UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. MARK A. JACKSON and JAMES J. RUEHLEN, Defendants.	)	Case No. 4:12-cv-00563

DEFENDANT MARK A. JACKSON'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT UNDER RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiff Securities and Exchange Commission's ("SEC") Response [Dkt. 37] ("Resp.") to Defendant Mark A. Jackson's ("Jackson") Motion to Dismiss [Dkt. 35] ("Mot.") side-steps the issues presented as well as Supreme Court precedent. Rather than address the deficiencies in its Complaint [Dkt. 1] under the standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the SEC ignores them and assumes it is not required to plead actual facts. Rather than properly plead the elements of a Foreign Corrupt Practices Act ("FCPA") violation, the SEC claims it would simply be too difficult to identify, in any way, the other necessary party in an alleged bribery scheme—the foreign official who received or was to receive alleged bribes, or what acts that specific foreign official took.

But viewed under proper pleading standards, the SEC's Complaint remains deficient and must be dismissed. The Complaint is nothing more than a series of conclusions about what Jackson "knew" or "believed," without the necessary foundation of facts suggesting that Jackson did "know" or "believe" what the SEC asserts. Such conclusions are not "well-pleaded" facts which must be accepted by the Court as true for the purpose of a motion to dismiss. The few well-pleaded facts do not rise to the level of a plausible entitlement to relief, and indeed are equally consistent with a legally permissible explanation of Jackson's conduct, which requires the Complaint to be dismissed. And many of the claims are barred by the statute of limitations.

The SEC has had years to investigate this case, using the full force of its investigatory power. It is not too much to ask, now that it has filed suit, for the SEC to plead actual facts.

I. THE SEC MUST PLEAD FACTS, EVEN IF GENERAL FACTS, SHOWING JACKSON'S KNOWLEDGE AND INVOLVEMENT

Central to the SEC's theory of liability, and repeated extensively throughout both its Complaint and its Response, is the idea that Jackson "knew" or "understood" various facts: that payments were being made to (undescribed and unidentified) Nigerian government officials for

the purpose of inducing them to take (unspecified) actions on Noble's behalf; that those actions were unlawful; or that the officials had discretion in taking those actions. Resp. at 6-7, 13-14, 19-20, 28, 32-34, 40. Jackson pointed out in his Motion that because the SEC never pleads any ***facts*** to support the idea that he possessed this crucial knowledge, under *Iqbal* and *Twombly* these unsupported allegations cannot be considered as true on a motion to dismiss. Mot. at 6-7.

The SEC's response to Jackson's arguments appears first to be that *Iqbal* and *Twombly* play no part in the Court's consideration of the adequacy of the Complaint regarding such critical elements of the offense as what Jackson knew. The SEC ignores the Supreme Court's holding in *Iqbal* that allegations that a defendant "knew of" something are legal conclusions couched as factual allegations that are not, themselves, well-pleaded facts. *Iqbal*, 556 U.S. at 680.

The SEC then claims Fed. R. Civ. P. 8(a)(2) does not require the pleading of facts because the Rule only mandates "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Resp. at 8. Yet the SEC ignores the ***purpose*** of Rule 8(a)(2)—to provide the defendant with fair notice of the claim and its factual support. *Twombly*, 550 U.S. at 555. The Supreme Court has, in fact, expressly ***rejected*** the SEC's Rule 8(a)(2) argument:

> Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests.

Twombly, 550 U.S. at 555 n.3.

The SEC finally asserts that it may avoid pleading actual facts showing Jackson's knowledge because "intent, knowledge, and other conditions of a person's mind may be alleged generally," as opposed to "with particularity." Resp. at 9, 21, 32 (citing Fed. R. Civ. P. 9(b)). Yet again, the Supreme Court explicitly rejected this notion in *Iqbal*:

> "[G]enerally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely

> excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8.

Iqbal, 556 U.S. at 686-87. The SEC fatally conflates "generally" with "conclusorily." While Rule 8 does not require the same level of specificity as Rule 9(b), it does still require actual facts, not mere legal conclusions or bare assumptions. The Court must disregard mere conclusions of what Jackson "knew" where the SEC fails to supply any foundational facts regarding Jackson's acquisition of such supposed knowledge.[1] *Iqbal*, 556 U.S. at 680.

