Court finds that the Witness Provision does not violate Ng's constitutional rights and declines to modify paragraph 5(c) of the DPA.

h. The production of *Brady*/*Giglio* and Rule 16 material

Ng argues that the Court should order the Government to promptly provide (1) communications the Government had with Leissner and Leissner's counsel regarding Leissner's allocution in connection with his guilty plea in *United States v. Leissner*, 18-CR-439 (E.D.N.Y. Aug. 28, 2018), (Def.'s Mem. 91–101), (2) all material covered by paragraphs 4 and 5 of the DPA, (*id.* at 101–14), and (3) any information in the Government's possession regarding the nature of the financial transactions described in paragraphs 40 and 53 of the Superseding Indictment, (*id.* at 114–16). Ng requests that, to the extent the Court "deems the requested materials as *Giglio* or [Section] 3500 material (as opposed to Rule 16 or *Brady* material)," the Court should "implore the Government to provide these materials at least [six] weeks before trial so as to avoid trial delays." (Def.'s Sur-Reply 6.)

The Government argues that Ng's requests are meritless, moot, or premature. (Gov't Opp'n 65–90.)

i. The Government need not produce documents related to Leissner's allocution months before trial

Ng argues that due process entitles him to know whether the Government had "any involvement in or supervision of the statement that Leissner made to the Court" during his plea allocution, (Def.'s Mem. 95, 97), as "Leissner . . . can be cross-examined on these issues" and "[s]uch coordination would directly impact [his] credibility," (*id.* at 92). In support, Ng observes that "[a] close comparison of the [original] Indictment filed against [him on October 3, 2018,]

with the plea colloquy that Leissner claimed he wrote himself [on August 28, 2018,] lays bare that numerous sections mirror each other — often word for word,"[26] (*id.* at 93), suggesting that Leissner may have "initially drafted a version of events in which Ng was less directly implicated"; that the Government may have "scripted either Leissner's colloquy or his trial testimony"; or that the Government may have commented on Leissner's proposed allocution, which may have led to "material changes in [the] allocution," (*id.* at 97–98). In addition, Leissner stated in his allocution that he "conspired with other employees and agents of Goldman Sachs very much in line [with the] culture of Goldman Sachs to conceal facts from certain compliance and legal employees of Goldman Sachs," (Transcript at 39, *Leissner*, No. 18-CR-439), and the Indictment (and now Superseding Indictment) similarly states that "the business culture at [Goldman], particularly in Southeast Asia, was highly focused on consummating deals, at times prioritizing this goal ahead of the proper operation of its compliance functions," (Indictment ¶ 19), suggesting that the Government "may have interacted with Leissner and subsequently changed its pleadings," (Def.'s Mem. 96; Def.'s Reply 52). Therefore, Ng requests that the Court "order the Government to produce the items attached to [his] motion as Attachment A[27] or to represent to the Court that no such material exists or was ever communicated in any form." (Def.'s Mem. 92 (citing Attachment A).)

---

[26] The Court notes that the same is true of the Superseding Indictment.

[27] Attachment A requests all documents relating to:

- Any cooperating witness's plea hearing, plea allocution or trial testimony. These documents should include not only substantive communications, but also documents that reflect or are indicative of oral communications.
- All versions of any draft, proposed, or actual plea allocutions relating to the allegations in this case (including native files with metadata).

The Government argues that Ng is seeking the production of impeachment material and witness statements to which he is not entitled months before trial. (Gov't Opp'n 65, 69–70.) The Government maintains that it is aware of its disclosure obligations and "will produce to [Ng] prior to trial potential impeachment materials pursuant to *Giglio* and witness statements pursuant to Section 3500," as well as "documents related to Leissner's allocution to which [Ng] may be entitled . . . to the extent that they both exist and fall within either or both of these two categories." (*Id.* at 70.) In addition, the Government argues that Ng "cites nothing" suggesting that he is entitled to these materials at this time — only cases that "discuss the unremarkable proposition that allegations that a . . . witness was 'coached' are properly addressed through

---

- Any meetings regarding cooperator allocutions in this case (including, but not limited to, notes, calendar entries, emails, internal chats, or other documents).
- Communications with counsel for any Government witness about the content or substance of the witness's proffer statements or actual or anticipated testimony.
- Communications with law enforcement agencies, including the FBI, about the content or substance of a witness's proffer statements or actual or anticipated testimony.
- Other communications concerning the content or substance of any Government witness's proffer statements or actual or anticipated testimony.
- Communications with any lawyer for any Government witness concerning this case.
- Communications or other documents related to consideration, offers, or requests of immunity, non-prosecution or other agreement.
- Communications in which the Government or law enforcement agents advised any Government witness against sending emails or text messages.

(Attachment A, annexed to Def.'s Mem. as Ex. 3, Docket Entry No. 46-3.) The Government notes that "the items in Attachment A are not specific to Leissner, and [Ng] does not explain why he is entitled to all of these items at this stage of the case," as they are all either potential impeachment material or witness statements. (Gov't Opp'n 69 n.15.)

cross-examination" or cases with "instances where courts have evaluated, *after trial*, the impact of the government's failure to produce certain material." (*Id.* at 70–71.)

"Under *Brady* and its progeny, 'the Government has a constitutional duty to disclose favorable evidence to the accused where such evidence is 'material' either to guilt or to punishment.'" *United States v. Certified Env't Servs., Inc.*, 753 F.3d 72, 91 (2d Cir. 2014) (quoting *United States v. Coppa (In re United States)*, 267 F.3d 132, 139 (2d Cir. 2001)); *United States v. Douglas*, 525 F.3d 225, 244 (2d Cir. 2008) (quoting *Brady*, 373 U.S. at 87); *see also Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006); *United States v. Gil*, 297 F.3d 93, 101 (2d Cir. 2002) ("To the extent that [a] prosecutor knows of material evidence favorable to the defendant in a criminal prosecution, the government has a due process obligation [grounded in the 14th Amendment] to disclose that evidence to the defendant." (alterations in original) (quoting *Leka v. Portuondo*, 257 F.3d 89, 98 (2d Cir. 2001))).

Favorable evidence "includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness," also known as "*Giglio* material." *Certified Env't Servs., Inc.*, 753 F.3d at 91 (quoting *Coppa*, 267 F.3d at 139); *see, e.g.*, *United States v. Brennerman*, 818 F. App'x 25, 29 (2d Cir. 2020) ("The government has an obligation under the Due Process Clause to make a timely disclosure of any exculpatory or impeaching evidence that is material and in its possession." (first citing *Brady*, 373 U.S. at 83; and then citing *Giglio*, 405 U.S. at 150)); *Kirk Tang Yuk*, 885 F.3d at 86 (stating that the Supreme Court extended the government's *Brady* obligations in *Giglio* "to cover evidence that could be used to impeach a government witness"); *United States v. Djibo*, 730 F. App'x 52, 55 (2d Cir. 2018) (same); *Strickler v. Greene*, 527 U.S. 263, 282 n.21 (1999) (same); *Giglio*, 405 U.S. at 154–55.

Evidence is material "in the *Brady* context[] if there is a 'reasonable probability' that disclosure would have changed the outcome of the case, or where the suppressed evidence 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Kirk Tang Yuk*, 885 F.3d at 86 (quoting *Kyles v. Whitley*, 544 U.S. 419, 434–35 (1995)); *see, e.g.*, *Djibo*, 730 F. App'x at 56 (same); *see also Kyles*, 544 U.S. at 434 (discussing materiality). "The assessment of materiality is made in light of the entire record." *United States v. Triumph Cap. Grp., Inc.*, 544 F.3d 149, 161 (2d Cir. 2008) (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)). "Materiality encompasses the notions that the suppressed evidence is favorable to the accused and that he was prejudiced by its suppression." *Douglas*, 525 F.3d at 244 (citing *Kyles*, 544 U.S. at 434). Therefore, "[t]o establish a *Brady* or *Giglio* violation, 'a defendant must show that: (1) the government, either willfully or inadvertently, suppressed evidence; (2) the evidence at issue is favorable to the defendant; and (3) the failure to disclose this evidence resulted in prejudice.'" *Kirk Tang Yuk*, 885 F.3d at 86 (quoting *Coppa*, 267 F.3d at 140); *see also Douglas*, 525 F.3d at 244 (quoting *Strickler*, 527 U.S. at 281–82).

"Although there is no precise deadline for when the government is required to disclose *Brady* and *Giglio* material, [the Second Circuit] has held that *Brady* requires disclosure 'in time for its effective use at trial.'" *Djibo*, 730 F. App'x at 55 (quoting *Douglas*, 525 F.3d at 245); *see also United States v. Campbell*, 850 F. App'x 102, 109 n.4 (2d Cir. 2021) ("It is well settled that 'as long as a defendant possesses *Brady* evidence in time for its effective use, the government has not [committed a *Brady* violation] simply because it did not produce the evidence sooner" (alteration in original) (quoting *Coppa*, 267 F.3d at 144)); *United States v. St. Lawrence*, 767 F. App'x 77, 81–82 (2d Cir. 2019) (same); *Halloran*, 821 F.3d at 341 (same); *Coppa*, 267 F.3d at 142, 144, 146 (same).

"[T]he time required for the effective use of a particular item of evidence will depend on the materiality of that evidence . . . as well as the particular circumstances of the case." *Coppa*, 267 F.3d at 146. "*Brady* information must be disclosed . . . in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial. Thus, the Government must make disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously." *United States v. Rodriguez*, 496 F.3d 221, 227–28 (2d Cir. 2007); *United States v. Frank*, 11 F. Supp. 2d 322, 325 (S.D.N.Y. 1998) ("The [c]ourt has ordered that *Brady* material be disclosed promptly after it comes to the [g]overnment's attention, inasmuch as the defendant may need to undertake an investigation to develop and present effectively the exculpatory information."). "The issue of when *Giglio* material should be disclosed, however, must be analyzed separately," *Frank*, 11 F. Supp. 2d at 325, as "[*Giglio*] material ripens into evidentiary material for purposes of impeachment only if and when the witness testifies at trial," *Wey*, 2017 WL 237651, at *3 (quoting *United States v. Earls*, No. 03-CR-364, 2004 WL 350725, at *8 (S.D.N.Y. Feb. 25, 2004)). Accordingly, "there is no constitutional right to early disclosure of *Giglio* or § 3500 material." *United States v. Davis*, No. 17-CR-615, 2021 WL 826261, at *4 (E.D.N.Y. Mar. 3, 2021) (quoting *United States v. Minaya*, No. 11-CR-755, 2012 WL 1711569, at *1 (S.D.N.Y. May 14, 2012)); *Frank*, 11 F. Supp. 2d at 325 (noting that government may "defer[] production" of *Giglio* material "until closer to the time of the witnesses' testimony" as long as the defendant still has time to use it effectively). Nevertheless, a court may "order *Brady*/*Giglio* disclosure at any time as a matter of 'sound case management.'" *United States v. Taylor*, 17 F. Supp. 3d 162, 177 (E.D.N.Y. 2014) (quoting *United States v. Nogbou*, No. 07-CR-814, 2007 WL 4165683, at *3–4 (S.D.N.Y. Nov. 19, 2007)). "Courts in the Second Circuit generally do not compel

immediate disclosure of *Brady*/*Giglio* materials where (1) the Government represents it is aware of and will comply with its *Brady*/*Giglio* obligations, and (2) the [d]efense does not provide any reason for suspecting the Government will not comply." *United States v. Mohamed*, 148 F. Supp. 3d 232, 246 (E.D.N.Y. 2015) (collecting cases); *see also United States v. Rodriguez*, No. 19-CR-779, 2020 WL 5819503, at *10 (S.D.N.Y. Sept. 30, 2020) (stating that "[c]ourts in this Circuit have repeatedly declined to issue pretrial discovery orders pertaining to *Brady* and *Giglio* material, upon a good faith representation by the government that it has complied — and will continue to comply — with its disclosure obligations" and collecting cases).