II. THE SEC FAILS TO PLEAD FACTS SUPPORTING THE REQUIREMENT THAT JACKSON ACT WITH CORRUPT INTENT

As Jackson explained in his Motion, one element of an FCPA anti-bribery violation is that the defendant act "corruptly"—"with a bad purpose or evil motive of ***accomplishing either an unlawful end or result***, or a lawful end or result by some ***unlawful method or means***." Mot. at 14 (citing *United States v. Kay*, 513 F.3d 432, 446, 449 (5th Cir. 2007) (emphasis added)).

The SEC wholly fails to plead facts showing Jackson was informed that obtaining certain TIPs or extensions would be illegal—an "unlawful end or result"—or that obtaining them through the documents dictated by Customs itself would be illegal—an "unlawful method or means." Instead, the SEC offers its assumption, couched in a legal conclusion, that the paper process and "tak[ing] bribes" were *per se* illegal. *E.g.*, Resp. at 19-20 n.9; *id.* at 27. These assumptions are legal conclusions based on assumptions about the laws of another nation, unsupported by citation to any indication that Jackson ***knew*** the acts sought or methods used

[1] The SEC as much as concedes that the Complaint failed to plead any actual facts showing Jackson's supposed receipt of relevant information. *See* Resp. at 13 n.4 ("[T]he general averments of Jackson's knowledge are well-supported by the other facts regarding, for example, Jackson's positions, his communications with others, his presence at audit meetings, his payment approvals, and his quarterly review of payments."). The SEC asks the Court to create a new pleading standard for corporate executives, where the SEC claims the executive's title and attendance at meetings would necessarily establish his knowledge of relevant information.

were actually illegal, and therefore are insufficient to establish Jackson's state of mind.[2] The SEC also claims the TIP permits themselves informed Jackson that it would violate Nigerian law for Nigerian officials to approve certain extensions or TIP applications. *Id.* at 19-20 n.9. Yet the Complaint fails to plead that Jackson actually ***saw*** any of the TIP permits.[3]

Finally, the SEC falls back on facts that purportedly informed Jackson there was something wrong with Noble's practices in Nigeria. *Id.* at 32-33. But no facts actually show Jackson seeking an illegal end, or using illegal methods. And almost all of these facts address only the documents used to obtain new TIPs (the so-called "paper process"), so cannot qualify as well-pleaded facts regarding Jackson's knowledge that payments regarding new TIPs or TIP extensions were in any way unlawful. For example, the SEC claims that Noble's Audit Committee had instructed management to stop using the so-called paper process and that Jackson knew of "lawful" alternatives. *Id.* at 33. Yet the Complaint contains no facts showing that the Audit Committee acted because of any confirmed ***illegality*** of the paper process, and knowledge that other alternatives are lawful does not mean that the method under review is ***un***lawful.

III. THE SUPREME COURT REQUIRES CONSIDERATION AT THE PLEADING STAGE OF WHETHER WELL-PLEADED FACTS SUPPORT A LAWFUL ALTERNATIVE EXPLANATION

The SEC next gives the back of its hand to Jackson's argument that the Complaint must

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[2] Contrary to the SEC's straw man argument (Resp. at 31), Jackson never argued that the SEC must allege Jackson knew he was violating a specific Nigerian law, or that he was violating the FCPA.

[3] As another example of the SEC's loose approach to its "knowledge" allegations, the SEC argues that Jackson "knew, firmly believed, or [was] aware to a high probability that the[] payments were going to Nigerian government officials" because "the customs agent specifically told [him] as much." Resp. at 13. Yet the Complaint paragraphs cited by the SEC only show invoices from the customs agent being sent to other Noble employees—never to Jackson. *Id.* Then, to fill in the gaps, the SEC cites again to conclusory allegations that, unsupported by any foundational facts, claim Jackson "understood" that special handling charges were requests to make illegal payments. *Id.* at 13-14.

be dismissed because the few well-pleaded facts in the Complaint are equally consistent with a legal alternative explanation, that Jackson believed any payments were lawful facilitating payments. The SEC dismisses Jackson's argument as premature, and instructs Jackson to "dispute the allegations about his mental state . . . at trial." Resp. at 24 n.13.