Under the Jencks Act, 18 U.S.C. § 3500, "no prior statement made by a government witness shall be the subject of discovery until that witness has testified on direct examination." *Coppa*, 267 F.3d at 145; *see* 18 U.S.C. § 3500 ("In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena discovery, or inspection until said witness has testified on direct examination in the trial of the case."); *see also* Fed. Rule Crim. P. 26.2(a) (providing that "[a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified"). "[T]he Jencks Act prohibits a [d]istrict [c]ourt from ordering the pretrial disclosure of witness statements." *Coppa*, 267 F.3d at 145 (citing *In re United States*, 834 F.2d 283, 286–87 (2d Cir. 1987)); *United States v. Percevault*, 490 F.2d 126, 131–32 (2d Cir. 1974) (finding district court exceeded its authority in compelling pretrial

disclosure of statements made by prospective government witnesses). However, where witness statements "fall within the ambit of *Brady*/*Giglio*," they "may be required to be produced in advance of trial despite the Jencks Act." *Coppa*, 267 F.3d at 145.

As Ng "admits . . . candidly," his request for materials relating to Leissner's allocution is a search for "'weapons' for cross-examination" — that is, a search for potential impeachment or "*Giglio*" material. (Def.'s Reply 52.) Indeed, most of the items detailed in Attachment A to his motion fall into this category, with the remainder falling into the category of witness statements — Section 3500 material. While Ng has the right to cross-examine Leissner on his allocution and testimony and to ask him whether the Government assisted him in crafting his allocution, there is no pretrial discovery right to these impeachment materials, particularly where the Government has represented that it is aware of its discovery obligations and will comply with them and Ng has not provided a reason for suspecting that the Government will not comply with its obligations. *See, e.g.*, *Mohamed*, 148 F. Supp. 3d at 246 (denying request for immediate production of *Brady*/*Giglio* materials as premature where the government represented it would "provide *Brady*/*Giglio* material . . . four weeks prior to the suppression hearing" and "search for any *Brady*/*Giglio* material that would require earlier disclosure" — indicating that it was "aware of its obligations and [would] comply with such obligations before trial" — and where the defendant "provided no reason for suspecting the [g]overnment [would] fail to comply with its obligations"); *Rivera*, 89 F. Supp. 3d at 396–97 (declining to compel early disclosure where government represented it would produce *Brady* materials immediately upon becoming aware of such materials and would produce *Giglio* materials in advance of trial); *United States v. Badoolah*, No. 12-CR-774, 2014 WL 4793787, at *16 (E.D.N.Y. Sept. 25, 2014) (same); *see also United States v. Sezanayev*, No. 17-CR-262, 2018 WL 2324077, at *4 (S.D.N.Y. May 22,

2018) ("The [g]overnment's good faith representations of its continuing compliance with its *Brady* disclosure obligations is sufficient [to satisfy its *Brady* obligations]." (citing *United States v. English*, No. 10-CR-431, 2011 WL 3366490, at *5 (S.D.N.Y. July 29, 2011))); *see also Brennerman*, 818 F. App'x at 30 (finding no *Brady* violation where the government represented that it had already turned over everything in its possession and was unaware of requested materials); *United States v. Gatto*, 316 F. Supp. 3d 654, 657–60 (S.D.N.Y. 2018) (declining to order immediate disclosure of purported "exculpatory and impeaching witness statements"). In addition, the remaining items in Attachment A appear to be witness statements — Section 3500 material. However, a district court may not order pretrial disclosure of witness statements, *Coppa*, 267 F.3d at 145, and to the extent these statements are also *Giglio*, their early production is not required at this time for the reasons stated above.

Accordingly, the Court denies as premature and without prejudice Ng's request for production of the *Giglio* material and Section 3500 material outlined in Attachment A.

ii. Production of all material covered by the DPA

Ng requests production of all material covered by paragraphs 4 and 5 of the DPA. (Def.'s Mem. 102, 109.) In support, he argues that he is entitled to (1) "factual representations" the Goldman Sachs Group made to the Government during the Government's investigation under *Brady*, *Giglio*, and Rule 16, (*id.* at 104–05), (2) "investigative updates" the Goldman Sachs Group is required to provide to the Government, as well as any *Brady* or Rule 16 material the Goldman Sachs Group possesses, because it is part of the "prosecution team" for purposes of *Brady* and because such materials are in the Government's "possession, custody, or control" by virtue of the DPA for purposes of Rule 16, (*id.* at 106–12; *see also* Def.'s Reply 53–55), (3) equal access to witnesses who, to the Goldman Sachs Group's knowledge, "may have material information regarding the matters being investigated or prosecuted," (Def.'s Mem. 112–

13), and (4) all "*Brady* and Rule 16 materials that are within the possession, custody, or control of the Government but have not been produced," as evidenced by statements in the November 2020 Letter that contradict the Government's theory of the case, (Def.'s Reply 39).

The Government argues that (1) it has already produced to Ng all of the materials it received from the Goldman Sachs Group pursuant to the DPA, (Gov't Opp'n 72–73), (2) as a cooperating private party, the Goldman Sachs Group is not part of the prosecution team for the purposes of *Brady*, (*id.* at 80–86), and the Government does not "control" the Goldman Sachs Group for the purposes of Rule 16, (*id.* at 76–80), (3) Ng's request for equal access to the Goldman Sachs Group's witnesses "is unsupported by any case law . . . and is simply a rehash of [Ng's] earlier, meritless argument that the Court should modify the DPA," (*id.* at 72 n.17), and (4) the November 2020 Letter does not point to the existence of unproduced materials; rather, it summarizes factual representations and arguments made in advocacy materials that the Goldman Sachs Group's counsel created based on the materials the Government has already provided, (Gov't Sur-Reply 18–20).

1. Factual presentations and advocacy materials

Ng argues that, under paragraph 4 of the DPA, he is entitled to the "factual presentations" the Goldman Sachs Group provided to the Government during its investigation, as these details "are exculpatory and impeachment material, or at the very least Rule 16(a)(1)(E) material," and are not privileged since the Goldman Sachs Group "provided [them] to the Government." (Def.'s Mem. 104–05.)

The Government maintains that it has already produced the DPA materials in its possession, custody, or control pursuant to Rule 16. (Gov't Opp'n 72–73.) The Government contends that the only materials it has not produced are "certain advocacy materials used by the Goldman [Sachs] Group's counsel at various points during the investigation and during plea

negotiations," and argues that Ng is not entitled to these materials (1) under *Brady* because they are not exculpatory, as they are "not records of contemporaneous conduct, but are, instead, the product of [the Goldman Sachs Group's] lawyers advocating on the company's behalf after the fact," (*id.* at 74), (2) under *Giglio* because Ng "should not be permitted at trial to cross-examine fact witnesses with [the Goldman Sachs Group's] legal arguments and advocacy (as opposed to documents and underlying evidence) made in the course of plea negotiations," (Gov't Sur-Reply 23), and (3) under Rule 16(a)(1)(E) because the Government has already produced "all of the factual information and documentation underlying" these materials, and therefore the materials themselves would not alter the quantum of proof in this case, (Gov't Opp'n 75).[28] In addition, the Government argues that it nevertheless disclosed to Ng "representations and legal arguments made in the [a]dvocacy [m]aterials as early potential Section 3500 material and *Giglio* information" in the November 2020 Letter. (*Id.* at 74.)

To the extent Ng seeks production of "factual presentations" the Goldman Sachs Group made to the Government pursuant to the DPA, the Court denies his request as moot in view of the Government's representation that it has already provided these materials to Ng. (*See id.* at 74–75.) To the extent Ng seeks production of the advocacy materials pursuant to *Brady* and *Giglio*, the Court similarly denies his request, as the Government has represented that the advocacy materials were prepared by the Goldman Sachs Group's counsel and they therefore do not constitute evidence. *See Silverman v. Colvin*, No. 13-CV-3062, 2014 WL 198767, at *2 n.3 (E.D.N.Y. Jan. 16, 2014) ("[A] lawyer's argument is not evidence . . . ."); (Gov't Sur-Reply 19). In addition, as discussed above in connection with Ng's request for materials relating to

[28] The Government notes that, "in the event the Court wishes to examine [the advocacy materials] before ruling, the [G]overnment will provide them for *ex parte* review." (Gov't Opp'n 76 n.18.)

Leissner's allocution, Ng is not entitled to early production of *Giglio* material — to the extent anything in the advocacy materials could be used for impeachment, the Government is reminded of its obligation to produce such materials to Ng in time for their effective use at trial. Finally, the Court denies as moot Ng's request for production of the advocacy materials under Rule 16, as the Government has represented that it has already produced all of the underlying evidence upon which the advocacy materials are based.

2. Investigative updates

Ng argues that the DPA's reference to "investigative updates" suggests that the Government "outsource[d]" some of its investigation to the Goldman Sachs Group, begging questions such as how much information the Goldman Sachs Group and the Government shared and "whether the Government has examined all of [the Goldman Sachs Group's] files" for material that must be produced. (Def.'s Mem. 106.) Ng requests production of the investigative updates and any files in the Goldman Sach's Group's possession that may constitute *Brady* or Rule 16 material. (*Id.*) In support, he argues that (1) he is entitled to production of any *Brady* material in the Goldman Sachs Group's possession because the Goldman Sachs Group is part of the "prosecution team," and, as such, the Government has "constructive" knowledge or possession of these materials, (*id.* at 108–12), and (2) he is entitled to production under Rule 16 of anything in the Goldman Sachs Group's possession that is material to preparing his defense and covered by paragraphs 4 and 5 of the DPA because materials the Goldman Sachs Group possesses are within the Government's "possession, custody, or control" by virtue of the DPA, (*id.* at 107; *see also* Def.'s Reply 53–55).

The Government argues that (1) as a cooperating private party, the Goldman Sachs Group is not part of the prosecution team, (Gov't Opp'n 80–86), and (2) documents in the Goldman

Sachs Group's possession are not within the Government's "control" for the purposes of Rule 16, (*id.* at 76–80).

A. The Goldman Sachs Group is not part of the "prosecution team"

Ng argues that it appears, based on the language of the DPA, that the "Goldman [Sachs Group] and its counsel played an active and instrumental role in the Government's investigation of this case," and that the Government may have even "delegated numerous investigative tasks to [the] Goldman [Sachs Group]" or participated in a "joint investigation" with the Goldman Sachs Group, making the Goldman Sachs Group an "arm of the prosecutor" or member of the "prosecution team." (Def.'s Mem. 109.) Ng argues that, because the Government, under *Brady*, has a "duty to learn of any favorable material known to . . . others acting on the government's behalf in the case," (*id.* at 108 (quoting *Kyles*, 514 U.S. at 437)), and because it appears that the Goldman Sachs Group may be a member of the prosecution team, he is entitled to production of any *Brady* material in the Goldman Sachs Group's possession, (*id.* at 108–12).[29]

The Government argues that the Goldman Sachs Group is not a member of the prosecution team both as a matter of law and as a matter of fact. As a matter of law, the Government argues that it "cannot be required to produce that which it does not control and never possessed or inspected," (Gov't Opp'n 80 (quoting *United States v. Canniff*, 521 F.2d 565, 573 (2d Cir. 1975))), and that a contrary rule would be unworkable because "[t]he imposition of

[29] Ng requests that "[s]hould the Court find that the record is not sufficiently developed to conclude that [the] Goldman [Sachs Group] was part of the 'prosecution team,'" the Court should "hold an evidentiary hearing to determine (1) the extent of cooperation between the Government and [the] Goldman [Sachs Group] in the investigation of this case, and (2) the Government's ability to access [the Goldman Sachs Group's] files." (*Id.* at 113 n.35; Def.'s Reply 55.) The Government argues that Ng is not entitled to an evidentiary hearing "to probe the relationship between [the] Goldman [Sachs Group] and the [G]overnment" because he has not and cannot "make a threshold showing that misconduct in fact occurred." (Gov't Opp'n 86–87.)

an unlimited duty on a prosecutor to inquire of [others] not working with the prosecutor's office on the case in question would . . . condemn the prosecution of criminal cases to a state of paralysis," (*id.* at 81 (quoting *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998))). In addition, the Government argues that the Goldman Sachs Group cannot be a member of prosecution team merely because it is "cooperating with the [G]overnment's investigation" because "cooperators have their own interests and motives, so it would be illogical to treat them as part of the prosecution team," and the fact that the Government "sought documents from [the] Goldman [Sachs Group] and interacted with it during the . . . investigation," without more, does not make it part of the prosecution team. (*Id.* at 82.) As a matter of fact, the Government argues that it conducted "an independent criminal investigation." (*Id.* at 83.)

The Fifth Amendment's Due Process Clause requires the Government to disclose favorable material evidence in its knowledge or possession to a criminal defendant. *Brady*, 373 U.S. at 86; *Avellino*, 136 F.3d at 255. "The *Brady* obligation extends only to material evidence . . . that is known to the prosecutor," but the "prosecutor is presumed . . . to have knowledge of all information gathered in connection with his office's investigation of the case and indeed 'has a duty to learn of any favorable evidence known to . . . others acting on the government's behalf in the case.'" *Avellino*, 136 F.3d at 255 (quoting *Kyles*, 514 U.S. at 437); *United States v. Barcelo*, 628 F. App'x 36, 38 (2d Cir. 2015) (same); *see also United States v. Bin Laden*, 397 F. Supp. 2d 465, 481 (S.D.N.Y. 2005) ("[A] prosecutor is only obligated to disclose information of which he has either actual or constructive knowledge." (citing *Avellino*, 136 F.3d at 255)), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93 (2d Cir. 2008).

"A prosecutor is deemed to have constructive knowledge of information known to persons who are a part of the 'prosecution team.'" *Barcelo*, 628 F. App'x at 38 (citing *Stewart*, 433 F.3d at 298); *see also, e.g.*, *Gil*, 297 F.3d at 106 ("The government is reasonably expected to have possession of evidence in the hands of investigators, who are part of the 'prosecution team.'"); *United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975) (holding that *Brady* obligations extend to those who are "an arm of the prosecutor," including those who are "intimately involved in the prosecution"); *Bin Laden*, 397 F. Supp. 2d at 481 ("[A] prosecutor has constructive knowledge of any information held by those whose actions can be fairly imputed to him — those variously referred to as an 'arm of the prosecutor' or part of the 'prosecution team.'" (quoting *Avellino*, 136 F.3d at 255)); *United States v. Meregildo*, 920 F. Supp. 2d 434, 440–41 (S.D.N.Y. 2013) ("In the Second Circuit, a prosecutor's constructive knowledge only extends to those individuals who are 'an arm of the prosecutor' or part of the 'prosecution team.'" (first quoting *Gil*, 297 F.3d at 106; then citing *Morell*, 524 F.2d at 555; and then citing *Bin Laden*, 397 F. Supp. 2d at 481)), *aff'd sub nom. United States v. Pierce*, 785 F.3d 832 (2d Cir. 2015). "Whether someone is part of the prosecution team depends on the level of interaction between the prosecutor and the agency or individual." *Meregildo*, 920 F. Supp. 2d at 441 (collecting cases).

"A prosecution team may have many members with different responsibilities. At its core, members of the team perform investigative duties and make strategic decisions about the prosecution of the case." *Id.* (first citing *Kyles*, 514 U.S. at 438; and then citing *Giglio*, 405 U.S. at 154); *see also Barcelo*, 628 F. App'x at 38 ("Individuals who perform investigative duties or make strategic decisions about the prosecution of the case are considered members of the prosecution team, as are police officers and federal agents who submit to the direction of the

prosecutor and participate in the investigation." (citing *Meregildo*, 920 F. Supp. 2d at 441 (collecting cases))). "The prosecution team may also include individuals who are not strategic decision-makers." *Meregildo*, 920 F. Supp. 2d at 441 (citing *Bin Laden*, 397 F. Supp. 2d at 481); *see also Bin Laden*, 397 F. Supp. 2d at 484 n.22 ("[A] paralegal, translator, or other non-lawyer assistant facilitating the prosecutors' work would be a member of the prosecution team, regardless of the fact that they were not investigating the case or making charging decisions"). "[T]he propriety of imputing knowledge to the prosecution is determined by examining the specific circumstances of the person alleged to be an 'arm of the prosecutor.'" *Stewart*, 433 F.3d at 298 (quoting *Morell*, 524 F.2d at 555); *see also United States v. Alvared-Estevez*, 671 F. App'x 834, 835 (2d Cir. 2016) (same). "It does not turn on the status of the person with actual knowledge, such as a law enforcement officer, prosecutor or other government official. In other words, the relevant inquiry is what the person *did*, not who the person *is*." *Stewart*, 433 F.3d at 298. However, "[i]nteracting with the prosecution team, without more, does not make someone a team member. *Meregildo*, 920 F. Supp. 2d at 441–42 (citing *Stewart*, 323 F. Supp. 2d at 616–18). "Instead, under the totality of the circumstances, the more involved individuals are with the prosecutor, the more likely they are team members." *Id.* at 442 (citing *Stewart*, 323 F. Supp. 2d at 616–18). "Among many others, these circumstances include whether the individual actively investigates the case, acts under the direction of the prosecutor, or aids the prosecution in crafting trial strategy." *Id.* (citing *United States v. Diaz*, 176 F.3d 52, 106–07 (2d Cir. 1999)).

The Second Circuit has "never held that the 'prosecution team' includes cooperating witnesses." *Barcelo*, 628 F. App'x at 38 (quoting *United States v. Garcia*, 509 F. App'x 40, 43 (2d Cir. 2013)); *see also Meregildo*, 920 F. Supp. 2d at 442 ("Applying the Second Circuit's imputation analysis to cooperating witnesses suggests that, in most cases, cooperating witnesses

should not be considered part of the prosecution team."); *see also, e.g.*, *United States v. Lujan*, 530 F. Supp. 2d 1224, 1231 (D.N.M. 2008) ("[T]here is no affirmative duty to discover information in possession of independent, cooperating witness[es.]"); Wayne Lafave et al., Criminal Procedure § 20.3(a) (3d ed. 2011) ("Courts generally agree that the prosecutor's obligations do not extend to agencies that are not law enforcement agencies, even though they may furnish some information to the prosecution. The same is true of private parties."). Cooperators "stand in a very different position in relation to the prosecution than do police officers and other governmental agents." *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (finding no *Brady* violation in connection with documents under government witness's control because witness "remained an independent actor" while cooperating). Unlike federal agents, who serve the law and are engaged in the same enterprise as prosecutors, cooperators have their own interests and motives, "[a]nd it is unreasonable to expect the same solicitude and sacrifice from cooperators." *Meregildo*, 920 F. Supp. 2d at 445.

The Court is not persuaded that the Goldman Sachs Group is part of the "prosecution team" simply because it entered the DPA with the Government. As a cooperating private entity, the Goldman Sachs Group remains a third-party with its own interests and motives rather than an arm of the prosecution. *See, e.g.*, *United States v. Tomasetta*, No. 10-CR-1205, 2012 WL 896152, at *5 (S.D.N.Y. Mar. 16, 2012) ("[T]he fact that a third-party corporation is cooperating with the [g]overnment's investigation — as many do — does not turn it into an 'agent' of the [g]overnment. Cooperating parties have their own sets of interests . . . ." (citing *United States v. Josleyn*, 206 F.3d 144, 153–54 (1st Cir. 2000))). Indeed, the DPA indicates that the Goldman Sachs Group received only partial credit for its cooperation because it "was significantly delayed in producing relevant evidence, including recorded phone calls" — a fact inconsistent with Ng's

contention that the Goldman Sachs Group is part of the "prosecution team." *See Josleyn*, 206 F.3d at 153–54 (finding that cooperating private party was not part of the prosecution team where it withheld information from the government because it had an interest that the government knew some information but not too much, stating that "[w]hile prosecutors may be held accountable for information known to police investigators . . . we are loath to extend the analogy . . . to cooperating private parties who have their own set of interests," which "are often far from identical to — or even congruent with — the government's interests"). In addition, although the Government has sought specific information from the Goldman Sachs Group and the Goldman Sachs Group has interacted with the Government during its investigation, the Government appears to have conducted an independent investigation,[30] and there is no evidence that the Government has delegated investigative tasks to the Goldman Sachs Group, as Ng speculates based on the DPA, or that the Goldman Sachs Group has made strategic decisions about the prosecution. *See, e.g.*, *Rajeha*, 2020 WL 7769725, at *3 n.4 (finding that a private entity "would not qualify as a member of the prosecution team as it never participated in formulating trial strategy," was never "directed to investigate on behalf of the government," and

[30] The Government notes that:

> The voluminous discovery in this case shows that the government: (1) conducted its own independent interviews of witnesses; (2) issued grand jury subpoenas to various individuals and entities, including to [the] Goldman [Sachs Group] itself — a step entirely inconsistent with a joint or "outsourced" investigation; (3) did not have access to materials [the] Goldman [Sachs Group] withheld as privileged or the decision-making process behind those determinations; (4) obtained evidence through additional investigative steps, including multiple search warrants executed on third-party email service providers, as well as Mutual Legal Assistance Treaty requests for foreign evidence; and (5) made its own independent assessment of the evidence.

(Gov't Opp'n 83.)