Once again, the SEC ignores governing precedent. Both *Iqbal* and *Twombly* ***require*** the Court, at the ***pleading*** stage—not at trial—to assess whether the well-pleaded facts in a Complaint give rise to a plausible claim to relief, including whether there are sufficient well-pleaded facts regarding the defendant's knowledge. Both cases make clear that if the well-pleaded facts are equally consistent with an alternative, legal, explanation, the Complaint fails the plausibility test and must be dismissed. *Twombly*, 550 U.S. at 567; *Iqbal*, 556 U.S. at 681.

Finally, the SEC's assertion that the payments do not, today, legally qualify as facilitating payments under the FCPA (Resp. at 24-27), is irrelevant to whether the SEC has adequately pleaded Jackson's corrupt intent at the time. Instead, the few well-pleaded facts in the Complaint, which do not show that Jackson was ever informed of any illegality involving the TIP process or payments related to the TIP process, are equally consistent with Jackson's belief ***at the time*** in the lawfulness of the payments under the facilitating payments exception. Jackson's good faith belief in the payments' legality is the antithesis of corrupt intent.

IV. THE SEC MUST PLEAD FACTS REGARDING THE IDENTITY OR ROLE OF THE IMPLICATED GOVERNMENT OFFICIAL(S)

In his Motion, Jackson pointed out a glaring deficiency in the SEC's Complaint—the total failure to identify, in any way, the Nigerian government officials who supposedly were to receive the purportedly illicit payments. Mot. at 11. In response, the SEC offers a tortured reading of the statute—and an appeal for sympathy over due process.

The SEC first claims that the FCPA does not require any identification or specification of

the foreign official who is to receive bribe payments, because the statute prohibits knowingly passing money through an intermediary to "any foreign official."[4] Resp. at 14-15 (citing 15 U.S.C. § 78dd-1(a)(3)). Yet the SEC fails to cite the Court to the very next section of the statute, which itself requires greater specificity. The FCPA prohibits pass-through payments to a foreign official:

> [F]or purposes of [either] influencing any ***act or decision of such foreign official*** . . . in ***his official capacity***, [or] inducing ***such foreign official*** . . . to do or omit to do any act in violation of ***the lawful duty of such foreign official*** . . . [or] securing any improper advantage . . . in order to assist . . . in obtaining or retaining business.

15 U.S.C. § 78dd-1(a)(3)(A) (emphases added).

Even without the names of the official(s), the SEC still needs to provide some basis for the Court to conclude, among other things, that the payments were going to an official with discretion to abuse, and that the acts alleged were those of the ***particular*** foreign official in his official capacity ("such foreign official"). There is a relevant difference between the roles and responsibilities of a clerk, a high-level official, and others in between, yet the SEC claims it does not have to prove, even at trial, the "role of the official targeted for bribery." Resp. at 3.[5]

The SEC also faults Jackson for supposedly failing to cite a case where the government was required to specify anything about the foreign officials at issue. *Id.* at 15. The SEC ignores

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[4] The SEC admits that the Fifth Circuit has recognized that the identity of the foreign official is an element of an FCPA violation that must be alleged with a certain level of facts. Resp. at 18. Yet the SEC then denies the need to plead facts regarding the identity of the foreign official beyond calling them one (or more) officials at one (or more) Nigerian government agencies. *Id*. Jackson is unaware of any authority allowing the SEC to pick and choose which elements of an offense require well-pleaded facts giving rise to a plausible claim to relief.

[5] On the one hand, the SEC claims it has adequately pleaded that the government officials involved include multiple officials of the Nigerian Customs Service, the Nigerian Port Authority, and the National Maritime Authority. Resp. at 11, 13, 18. On the other hand, when forced to identify the role of those foreign officials and what acts Jackson sought to influence, the SEC can cite only to allegations about the general role of Nigerian Customs Service officials in "grant[ing] or extend[ing] TIPs." *Id.* at 19; *id.* at 19-21.

that in all other litigated FCPA cases, the government provided that specific information in the charging documents ***without needing to be ordered to do so***. *See* Mot. at 12; *see also* First Superseding Indictment at 2-3, 7, 12-15, *United States v. Noriega*, No. 10-1031 (C.D. Cal. Feb. 28, 2011) (attached at Exhibit 1) (identifying two specific officials, Official 1 and 2, along with their level of authority within the specific agency, and the specific acts those officials took regarding specific contracts and wire transfers).