"[w]hile it responded to specific requests for information . . . '[i]nteracting with the prosecuting team, without more, does not make someone a team member'" (second alteration in original) (quoting *Meregildo*, 920 F. Supp. 2d at 441–42, 445)); *United States v. Buske*, No. 09-CR-65, 2011 WL 2912707, at *7–8 (E.D. Wis. July 18, 2011) (rejecting argument that company was part of the prosecution team "[b]ecause of the coordinated effort between [the company] and the government"); *United States v. Norris*, 753 F. Supp. 2d 492, 529–31 (E.D. Pa. 2010) (rejecting argument that government "violated Rule 16 and *Brady* by failing to turn over materials in the possession of . . . foreign corporations with whom the [government] had plea agreements" and noting that "the fact that the [government] could have possibly obtained the materials does not give rise to any discovery obligations"), *aff'd*, 419 F. App'x 190 (3d Cir. 2011). Accordingly, although subject to the DPA and required to cooperate with the Government, the Goldman Sachs Group is not a member of the prosecution team and the Government cannot be deemed to have constructive knowledge of materials in the Goldman Sachs Group's possession. Therefore, the Government does not have a *Brady* obligation to obtain and produce these materials.

In support of his contention that the Goldman Sachs Group is part of the prosecution team, Ng points to a line of cases in which courts have found the SEC to be part of the prosecution team where the facts suggested that the SEC and the Government were conducting a "joint investigation." (Def.'s Mem. 109.) Citing *United States v. Duronio* and *United States v. Connolly*, Ng argues that "[a] private party may [also] be so closely aligned with the Government that it becomes a member of the prosecution team." (*Id.* at 110 (first citing *Duronio*, No. 02-CR-933, 2006 WL 1457936, at *2–4 (D.N.J. May 23, 2006), *aff'd*, 2009 WL 294377 (3d Cir. Feb. 9, 2009); and then citing *Connolly*, No. 16-CR-370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019)).)

The Government argues that the cases Ng relies on "further demonstrate why his claim here fails." (Gov't Opp'n 84.)

In *Duronio*, the defendant was charged with attacking his employer's computers. 2006 WL 1457936, at *1. While the government investigated the defendant, the employer conducted a separate internal investigation of the defendant and other employees. *Id.* After an independent company hired by the employer concluded that it was unlikely that the other employees were directly involved in the attack, the employer reconfigured those employees' computers, wiping them clean. *Id.* The employer never informed the defendant or the government that it had been investigating other employees, and when the defendant became aware of this fact, he requested access to one of the reconfigured computers. *Id.* at *2. When the defendant was informed that the computer had been wiped clean, he argued that the computers could have contained *Brady* material and that the destruction and suppression of that evidence should be imputed to the government. *Id.* In considering whether the government had a duty to disclose the material on the computer — material of which it had been unaware and never had in its possession — the court employed the Third Circuit's test for determining whether to impute knowledge to the government, and considered (1) whether the party with knowledge of the information was "acting on the government's 'behalf' or [was] under its 'control,'" (2) the extent to which the party with knowledge and the government were part of a "team," "participating in a 'joint investigation,'" or "sharing resources," and (3) whether the government, as "the entity charged with constructive possession," had "ready access" to the evidence. *Id.* at *2–3 (quoting *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006)). The district court concluded that neither the employer nor the company it had hired was part of a "team" or "joint investigation" with the government because, among other things, while the government had consulted with the company

hired by the employer, it had also hired its own expert and had not shared its findings, and the employer "was not cooperating with the government or acting within its control" because it "failed to disclose to the government . . . that [another employee] was the subject of an internal investigation." *Id.* at *4.

In *Connolly*, a government regulatory agency advised a bank that it intended to investigate whether the bank had submitted false or misleading reports. 2019 WL 2120523, at *2. The agency advised the bank that it expected the bank to cooperate fully with its investigation and requested that the bank conduct a voluntary internal investigation through outside counsel, attaching an "Enforcement Advisory Memorandum" to its request noting that a corporate cooperator might receive cooperation credit if it utilizes all available means to make employee testimony and other documents available. *Id.* The bank hired outside counsel to conduct "the so-called 'voluntary' investigation that was demanded." *Id.* The agency directed the bank to conduct interviews of specific employees, including the defendant, to approach an interview with the defendant "as if [the interviewer] were a prosecutor," and to report the results to the agency. *Id.* at *3–4, *12. At issue in *Connolly* was whether the interviews were both fairly attributable to the government and compelled, such that they violated the defendant's right against self-incrimination articulated in *Garrity v. New Jersey*, 385 U.S. 493 (1967). *Id.* at *1. The court found that the "internal" investigation was "fairly attributable to the [g]overnment" because the evidence suggested that the government had not only "directed [the bank] to investigate [the defendant] on its behalf" but also directed outside counsel "on the precise manner in which [it] should ask questions," making the interviews "[g]overnment-engineered." *Id.* at *12. The court concluded that "rather than conduct its own investigation, the government outsourced the important developmental stage of its investigation to [the bank]," and that the

bank's outside counsel "did everything that the [g]overnment could, should, and would have done had the [g]overnment been doing its own work." *Id.* In addition, the court noted that there was not only "little evidence about the [g]overnment's own independent investigative efforts" but also that the government did not even present evidence "demonstrating, at the very least, that it was conducting a parallel investigation." *Id.*

As an initial matter, although Ng is correct that courts in this Circuit have found the SEC to be part of the prosecution team where the facts suggested that the SEC and the government were conducting a "joint investigation," he has not cited and the Court cannot find an in-Circuit decision applying the "joint investigation" analysis to a private party. Rather, it appears that in the Second Circuit, this analysis has only been applied to other governmental agencies. *See, e.g.*, *United States v. Gupta*, 848 F. Supp. 2d 491, 493 (S.D.N.Y. 2012) ("Where the [U.S. Attorneys' Office] conducts a 'joint investigation' with another state or federal agency, courts in this Circuit have held that the prosecutor's duty extends to reviewing the materials in the possession of that other agency for *Brady* evidence." (citing *United States v. Upton*, 856 F. Supp. 727, 749–50 (E.D.N.Y. 1994))). As the Government argues, *Duronio* and *Connolly* do not support Ng's contention that the Goldman Sachs Group was part of the prosecution team. As in *Duronio*, where the fact that the employer "failed to disclose" information to the government suggested that the employer "was not cooperating with the government or acting within its control," 2006 WL 1457936, at *2–4, the fact that the Goldman Sachs Group received only partial cooperation credit for its "significant[] delay[]" in providing the Government with relevant evidence does not support a conclusion that the Goldman Sachs Group and the Government were engaged in a joint investigation, (DPA).

In addition, although Ng highlights some "similarities between what [the bank] did in *Connolly* and what [the] Goldman [Sachs Group] did here," (Def.'s Mem. 110–11), including making regular investigative updates and factual presentations, collecting and producing voluminous evidence located in other countries, and facilitating interviews with foreign-based employees, all for cooperation credit, *Connolly* did not consider whether these facts evidenced a "joint investigation" making the bank part of the prosecution team such that knowledge of *Brady* materials in its possession could fairly be attributed to the government. Rather, the court in *Connolly* considered whether a particular action — interviews conducted at the specific direction of the government — could be attributed to the Government as state action. Unlike in *Connolly*, the Government here conducted its own interviews of witnesses and did not direct the Goldman Sachs Group to conduct any interviews, and while it appeared in *Connolly* that the government had not undertaken a "substantive parallel investigation" or engaged in "independent investigative activities" but had instead directed and relied on the employers' investigation, the Government here took significant independent investigative steps beyond seeking information from the Goldman Sachs Group, including not only conducting its own interviews but also subpoenaing other individuals and entities and obtaining evidence through search warrants and Mutual Legal Assistance Treaty requests for foreign evidence. (Gov't Opp'n 83.) Thus, neither case supports Ng's argument that the Goldman Sachs Group is part of the prosecution team.

Accordingly, the Court concludes that the Goldman Sachs Group is not part of the prosecution team for purposes of *Brady*.

B. The Government does not "control" the Goldman Sachs Group for purposes of Rule 16

Ng contends, relying on *United States v. Stein ("Stein I")*, 488 F. Supp. 2d 350, 360–64 (S.D.N.Y. 2007), that because the DPA gives the Government a legal right to obtain materials in

the Goldman Sachs Group's possession, such materials are within the Government's "control" and must be produced pursuant to Rule 16. Ng therefore requests that the Court order the Government to produce under Rule 16 all evidence in the Goldman Sachs Group's possession that is material to preparing the defense and covered by paragraphs 4 and 5 of the DPA. (*See* Def.'s Mem. 106–08.) In addition, relying on *United States v. Stein ("Stein II")*, 541 F.3d 130, 151 (2d Cir. 2008), Ng appears to argue that by entering the DPA to avoid the threat of prosecution, the Goldman Sachs Group became an agent of the Government such that any materials the Goldman Sachs Group acquired pursuant to the DPA are within the Government's "control." (Def.'s Reply 53–54.)

The Government argues that *Stein I* was "predicated on unique factual and procedural circumstances that are not present here," that its holding is questionable on its own terms, and that several courts have rejected or declined to follow it. (Gov't Opp'n 76–80.) In addition, the Government argues that *Stein II* is inapposite because it was a state-action case that did not involve the question of what constitutes "control" for Rule 16 purposes "but rather considered whether the company, in adopting a policy to stop paying legal fees and expenses to employees facing criminal charges, had acted at the direction of the government, and in doing so had violated the employees' Sixth Amendment rights." (Gov't Sur-Reply 25 n.10)

Rule 16 of the Federal Rules of Civil Procedure "governs discovery in criminal cases," *United States v. Armstrong*, 517 U.S. 456, 456 (1996), and "is a rule of checks and balances," *United States v. Cobb*, --- F. Supp. 3d ---, ---, 2021 WL 2493240, at *17 (W.D.N.Y. June 18, 2021) (alteration in original) (quoting *United States v. Cherry*, 876 F. Supp. 547, 549 (S.D.N.Y. 1995)) (collecting cases). Rule 16(a)(1)(E) provides that:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers,

> documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

United States v. Monsanto Lopez, 798 F. App'x 688, 690 (2d Cir. 2020) (quoting Fed. R. Crim. P. 16(a)(1)(E)); *see also United States v. Reichberg*, 5 F.4th 233, 242 n.25 (2d Cir. 2021) (citing Fed. R. Crim. P. 16(a)(1)(E)); *United States v. King*, --- F. App'x ---, ---, 2021 WL 2817004, at *1 (2d Cir. July 7, 2021) (citing Fed. R. Crim. P. 16(a)(1)(E)(ii)). "Evidence is material 'if it could be used to counter the government's case or to bolster a defense.'" *United States v. Clarke*, 979 F.3d 82, 97 (2d Cir. 2020) (quoting *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993)). "There must be some indication that the pretrial disclosure of the disputed evidence would . . . enable[] the defendant significantly to alter the quantum of proof in his favor." *United States v. Maniktala*, 934 F.2d 25, 28 (2d Cir. 1991) (quoting *United States v. Ross*, 511 F.2d 757, 762–63 (5th Cir. 1975)).

In *Stein I*, the court considered when an item of evidence is within the government's "control" for purposes of Rule 16. 488 F. Supp. 2d at 360–64. The government was seeking to prosecute former KPMG employees for developing and marketing unlawful tax shelters. *Id.* at 352. A deferred prosecution agreement between the government and non-party KPMG required KPMG to "cooperate extensively" with the government. *Id.* at 353. The KPMG employees' attorneys requested that the court issue a Rule 17 subpoena to KPMG for several categories of documents. *Id.* at 355. The government objected to certain categories in the proposed subpoena and advised the court that there was no need for a subpoena for the other categories because the government would "promptly request these materials from KPMG and provide them to the defense." *Id.* While the government acknowledged that the deferred prosecution agreement

gave it "the unqualified right to demand from KPMG the production of any documents within KPMG's control," it contended that the agreement did "not give the government 'possession, custody or control' of documents that [were] within the hands of KPMG and its agents" for purposes of Rule 16, and thus it did not have to obtain for the defendants those documents to which it objected to them being provided. *Id.* at 360. The court rejected the government's position as "untenable," noting that "[t]he phrase 'possession, custody or control' has a venerable history in the federal rules of procedure," and "[t]here is no hint in the history of these rules that the meaning of the phrases differs depending upon which rule is in question," be it a civil rule of procedure or a criminal rule of procedure. *Id.* at 360–61. The court stated that "[c]ommon sense" and "settled principles of construction" suggest "a uniform construction," and therefore "case law under all of the relevant rules is equally instructive." *Id.* at 361. Quoting *Moore's Federal Practice — Civil*, the court noted that "[*c*]*ontrol* has been defined to include 'the legal right to obtain the documents requested upon demand.'" *Id.* Relying mostly on civil cases, the court held that:

> [g]iven the terms of the DPA and the government's admission that it has the unqualified right to demand production by KPMG of any documents it wishes for purposes of this case, subject to the limited privilege carve-out . . . , the requested documents, to the extent the [c]ourt has found them material to preparing the defense, appear to be within the possession, custody or control of the government.

Id. at 362.

While *Stein I*'s holding supports Ng's position, the Court is not persuaded by *Stein I*'s reasoning. As noted above, the *Stein I* court took as its premise that the words "possession, custody, or control" should have the same meaning in both the civil and criminal rules of procedure. The court then quoted a "noted commentator['s]" statement regarding Rule 34 of the Federal Rules of Civil Procedure that "[*c*]*ontrol* has been defined to include 'the legal right to

obtain the documents requested upon demand.'" *Stein I*, 488 F. Supp. 2d at 361 (quoting 7 Moore's Federal Practice — Civil § 34.14[2][b]). However, in the context of Rule 16 of the Federal Rules of Criminal Procedure, the same commentator states that:

> [i]n order to trigger discovery under [Rule 16(a)(1)(E)], the papers, documents, or tangible objects must be in the actual custody or control of the federal government. *Objects in the possession of . . . private parties are not discoverable*. The defendant is not entitled to discovery of items that the government does not actually have.

25 Moore's Federal Practice — Criminal Procedure § 616.05[1][e] (emphasis added). This distinction — the requirement that the Government have "actual custody or control" of items in the context of Rule 16 — is supported by case law. *See, e.g.*, *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1375 (9th Cir. 1987) ("[W]e [have] held that the triggering requirement of a discovery request under rule 16(a)(1)(C) is that the papers, documents or tangible objects requested be in the actual custody or control of the federal government." (citing *United States v. Gatto*, 763 F.2d 1040, 1048–49 (9th Cir. 1985))); *Gatto*, 763 F.2d at 1048 (concluding that "Congress intended no such constructive possession extension" in Rule 16(a)(1)(C), which therefore "triggers the government's disclosure obligation only with respect to documents within the federal government's actual possession, custody, or control"); *United States v. Green*, 144 F.R.D. 631, 641 (W.D.N.Y. 1992) ("It is apparent from a review of [the Ninth Circuit's decision in *Chavez-Vernaza* and other] authorities that [the] defendants cannot force the government to produce copies of state police or prison reports unless the government already has such reports in its possession . . . ."); *United States v. McArdle*, No. 20-CR-56, 2021 WL 149411, at *2 (E.D. Tenn. Jan. 15, 2021) ("[F]or Rule 16 purposes, material will be considered as being in the possession of the government only if it is in the actual possession of the prosecutor or if the prosecutor has knowledge of and access to the material while it is in the possession of another

federal agency." (quoting *Skaggs*, 327 F.R.D. at 174)).

In addition, although *Stein I* is sometimes cited for the proposition that documents in a third party's possession may be within the Government's "control" for purposes of Rule 16 pursuant to a cooperation agreement, *see, e.g.*, *United States v. Ellison*, --- F. Supp. 3d ---, ---, 2021 WL 1043991, at *4 (D.P.R. Mar. 18, 2021) ("Sometimes, the government may have possession, custody, or control over documents pursuant to an agreement." (citing *Stein I*, 488 F. Supp. 2d at 362)); *Tomasetta*, 2012 WL 896152, at *5 ("If the [g]overnment has a written agreement with the third party giving it the legal right to obtain documents upon demand, . . . the [g]overnment may be in 'control' of such materials, even if in the possession of third parties." (citing *Stein I*, 488 F. Supp. 2d at 363)), it appears that most courts that have considered *Stein I* have declined to follow it for various reasons.

Further, the cases the Government cites — *United States v. Carson*, *United States v. Norris*, and *United States v. Meregildo* — are instructive and also support a rejection of *Stein I*.

In *United States v. Carson*, an FCPA case, the court considered whether the government's ability to obtain documents pursuant to a plea agreement with the defendants' former employer constituted "control" of those documents for Rule 16 purposes, requiring their production. *See* Order Granting in Part and Denying in Part Defendants' Motion to Compel at 2 ("*Carson* Order"), No. 09-CR-77 (C.D. Cal. Dec. 8, 2009), Docket Entry No. 133. The plea agreement in *Carson* required the employer to "disclose to the [government] all non-privileged information with respect to the activities of [the employer] and its affiliates . . . concerning all matters relating to corrupt payments to foreign public officials or to employees of private

customers . . . and about which the [government] . . . shall inquire."[31] *Id.* The court "reject[ed] the contention that under Rule 16 the [g]overnment's obligation extends to materials in the possession of a private third party," finding that "[t]here are many reasons not to follow *Stein* [*I*]'s lead." *Id.* at 3, 5. First, the court distinguished *Stein I* on the facts, noting that the terms of the agreement in *Stein I* were "sweeping and open-ended," unlike the more limited language in the employer's plea agreement, which did not "allow[] the [g]overnment to request anything in the [employer's] possession." *Id.* at 5. Second, the court noted that "*Stein* [*I*] is inconsistent with . . . Rule 16 case law," as "[m]ost of [*Stein I*'s] legal analysis of the concept of constructive custody hinges on private parent/subsidiary and like relationships." *Id.* (citing *Stein I*, 488 F. Supp. 2d at 361 & nn.45–46.) In addition, the court noted that "[t]he two district court criminal decisions which *Stein* [*I*] cites provide modest support," as the first "involved an agreement just as broad as the KPMG agreement" and the second required the government to "recapture and produce *documents which it once had but returned*." *Id.* at 6 (first citing *United States v. Kilroy*,

---

[31] The relevant portion of the DPA in this case provides:

> The Company shall truthfully disclose all factual information with respect to its activities, those of its branches, representative offices, subsidiaries and affiliates, and those of its present and former directors, officers, employees, agents, and consultants, including any evidence or allegations and internal or external investigations, about which the Company has any knowledge or about which the Offices may inquire. This obligation of truthful disclosure includes, but is not limited to, the obligation of the Company to provide to the Offices, upon request, any document, record, or other tangible evidence about which the Offices may inquire of the Company.

(DPA ¶ 5(a).) The Government argues that the DPA in this case, as in *Carson*, is not as broad as the DPA in *Stein*, as it does not give the Government an unqualified right or ability to obtain "any document, record, or other tangible evidence" but rather is limited to matters "relating to the conduct described in this Agreement and the Statement of Facts and other conduct under investigation by the [government] at any time during the Term," and is further restricted by and subject to "applicable law and regulations, including relevant data privacy and national security laws and regulations, as well as valid claims of attorney-client privilege or attorney work product doctrine." (Gov't Opp'n 77 (emphasis added) (alteration in original).)

523 F. Supp. 206 (E.D. Wis. 1981); and then citing *United States v. Skeddle*, 176 F.R.D. 258, 261–62 (N.D. Ohio 1997)).

In *United States v. Norris*, the court similarly considered whether the government had Rule 16 and *Brady* obligations where it "had broad power to obtain overseas documents" from several companies pursuant to "corporate amnesty and plea agreements." 753 F. Supp. 2d at 530. Citing *Stein I*, the court noted that "[s]ome courts have accepted similar arguments" but explained that the Third Circuit's test from *United States v. Reyeros,* 537 F.3d 270, 282 (3d Cir. 2008), "is controlling on the question of whether the government must produce materials possessed by another entity." *Id.* Although *Reyeros* was a *Brady* decision involving the question of whether another sovereign was a part of the "prosecution team" such that the government had "constructive possession" of materials in the sovereign's hands — rather than the question under Rule 16 of whether materials in a third party's hands are in the government's "possession, custody, or control" — the court reasoned that "the circumstances [were] not materially different" and "the mode of analysis in *Reyeros* is even more compelling . . . where the materials at issue are in the possession of non-governmental cooperating foreign entities."[32] *Id.* Accordingly, the court analyzed:

> (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

[32] *See United States v. Raheja*, No. 19-CR-559, 2020 WL 7769725, at *3 n.4 (N.D. Ohio Dec. 30, 2020) (noting that "[s]ome courts, such as *Norris*, have . . . focused on the definition of 'government' to determine whether the requested documents are controlled by the government for purposes of Rule 16. In those cases, courts have borrowed the concept of the 'prosecution team' from *Brady* cases to determine whether a private entity can be considered part of the government" (citing *United States v. Rosenchein*, No. 16-CR-4571, 2019 WL 2298810, at *4 (D.N.M. May 30, 2019) (collecting cases))); *see also United States v. Upton*, 856 F. Supp. 727, 750 (E.D.N.Y. 1994) (conducting joint investigation analysis to determine whether agency was part of the "government" or "prosecution team" for purposes of Rule 16).

> (3) whether the entity charged with constructive possession has "ready access" to the evidence.

Id. (citing *Reyeros*, 537 F.3d at 282). The court held that the defendant had not demonstrated that the government "had the requisite control of any of the materials possessed by [the companies]" because, despite their cooperation agreements with the government, the companies "were not — by any means — agents of [the government]," and "the fact that [the government] could have possibly obtained the materials does not give rise to any discovery obligations." *Id.* at 530–31; *see also Reyeros*, 537 F.3d at 284 ("[T]he mere fact that documents may be obtainable is insufficient to establish constructive possession.").).