The SEC's final attempt to salvage its Complaint is a play for sympathy. It would simply be too difficult, the SEC says, to plead the identity of a foreign bribe recipient, because "the nature of the schemes makes specific identification of the officials pocketing the bribes far more difficult than in domestic bribery schemes." Resp. at 18. However, the purpose of the pleading rules is to provide a defendant with "'fair notice' of the nature of the claim [and] 'grounds' on which the claim rests." *Twombly*, 550 U.S. at 555 n.3. The SEC spent years investigating these matters before filing its Complaint. If the SEC is still unable to provide well-pleaded facts as to all of the elements of an FCPA violation, the remedy is dismissal.

V. THE BRIBERY CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

In addition to the deficiencies described above, many of the claims against Jackson are not timely. Most importantly, the SEC does not refute Jackson's contention that the Complaint does not allege his involvement in any bribes during the five years preceding the Complaint.[6]

As a preliminary matter, the tolling agreements cannot be considered on this motion because the SEC chose not to allege them in the Complaint. *Lone Star Fund V (US), LP v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). The omission cannot be cured by attaching the documents to the SEC's response brief. *Knatt v. Hosp. Serv. Dist. No. 1 of E.*

[6] Contrary to the SEC's representation, Jackson does not now seek dismissal of the SEC's claims for injunctive relief. *Compare* Mot. at 19 n.20, *with* Resp. at 48. Only the SEC's requests for penalties are at issue for the purposes of this motion.

Baton Rouge Parish, 289 Fed. Appx. 22, 27 n.2 (5th Cir. 2008) (attached at Exhibit 2).[7]

A. The Bribery Claims are Barred by the Statute of Limitations

The Complaint does not allege that Jackson authorized any bribe payments within five years of the Complaint. The SEC's argument on this point is as follows:

> Here, the Complaint alleges that, on or after May 10, 2006, the defendants approved the payment of certain bribes to NCS government officials through a "customs agent." Complaint ¶¶ 110-34. . . . Throughout this period, Jackson either participated in the authorization of the bribes, was in control of Ruehlen or the authorization, or induced the authorizations, for example by directing a new CFO in November 2006 to rubber stamp the approval of a Controller/Internal Audit Director who was complicit in the bribery. *See, e.g., id.* ¶¶ 114-16, 122-24, 142-49. Thus, the request for penalties is timely for the FCPA bribery claims (First and Second Claims).

Resp. at 44. The cited paragraphs simply do not allege that Jackson authorized any bribes during the limitations period:

- ¶ 114 merely alleges that Jackson assumed responsibility for authorizing payments.
- ¶ 115 alleges that Jackson authorized a bribe more than five years before the Complaint.[8]
- ¶ 116 alleges that Jackson ***did not authorize*** certain "non-TIP related payments."
- ¶¶ 122-24 relate to an incident in November 2006 wherein a new Noble CFO "raised concerns about his qualifications to approve these payments" to foreign officials. Jackson allegedly "told the new CFO to rely on the advice of Noble's then-Controller," who Jackson supposedly knew had previously approved improper bribes. However, Section 30A only prohibits "an offer, payment, promise to pay, or authorization of the payment of any money."

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[7] As for the SEC's outrageous suggestion that undersigned counsel's arguments were not in "good faith," it was the SEC that inexplicably decided not to reference the tolling agreements in its Complaint. Moreover, it appears that the omission was not merely a mistake, but was part of some type of litigation strategy. Resp. at 44 n.22 ("While the defendants are certainly correct that the SEC did not allege the existence of the tolling agreements, this was ***on the assumption*** that defense counsel would make only good faith arguments in their motions to dismiss.") (emphasis added). Jackson forthrightly noted the agreements in his Motion, and then explained the legal effect of the SEC's choice to omit them. The SEC certainly knows how to plead tolling agreements, and has done so on numerous occasions. *See, e.g.*, Complaint at ¶ 103, *SEC v. Falcone et al.*, No. 12-5027 (S.D.N.Y. June 27, 2012) (attached at Exhibit 3)

[8] If the Court considers the tolling agreements, then the allegation in ¶ 115—that Jackson authorized $23,256 in bribe payments on May 16, 2006—would not be time-barred, although it should still be dismissed for the reasons set forth above. But this lone authorization is the only act by Jackson that can possibly give rise to a Section 30A civil monetary penalty.

15 U.S.C. § 78dd-1(a). The Complaint does not allege that Jackson authorized a payment; merely telling the new CFO to consult someone else simply does not suffice.

- ¶¶ 142-49 all relate to Jackson's certifications and Noble's books and records, not to any alleged bribe payments.[9]
- Jackson is not mentioned at all, substantively, in the other paragraphs referenced in the SEC's general citation in the quoted excerpt (¶¶ 110-13, 117-21, 125-34).

B. The Pleadings Fail to Raise Any Basis for Tolling

The SEC is not entitled to relief from the statute of limitations based on either the continuing violations doctrine or tolling based on fraudulent concealment. Both of these doctrines are equitable in nature and the SEC bears the burden of showing that it is entitled to relief.[10] The SEC has not done so. To the contrary, it has failed to explain why it waited nearly five years after Noble's June 2007 voluntary disclosure to initiate this lawsuit.

That failure is particularly crucial with respect to fraudulent concealment. The lone case the SEC cites (Resp. at 47) actually applied ***Texas***'s version of that doctrine. *See Liddell v. First Family Fin. Servs.*, 146 Fed. Appx. 748, 750 (5th Cir. 2005) (attached at Exhibit 4) (holding that *Texas v. Allan Construction Co.*, 851 F.2d 1526 (5th Cir. 1988), "interpreted the doctrine of

[9] Jackson also moved to dismiss Claims III-VII to the extent that they involved conduct outside the limitations period (and were entirely dependent on the existence of improper bribe payments). On the face of the Complaint (*e.g.*, ¶¶ 145-46), some of these alleged violations are within the limitations period and others are not, and Jackson seeks only to have the untimely claims dismissed on statute of limitations grounds. *SEC v. Microtune, Inc.*, 783 F. Supp. 2d 867, 889-90 (N.D. Tex. 2011), *appeal docketed*, No. 11-10594 (5th Cir. June 21, 2011) (dismissing claims only to the extent based on pre-limitations period conduct).

[10] The SEC is clearly incorrect in its assertion that the defendants bear the burden on these issues. Resp. at 47 n.27. Although the defendants must establish that the conduct is outside the statute of limitations in the first instance, once that showing is made (as it is here on the face of the Complaint), the SEC then must show that it is entitled to equitable relief. *See Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 644 (5th Cir. 1988). Indeed, one case the SEC cites for this very point holds "[t]he burden of proving the elements of fraudulent concealment is upon plaintiff." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988).

fraudulent concealment ***under Texas law***").[11] Because it cites state law, the SEC does not address two of the requirements for fraudulent concealment under federal law—that "the plaintiff acted diligently once he had inquiry notice" and that "the plaintiff did not have inquiry notice within the limitations period." *Mictrotune*, 783 F. Supp. 2d at 874; *see also SEC v. Brown*, 740 F. Supp. 2d 148, 158 (D.D.C. 2010). The SEC cannot satisfy either element—it offers no facts indicating that it was diligent, and it was clearly on inquiry notice by June 2007, very early in the limitations period.

With respect to the continuing violations doctrine, the SEC fails to disclose that many courts have expressed substantial doubt about whether the doctrine even applies in securities cases. *See, e.g.*, *Brown*, 740 F. Supp. 2d at 158 ("Our Court of Appeals has not considered whether the 'continuing violation doctrine,' which originated in the federal employment discrimination context, applies to claims brought in the securities fraud context. District courts in the Second and Third Circuits have indicated great skepticism that it does."). Moreover, the SEC does not respond to Jackson's argument that he had left his position as CFO prior to the start of the limitations period and therefore it is not plausible that he had any involvement in recording payments in Noble's books and records or the maintenance of its system of internal controls over financial reporting. Mot. at 24. Instead, the SEC simply asserts, without authority or explanation, that "[s]uch conduct is inherently continuing in nature." Resp. at 45. This is simply insufficient to meet the SEC's burden under *Twombly* and *Iqbal*.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Jackson's Motion, the Complaint against Jackson should be dismissed.

[11] The SEC also fails to note that, just last year, the Northern District of Texas specifically rejected its argument that *Allan Construction* supplies the applicable federal law on fraudulent concealment. *Microtune*, 783 F. Supp. 2d at 876.

Dated: July 13, 2012

Respectfully submitted by,

/s/_____

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CERTIFICATE OF SERVICE

I certify that on July 13, 2012, I caused to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system, the foregoing **Defendant Mark A. Jackson's Reply Memorandum of Law in Support of His Motion to Dismiss the Complaint Under Rule 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted**.

/s/
Lauren R. Randell