In *United States v. Meregildo*, the last case the Government cites, the court considered whether a witness who had entered into a cooperation agreement with the government was therefore part of the prosecution team such that *Brady* required the government to produce his Facebook posts. 920 F. Supp. 2d at 437. Although a *Brady* decision, the court discussed at length when a prosecutor may be said to have "constructive knowledge" or "constructive possession" of materials in a third-party's possession. *See id.* at 438–45. The court noted that, in the *Brady* context, courts have "refused to apply a broad standard of constructive knowledge" that encompasses information known by cooperating witnesses. *Id.* at 442. However, citing *Stein I*, the court noted that, "in different contexts," courts have held "that the prosecution is responsible for [such] information." *Id.* at 443. The court observed that *Stein I* "imported civil discovery principles into a criminal case" to "reach [the] conclusion" that Rule 16 "encompassed far more than physical control or possession." *Id.* (citing *Stein I*, 488 F. Supp. 2d at 361). Without commenting on whether *Stein I* was correct to import civil discovery principles into Rule 16, the court noted that "Rule 16 and *Brady* vindicate separate interests. And the interests that *Brady* serves would not be furthered by importing civil discovery concepts into the due

process analysis."[33] *Id.* The court determined that in the *Brady* context, the question is one of "agency law" — "[b]ecause a prosecutor exercises greater control over federal agents . . . , the agency relationship . . . is strong[er]" than it is with cooperating witnesses, and therefore the concern that a "broad theory of imputation would paralyze the prosecution . . . applies with greater force to cooperating witnesses." *Id.* (citing *Avellino*, 136 F.3d at 255).

The cases cited by the Government support its contention that Rule 16 does not require the Government to produce materials possessed by a third party simply because it may have a legal right to obtain such materials pursuant to a cooperation agreement. First, *Carson* squarely rejected *Stein I*, observing that its holding is inconsistent with Rule 16 case law because it relied on civil cases to broadly expand the "concept of constructive custody" from materials in the federal government's actual control, as it has been defined in the criminal context, to materials possessed by private parties. *Carson* Order 5. Second, although *Norris* used a "mode of analysis" from the *Brady* context to reach a Rule 16 holding, it too represents a rejection of *Stein I*'s broad concept of "control." In cases like *Norris*, courts consider not only whether the Government has "ready access to" or a legal right to obtain materials possessed by a third party but also the extent to which that party is acting on behalf of the government or under its control, and the extent to which it is acting as part of a team or joint investigation with the government.

---

[33] The court noted that "Rule 16 protects against trial by surprise. *Brady* ensures that the [g]overnment will not secure an unfair advantage at trial." *United States v. Meregildo*, 920 F. Supp. 2d 434, 437 (S.D.N.Y. 2013) (citing *United States v. Mahaffy*, 693 F.3d 113, 134 (2d Cir. 2012))); *see Lamborn v. Dittmer*, 873 F.2d 522, 527 (2d Cir. 1989) ("Rule 16 . . . was intended to [e]nsure the efficient resolution of cases and, most importantly, minimize prejudicial surprise."); *see also United States v. Maniktala*, 934 F.2d 25, 28 (2d Cir. 1991) ("Unlike Rule 16 and the Jencks Act, however, *Brady* 'is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation' and is not violated unless the [g]overnment's nondisclosure infringes upon a defendant's right to a fair trial." (quoting *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984))).

Therefore, these cases suggest that the ability to obtain materials is not by itself sufficient to give rise to discovery obligations. In other words, the fact that a private party has chosen to cooperate with the government does not, without more, make that party an agent of the government.[34] Finally, while *Meregildo* is a *Brady* decision, the Court finds it instructive in the Rule 16 context. *Meregildo* observed that the concern that a "broad theory of imputation would paralyze the prosecution . . . applies with greater force to cooperating witnesses," as it would impose an affirmative duty on the government to seek out and disclose information known by private parties who have their own interests and motives. Similarly, in the Rule 16 context, a broad theory of "control" that encompasses everything the government has a right to obtain from cooperating private parties would impose an untenable burden on the government. Indeed, courts like *Norris* that have focused on Rule 16's definition of "government" to determine what the government constructively "controls" have reached this same conclusion. *See, e.g.*, *United States v. Chalmers*, 410 F. Supp. 2d 278, 289 (S.D.N.Y. 2006) (stating that "although [Rule 16's] 'material to the defense' category is arguably a broader scope of documents than exculpatory materials required by *Brady*, the [c]ourt is not persuaded that the 'government' for purposes of

[34] The inquiry under the third factor of the *Reyeros* test — whether the entity charged with constructive possession has "ready access" to the evidence — is similar to the inquiry that the *Stein* court held is applicable in the Rule 16 context — whether the government has the legal right to obtain materials possessed by a third party. *See Meregildo*, 920 F. Supp. 2d at 440 (noting that "in addition to considering whether an individual is [a] . . . member of the prosecution team, some courts consider whether the prosecution has the power to obtain evidence" (citing *Reyeros*, 537 F.3d at 282)). However, in *Norris*, the fact that cooperation agreements gave the government access to materials held by foreign companies was not enough to establish control for purposes of Rule 16 or constructive possession for purposes of *Brady*. Rather, the court concluded that "there must be a 'showing that evidence is possessed by people engaged in the investigation or prosecution of the case,'" and "[b]ecause the materials were in possession of non-governmental entities that were in no way working with the [government] or acting on its behalf, the [government] had no constructive possession of the materials and, correspondingly, no discovery obligations that would entitle [the defendant] to a new trial." *Norris*, 753 F. Supp. 2d at 531.

Rule 16 should be any broader than the 'prosecution team' standard that has been adopted in the *Brady* line of cases," as "[t]he concern of the Second Circuit in *Avellino* that a 'monolithic view' of government would 'condemn the prosecution of criminal cases to a state of paralysis' applies with equal force in the Rule 16 context" (quoting *Avellino*, 136 F.3d at 255)); *see also United States v. Villa*, No. 12-CR-40, 2014 WL 280400, at *4 (D. Conn. Jan. 24, 2018) ("To the extent that [the defendant] seeks documents in the possession or control of [a third party] rather than the [g]overnment, it appears that *Brady* and Rule 16 do not require the [g]overnment to disclose such documents, although [the] [d]efendant has the option of seeking such material directly from [the third party] pursuant to a Rule 17 subpoena." (citing *Chalmers*, 410 F. Supp. 2d at 289)); *cf. Raheja*, 2020 WL 7769725, at *4, *5 n.6 (rejecting argument that right to obtain materials through deferred prosecution agreement constitutes control because defendants also have ability to obtain them through Rule 17(c) subpoena and because this "would put the government's discovery obligations at the mercy of a third party with divergent interests" and impose "the heavy burden of discovering the universe of documents and information in [a private company's] possession . . . in search of usable discovery for [the] defendants"); *Meregildo*, 920 F. Supp. 2d at 445 ("*Brady* does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel." (quoting *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002))).

Based on the foregoing, the Court is not persuaded that the Government's legal right to obtain materials in the Goldman Sachs Group's possession pursuant to the DPA gives it "control" over those materials for the purposes of Rule 16. Accordingly, the Court denies Ng's request to compel production of documents in the Goldman Sachs Group's possession, which he

may obtain himself through a Rule 17 subpoena.[35] *See Raheja*, 2020 WL 7769725, at *5 (denying similar request and noting that the "[d]efendants retain the option of seeking such material directly from [the third party company] pursuant to a Rule 17(c) subpoena"); *Villa*, 2014 WL 280400, at *4 (holding that *Brady* and Rule 16 do not require the government to disclose documents in the possession or control of a third party and noting that the defendant "has the option of seeking such material directly from [the third party] pursuant to a Rule 17 subpoena").

In his reply to the Government's opposition and his subsequent briefing, Ng argues that the cases the Government cites — *Carson*, *Norris*, and *Meregildo* — "lack the critical thing that *Stein* and this case share" because they involved plea agreements rather than deferred prosecution agreements.[36] (Def.'s Reply 53–54.) Quoting the Second Circuit's decision in *Stein II*, 541 F.3d at 151 — which was not an appeal from the district court's Rule 16 holding and did not involve the issue of what constitutes "control" for Rule 16 purposes — Ng argues that "[w]ithout the DPA, as [the Second Circuit] recognized . . . , [the] Goldman [Sachs Group] 'faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary into its

[35] The Government notes that, unlike in *Stein I*, it "has never attempted to dissuade the Court from issuing a Rule 17 subpoena," and Ng "has not sought" one. (Gov't Opp'n 77–78.)

[36] The Court notes that this position is inconsistent with *Stein I* — under *Stein I*, any cooperation agreement that gives the Government the legal right to obtain materials in a third party's possession would be interpreted as giving the Government "control" under Rule 16. In addition, as noted above, although *Carson*, *Norris*, and *Meregildo* involved plea agreements, at least one court has rejected *Stein I* in a case involving a deferred prosecution agreement, *see Raheja*, 2020 WL 7769725, at *1, and at least one court that has cited *Stein I* approvingly did not distinguish between types of cooperating agreements, *see Tomasetta*, 2012 WL 896152, at *5 ("If the [g]overnment has a written agreement with the third party giving it the legal right to obtain documents upon demand . . . the [g]overnment may be in 'control' of such materials, even if in the possession of third parties. . . . But that is not the case here . . . . Unlike *Stein* [*I*], there is no deferred prosecution agreement here, *or any agreement of its kind*, giving the [g]overnment the legal right to obtain materials from [the third party] on demand." (emphasis added).)

agent.'" (*Id.* at 54 (quoting *Stein II*, 541 F.3d at 151).) In shifting the focus from *Stein I*'s Rule 16 holding to the Second Circuit's statement in *Stein II*, Ng argues that "the fundamental point of *Stein* [*II*] is the pressure that the Government is able to bring to bear on a large corporation when that company has entered a DPA with the Government." (Def.'s Reply to Sur-Reply 4.) Ng argues that *Carson* supports this argument because it recognized a difference between cases where the company signed a DPA allowing the Government to request anything in the third-party's possession and cases where the company signed a more limited plea agreement. (*Id.* at 54–55.)

The Government argues that Ng's citation to *Stein II* is inapposite because "the Second Circuit did not address the issue from *Stein* [*I*] relevant to this case." (Gov't Sur-Reply 25 n.10 (citing *Stein II*, 541 F.3d at 146–51).) In addition, the Government argues that the Goldman Sachs Group's DPA "is much more akin to the plea agreement in *Carson* than [to] the DPA in *Stein*." (*Id.* at 25–26.)

In *Stein II*, the Second Circuit considered whether KPMG, in adopting a policy to stop paying legal fees and expenses to employees facing criminal charges, had acted at the direction of the government, and, in doing so, violated the employees' Sixth Amendment rights. *See* 541 F.3d at 131. The Second Circuit concluded that KPMG's adoption of the policy was "state action" because the government forced KPMG to adopt the policy, and therefore the government could be held responsible for the deprivation of the employees' Sixth Amendment right to counsel. *Id.* at 147–51. In reaching its conclusion, the court noted that the government had emphasized, prior to offering KPMG a deferred prosecution agreement, that KPMG's cooperation would be assessed in part based on whether, in advancing fees to its employees, it appeared to be "protecting its culpable employees and agents," and the government "reinforc[ed]

this message" with a "warning" that misconduct could not be rewarded, prompting KPMG to condition fees on employees' cooperation with the government and to terminate them upon indictment — the only policy that would allow it "to continue advancing fees while minimizing the risk that prosecutors would view such advancement as obstructive." *Id.* at 148. In addition, when KMPG advised employees of the policy change, prosecutors "intervened in KMPG's decisionmaking," expressing their disappointment with the tone of KPMG's advisory memorandum "and demand[ing] that KPMG send out a supplemental memorandum in a form they proposed," among other things. *Id.* at 138, 148. The court concluded that KPMG would not have adopted the fee policy at issue absent the government's involvement because "KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary into its agent." *Id.* at 151.

By invoking the Second Circuit's statement that KPMG's adoption of the policy was attributable to the government as state action because KMPG faced "ruin by indictment," Ng appears to suggest that there is a difference between deferred prosecution agreements and plea agreements because the government can exercise a higher degree of control over a company desperate to avoid prosecution than over one that is willing to agree to a plea. Ng characterizes *Stein II* as the "law of this Circuit" and suggests that it necessitates a finding that the Government "controls" the Goldman Sachs Group because the Goldman Sachs Group similarly faced "ruin by indictment," and the DPA was therefore sufficient to convert the Goldman Sachs Group into an "agent" of the Government. (*See* Def.'s Mem. 102.) The Court is not persuaded by this argument, for several reasons.

First, *Stein II* is a state-action case, not a case discussing or even mentioning the government's obligations under Rule 16 or *Brady*. Accordingly, Ng's assertion that *Stein II* is "the law of this Circuit" regarding what constitutes control for Rule 16 purposes is unpersuasive. Second, like *Connolly* — the state-action case Ng cited in support of his argument that the Goldman Sachs Group is part of the prosecution team for *Brady* purposes (an argument he seems to be repurposing for Rule 16 by invoking *Stein II*) — the facts in *Stein II* are distinguishable. Significantly, in *Stein II*, KPMG changed its policy *before* it signed the deferred prosecution agreement, and the court found that the change was state action attributable to the government because KPMG had only made the change to avoid facing indictment. While both KMPG and the Goldman Sachs Group entered into deferred prosecution agreements with the Government, there is no evidence in the record before the Court that the Government did anything to force the Goldman Sachs Group to take a particular action. Therefore, Ng's apparent suggestion that the Goldman Sachs Group's decision to enter the DPA and cooperate with the Government was itself sufficient to make the Goldman Sachs Group an "agent" of the Government, such that the Government now has discovery obligations under Rule 16, *Brady*, or both regarding materials in the Goldman Sachs Group's possession, is unpersuasive. The Government does not "control" the Goldman Sachs Group for purposes of discovery simply because the Goldman Sachs Group signed a DPA. *See, e.g.*, *Raheja*, 2020 WL 7769725, at *3 (rejecting argument that company with deferred prosecution agreement should be treated like a federal agency that is part of the prosecution team because, like a cooperating witness, it "is an independent actor with an agenda separate from (and arguably adverse to) the administration of justice," and the fact that it "must respond to the government's inquires and requests for information does not transform it into an

agent of the government, acting on the government's behalf and with the government's interests in mind" (citing *Norris*, 753 F. Supp. 2d at 530)).

Accordingly, the Court finds that the Government does not have "control" over materials in the Goldman Sachs Group's possession by virtue of the DPA for purposes of Rule 16 and denies Ng's request that the Court compel production of these materials.

3. Ng's request for access to the Goldman Sachs Group's witnesses

With respect to paragraph 5 of the DPA, Ng observes that the DPA states that the Goldman Sachs Group "voluntarily ma[de] foreign-based employees available for interviews in the United States" and contends that the Government "never notified" him about these interviews when they occurred, effectively "hid[ing]" these witnesses from him. (Def.'s Mem. 112.) Ng requests the "same access" to witnesses who, to the Goldman Sachs Group's knowledge, "may have material information regarding the matters being investigated or prosecuted." (Def.'s Mem. 113 (quoting DPA ¶ 5(c)).) Ng asserts that "the interests [*Brady*] vindicates are more fundamental than those addressed by pretrial discovery rules," and that access to these witnesses implicates his "right to a fair trial mandated by the Due Process Clause of the Fifth Amendment." (*Id.* at 112 (first quoting *Meregildo*, 920 F. Supp. 2d at 439; and then quoting *Agurs*, 427 U.S. at 107).)

The Government argues that Ng's request for the "same access" to the Goldman Sachs Group's witnesses that the Government has by virtue of the DPA "is unsupported by any case law . . . and is simply a rehash of [his] earlier, meritless argument that the Court should modify the DPA." (Gov't Opp'n 72 n.17.)

Although Ng requests the "same access" to the Goldman Sachs Group's foreign-based witnesses that the Government has through the DPA, (Def.'s Mem. 89), as discussed above, the

Court finds no case in support of Ng's position that the Court has the authority to direct a third-party private entity to provide its employees to the defense, and the Witness Provision does not prevent Ng from obtaining the information he seeks through a Rule 15 deposition. *See Ologeanu*, 2020 WL 1676802, at *5 (concluding that a defendant's constitutional right was not violated where he "ha[d] sought no letters rogatory and requested no Rule 15 depositions [of a witness outside the court's subpoena power] and thus . . . offer[ed] nothing but surmise regarding their efficacy"); *supra* Section III.g.ii. In addition, to the extent Ng suggests that *Brady* entitles him to the same access to these witnesses that the Government has, he has not provided any support for that contention, and the Government has represented that it is aware of and will continue to comply with its *Brady* obligations.

Accordingly, the Court denies Ng's request that the Government provide him access to the Goldman Sachs Group's witnesses pursuant to the DPA.

4. Production of information regarding nature of financial transactions

Ng requests that the Court order the Government to produce the information in its possession regarding the "true nature" of the financial transactions described in paragraphs 40 and 53 of the Superseding Indictment. (Def.'s Mem. 114–16.) Ng argues that the Superseding Indictment insinuates that he received more than $28 million as a kickback for his alleged role in the conspiracy but that he has reason to believe the Government possesses "documents and/or witness statements" that will show that prior to May of 2012, relatives of CC1's close relative "owed a debt to Ng's relative(s)" that was unrelated to any of the allegations or events in the Superseding Indictment, that they attempted to pay off this pre-existing debt with funds received from Low in connection with the 1MDB scheme, that Ng and his relatives were unaware of the source of those funds, and that Ng received no laundered money. (*Id.* at 114–15.) Ng notes that

once the requested material is produced and it becomes clear that the funds in question were related to a pre-existing debt rather than a "payoff," he will move to strike paragraphs 40 and 53 from the Superseding Indictment. (*Id.* at 116.)

The Government argues that Ng's request for "documents" related to paragraphs 40 and 53 should be denied as moot because the Government has already produced the relevant documents in its possession, custody, or control.[37] (Gov't Opp'n 88–89.) To the extent Ng requests "witness statements" related to paragraphs 40 and 53, the Government argues this request is premature under Section 3500. (*Id.* at 89 (first citing *Coppa*, 267 F.3d at 145; and then citing *Percevault*, 490 F.2d at 131).) Finally, with respect to Ng's statement that he will, in the future, move to have the allegations in these paragraphs struck, the Government argues that this motion would be "baseless," as the transfers detailed in these paragraphs "are relevant to the charged conspiracies" and a dispute as to why the transfers were made is not a basis to strike them but rather an issue for the jury. (*Id.* at 90.)

Paragraph 40 of the Superseding Indictment reads:

> Within three months of the closing of Project Magnolia, millions of dollars of bond proceeds that had been transferred to Shell Company Account #2 were transferred into Holding Company #1 Account, and these funds were transferred via wire to and from the United States. Approximately $24 million of these funds was subsequently transferred to a bank account beneficially owned by a relative of [Ng].

(Superseding Indictment ¶ 40.)

Paragraph 53 reads:

---

[37] The Government notes that while it has repeatedly requested reciprocal discovery from Ng relating to his claim that the funds constituted repayment of an unrelated debt rather than an illegal kickback, Ng has not provided any such discovery. (Gov't Opp'n 88 n.19.) The Government argues that if Ng intends to introduce evidence of this alternative explanation at trial, he must produce any such evidence pursuant to Rule 16(b)(1)(A) of the Federal Rules of Criminal Procedure. (*Id.*)

> The Project Catalyze bond issued on or about March 19, 2013. By or at the direction of [Low], some of the approximately $3 billion raised by this bond issuance was transferred to and through a series of transactions to Holding Company #1 Account, which account was owned and controlled by Co-Conspirator #1 and his close relative . . . . Some of these funds were further transferred via wire to accounts in the name of entities beneficially owned and controlled by 1MDB officials, including 1MDB Official #2 and 1MDB Official #3. More than $4 million of these funds were also transferred via wire to a bank account beneficially owned by a relative of [Ng].

(*Id.* ¶ 53.)

The Court denies as moot Ng's request for all "documents" related to paragraphs 40 and 53, as the Government has already produced "the relevant documents in its possession, custody, or control related to the corporate entities, bank accounts and monetary transfers related to Shell Company Account #2, Holding Company #1, the accounts beneficially owned and controlled by 1MDB officials, including 1MDB Official #2 and 1MDB Official #3, and the bank account beneficially owned by the defendant's relative." (Gov't Opp'n 88.) With respect to Ng's requests for "witness statements" related to paragraphs 40 and 53, the Court finds this request to be premature under Section 3500, for the reasons discussed above.[38] In view of the Court's findings, the Court declines to address the parties' arguments regarding the propriety of Ng's possible future motion to strike paragraphs 40 and 53 from the Superseding Indictment.

[38] The Court notes that to the extent Ng has evidence of his alternative explanation for the allegations in paragraphs 40 and 53 within his "possession, custody, or control" and intends to use it in his case-in-chief at trial, he must produce this evidence to the Government pursuant to Rule 16(b)(1)(A). *See* Fed. R. Crim. P. 16(b)(1)(A) ("If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if: (i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.).

[redacted]

The Court first addresses whether the requested materials are Rule 16 or Section 3500 materials and then determines whether the requested materials are subject to disclosure pursuant to the Protective Order.

a. Rule 16 versus Section 3500 materials

[redacted]

[redacted]

[redacted]

"While Rule 16 requires disclosure of specific information, a defendant is not entitled to discovery of 'the entirety of the [g]overnment's case against him.'" *Cobb*, --- F. Supp. 3d at ---, 2021 WL 2493240, at *17 (first quoting *Percevault*, 490 F.2d at 130; and then citing *United States v. Gerace*, No. 19-CR-86, 2020 WL 4227990, at *4 (W.D.N.Y. June 26, 2020)). Rule 16(a)(2) does not "authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500." Fed. R. Crim. P. 16(a)(2); *see also United States v. Avenatti*, No. 19-CR-373, 2021 WL 2809919, at *42 n.16 (S.D.N.Y. July 6, 2021) (noting that Rule 16 "specifically exempt[s] statements [producible under Section 3500] from the scope of pre-trial discovery" (alterations in original) (quoting *United States v. Lester*, No. 95-CR-216, 1995 WL 656960, at *16 (S.D.N.Y. Nov. 8, 1995))); *United States v. Wilson*, No. 19-CR-155, 2021 WL 480853, at *5 (W.D.N.Y. Feb. 10, 2021) ("Rule [16] also does *not* authorize the discovery of witness statements except as otherwise required by the Jencks Act, 18 U.S.C. § 3500." (citing Fed. R. Crim. P. 16(a)(2))).

Under 18 U.S.C. § 3500(b), "[a]fter a witness called by the United States has testified on direct examination, the court shall . . . order the United States to produce any statement . . . of the witness in the possession of the United States." *Brennerman*, 818 F. App'x at 29 (quoting 18 U.S.C. § 3500(b)); *see also United States v. Rivera*, 153 F. App'x 758, 759 (2d Cir. 2005) (quoting 18 U.S.C. § 3500(b)). A witness statement is defined as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e); *United States v. Artis*, 523 F. App'x 98, 101 (2d Cir. 2013) (quoting 18 U.S.C. § 3500(e)). Courts are prohibited "from ordering the pre-trial disclosure of witness statements." *Coppa*, 267 F.3d at 145. "[B]oth the statutory text and Second Circuit precedent plainly proscribe" a pretrial motion to obtain witness statements under 18 U.S.C. § 3500. *Minier v. United States*, No. 16-CR-23, 2021 WL 1292820, at *5 (S.D.N.Y. Apr. 7, 2021) (first citing 18 U.S.C. § 3500(a); and then citing *Coppa*, 267 F.3d at 145–46). "The practice in the Second Circuit is to produce this material before trial commences, but not sooner." *Id.*; *see also Davis*, 2021 WL 826261, at *4 ("[T]here is no constitutional right to early disclosure of *Giglio* or [Section] 3500 material." (quoting *Minaya*, 2012 WL 1711569, at *1)). "[C]ourts have found that providing . . . information [about a government witness] as little as one day in advance of a witness's testimony is sufficient to avoid unnecessary delay." *United States v. Helbrans*, No. 19-CR-49701, 2021 WL 2873800, at *19 (S.D.N.Y. July 8, 2021) (first citing 18 U.S.C. § 3500(a); and then citing *United States v. Ruiz*, 702 F. Supp. 1066, 1069–70 (S.D.N.Y. 1989)); *see also United States v. Romain*, No. 13-CR-724, 2014 WL 1410251, at *4 (S.D.N.Y. Apr. 11, 2014) ("18 U.S.C. § 3500 and [*Giglio*, 405 U.S. at 150] do not require disclosure of the existence and substance of promises of immunity, leniency or preferred treatment until the Friday before trial.").

[redacted] *See Cobb*, --- F. Supp. 3d at ---, 2021 WL 2493240, at *17 (denying the defendants' request for "disclosure of information that falls outside the scope of Rule 16" and concluding that "it would be premature to order production of [3500] information"); *United*

States v. Segovia-Landa, No. 20-CR-287, 2021 WL 1966117, at *5 (S.D.N.Y. May 17, 2021) (concluding that early disclosure was unnecessary where the government "represented that it will produce impeachment material at the same time as Jencks Act material: 'shortly before the beginning of trial, or, if additional time is reasonably required to review such material, sufficiently in advance of the witness's testimony so as to avoid any delay at trial'"); *United States v. Morgan*, 690 F. Supp. 2d 274, 285–86 (S.D.N.Y. 2010) (noting that "courts in this Circuit have repeatedly refused to compel disclosure of impeachment or *Giglio* material well in advance of trial").

Accordingly, the Court finds that the requested material is not Rule 16 material and is either *Giglio* or Section 3500 material, which Ng is not entitled to prior to trial.

b. Attorneys' Eyes Only designation

[redacted]

[redacted]

"'[A]ttorneys' eyes only' disclosure has been used as a mitigating procedure in criminal cases." *In re City of New York*, 607 F.3d 923, 936 n.12 (2d Cir. 2010); *see also United States v. Barret*, No. 10-CR-809, 2012 WL 3229291, at *44 (E.D.N.Y. Aug. 6, 2012) (denying motion to compel production of 3500 material, which was subject to a protective order), *aff'd*, 677 F. App'x 21 (2d Cir. 2017). "[A]ffording federal criminal defendants a 'sneak preview' of the government's case could 'facilitate witness tampering [and] jeopardize witness safety.'" *United States v. Sampson*, 898 F.3d 270, 281 n.8 (2d Cir. 2018) (second alteration in original) (quoting *Kaley v. United States*, 571 U.S. 320, 335 (2014)).

Paragraph 17 of the Protective Order states:

> Attorneys' Eyes Only Material may be reviewed only by [d]efense [c]ounsel and [d]efense [s]taff . . . . Attorneys' Eyes Only Material may not be disseminated to or reviewed by any other person, including [Ng]. Attorneys' Eyes Only Material may be shared with [Ng] under the constraints applicable to Sensitive Discovery Materials two weeks before trial unless the [G]overnment shows good cause why it should not be shared. If the [G]overnment and [d]efense [c]ounsel are not able to reach agreement on the sharing of Attorneys' Eyes Only Materials, the [G]overnment and [d]efense [c]ounsel may seek intervention from the Court on an *ex parte* basis or otherwise.

(Protective Order ¶ 17, Docket Entry No. 26.) The Protective Order further states that "[a]ny documents, material, or information may be designated Attorneys' Eyes Only Material only upon a good-faith belief by the [G]overnment that designation as Sensitive Discovery Material provides insufficient protection to such materials" and that "[t]o the extent the parties do not agree, the [G]overnment may make an application to the Court and seek to establish good cause regarding why the material should be treated as Attorneys' Eyes Only Material." (*Id.* ¶ 20.)

[redacted] However, the Government's failure to provide an explanation is non-dispositive because neither Section 3500 nor the Protective Order confers on Ng a right to access the statements of the Government's witnesses at this stage. *See United States v. James*, No. 02-CR-778, 2007 WL 914242, at *22 (E.D.N.Y. Mar. 21, 2007) ("[T]o the extent that [the] defendants seek an order compelling the immediate production of [3500] material, their motions should be denied because no authority has been cited to support a deviation from Second Circuit precedent."). Ng cannot effectively dispute the Attorneys' Eyes Only designation of Section 3500 materials — which he is not legally entitled to — as attorneys are routinely provided early access to 3500 materials, which remain shielded from defendants. *See United States v. Fuller*, No. 16-CR-867, 2017 WL 3457166, at *3–4 (S.D. Cal. Aug. 11, 2017) (granting the government's proposed protective order, which directed that "the [g]overnment turn over [3500] statements three weeks before trial under an [Attorneys' Eyes Only] protective order which discloses . . . the names of its cooperating witnesses to defendant no earlier than three days before the commencement of trial"); *United States v. Mendiola*, No. 08-CR-119, 2016 WL 7042109, at *7 (D. Alaska Sept. 20, 2016) (denying relief on the basis of failure to obtain discovery where the government "disclosed [Section 3500] material to counsel only pursuant to a protective order" and the defendant "complain[ed] that he personally did not receive the discovery").

The Protective Order specifies that Ng will have access to the requested information under a "Sensitive Discovery Material" designation two weeks before trial, (Protective Order ¶ 17), which is sufficient in most cases. *See Davis*, 2021 WL 826261, at *4 (denying motion for early disclosure of 3500 material where the court was "satisfied with the [g]overnment's representation that [the defendant] will receive this material [fourteen] days before trial" and the defendant did not "point[] to any authority that entitles him to the requested information [forty-five] days before trial"); *United States v. Rodriguez-Perez*, No. 10-CR-905, 2012 WL 3578721, at *10–11 (S.D.N.Y. Aug. 16, 2012) (declining to order early disclosures of 3500 material where the government intended to make such material available to defense one week before trial). Any burden on Ng as a result of his access to the requested documents two weeks before trial does not preclude "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *Trombetta*, 467 U.S. at 485); *see also United States v. Walker*, No. 18-CR-237, 2021 WL 1725513, at *14 (W.D.N.Y. Jan. 6, 2021) (denying defendant's request for "disclosure of witness statements thirty days prior to the start of trial in order to 'allow for meaningful preparation of a defense'"), *report and recommendation adopted*, 2021 WL 1723159 (W.D.N.Y. Apr. 30, 2021); *United States v. Basciano*, No. 03-CR-929, 2006 WL 8451578, at *13 (E.D.N.Y. Jan. 3, 2006) (concluding that 3500 material was not discoverable before trial despite the defendant's request for such "[i]n order to minimize delay and burden"); *see also United States v. Cordova*, 806 F.3d 1085, 1090–91 (D.C. Cir. 2015) (noting that "even though [the appellants'] individual use and access were subject to conditions, the effects of those limitations were counterbalanced by the [d]istrict [c]ourt's decision to afford them four to eight days' advance receipt of the materials when the Sixth Amendment and [3500 material] only require disclosure after the witness has testified").

[redacted]

[redacted] *See Blondet*, 2019 WL 5690711, at *6 (concluding that the government's representation that it will "produce 'the majority' of [3500] material for cooperating witnesses no later than six weeks before trial (subject to an appropriate protective order restricting such material to counsel's eyes only) and the rest no later than two weeks before trial" to be "more than adequate under the law" (citing cases)); *cf. United States v. Mount Sinai Hosp.*, 185 F. Supp. 3d 383, 396 (S.D.N.Y. 2016) (concluding in a civil action that since documents were "available to [the] relators' counsel without redaction, the [c]ourt cannot identify any significant prejudice that will result from upholding the Attorneys['] Eyes Only designations").

Because the Attorneys' Eyes Only documents are Section 3500 material — which Ng is not entitled to pretrial — and the Protective Order does not depart from Second Circuit precedent and does not mandate their disclosure, the Court declines to order the Government to change their designation to Sensitive Discovery Material.

However, in view of the volume of Section 3500 material in this case, the Court urges the Government to consider disclosing all Section 3500 material to counsel and Ng at least six weeks or as soon as practicable in advance of trial, in view of the trial date in early January of 2022, immediately after the holiday season. *See, e.g.*, *Rodriguez*, 2020 WL 5819503, at *11 ("[A]s a matter of case management, courts frequently encourage the government to produce Jencks Act material prior to trial." (citing *United States v. Stein*, 424 F. Supp. 2d 720, 728 (S.D.N.Y. 2006))); *United States v. Wilson*, No. 15-CR-142, 2017 WL 1456984, at *4 (W.D.N.Y. Apr. 24, 2017) ("The [g]overnment is encouraged to begin providing 3500 material as soon as practicable, in order to prevent delays at or immediately prior to trial.").

V. Conclusion

For the reasons explained above, the Court denies Ng's motion to dismiss the Superseding Indictment. The Court also declines to modify the Deferred Prosecution Agreement, to compel the production of the requested materials under Rule 16, *Brady*, and *Giglio*, and to order the Government to change the designation of Attorneys' Eyes Only material to Sensitive Discovery Material. The Court urges the Government to consider disclosing all 3500 material to counsel and Ng at least six weeks or as soon as practicable in advance of trial.

Dated: September 3, 2021
Brooklyn, New York

SO ORDERED:

s/ MKB

MARGO K. BRODIE
United States District Judge