

Client Alert

July 30, 2014

The Long Arm of the FCPA: Former BizJet CEO Arrested in Amsterdam, Pleads Guilty in Oklahoma

By Demme Doufekias and Adam J. Fleisher

On July 24, 2014, the Department of Justice (DOJ) announced that Bernd Kowalewski, the former president and chief executive officer of BizJet International Sales and Support Inc. (“BizJet”), pleaded guilty to conspiracy to violate the Foreign Corrupt Practices Act (FCPA) and one substantive count of violating the FCPA. Unlike his co-conspirators, who received significant reductions to their sentences for cooperating with the government’s investigation, and BizJet, which similarly received the benefit of a deferred prosecution agreement (DPA) for voluntarily disclosing to and cooperating with the government, Kowalewski became a wanted man after being indicted under seal in 2012. He was arrested on a provisional arrest warrant in Amsterdam on March 13, 2014, and waived extradition to the U.S. this past June. A fourth defendant in the case, Jald Jensen, remains at large.

DOJ’s approach to prosecuting BizJet and its former executives serves as an example of both the kind of credit the government is willing to give to companies and individuals who provide meaningful cooperation and the lengths to which DOJ is willing to go to track, arrest, and extradite U.S. and foreign nationals abroad to face FCPA charges in the United States. Executives such as Kowalewski—international businesspeople who depend on their ability to travel—should not be lulled into a false sense security as a result of their status as foreign nationals or the fact that they live outside the United States, possibly in countries that do not extradite their own nationals. Indeed, in this case and a number of others, DOJ has filed charges under seal, lying in wait for fugitives to cross international borders.

THE CASE AGAINST BIZJET’S EXECUTIVES

BizJet is a provider of aircraft maintenance, repair, and overhaul services based in Tulsa, Oklahoma. Kowalewski’s plea is the latest development in a larger FCPA investigation involving four BizJet executives: Kowalewski, BizJet’s former President and CEO; Peter DuBois, the former Vice President of Sales and Marketing; Neal Uhl, the former Vice President of Finance; and Jald Jensen, a former BizJet sales manager.

Indictments filed against the four executives allege that BizJet and its employees engaged in a conspiracy to violate the FCPA by paying bribes to foreign officials to obtain and retain business from foreign government customers including the Mexican Federal Police, the Mexican President’s Fleet, Sinaloa, the Panama Aviation Authority, and other customers.¹ The contracts obtained through bribery by BizJet included maintenance contracts for planes used by the President of Mexico.

Kowalewski, Dubois, Uhl, and Jensen paid bribes, which they referred to as “commissions,” “incentives,” and “referral fees.” They attempted to conceal the bribes by making the payments by hand or by using a shell corporation, Avionica International & Associates, Inc. (“Avionica”), owned by Jensen. Avionica operated under

¹ See, e.g., *United States v. Kowalewski*, No. 12-CR-07-GKF, Indictment at 5-6 (N.D. Cal.) (filed Jan. 5, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kowalewskib/Kowalewski-Indictment.pdf>.

Client Alert

the pretense of providing aircraft maintenance brokerage services, but, in fact, existed only to launder money related to BizJet's bribery scheme.²

DOJ identified specific emails and other communications in which the individual defendants discussed how to collect and remit the bribes. For example, at one meeting, in response to a question about who the decision-maker was at a particular customer organization, DuBois stated that a director of maintenance or chief pilot was normally responsible for decisions on where an aircraft went for maintenance work. Kowalewski then responded by explaining that the directors of maintenance and chief pilots in the past received "commissions" of \$3,000 to \$5,000 but were now demanding \$30,000 to \$40,000. Other emails cited by the government stated that the BizJet executives would "work to build these fees into the revenue as much as possible" in order to "remain competitive in this respect to maintain and gain market share."³

The indictments also allege that, when Kowalewski learned BizJet's parent, Lufthansa Technik AG, was conducting a detailed audit of BizJet's "incentive payments," he allegedly "caused deletion software to be installed and run on his computer that erased content from his computer."⁴

DuBois pled guilty, on January 5, 2012, to conspiracy to violate the FCPA and a substantive violation of the FCPA. Uhl also pled guilty on January 5, 2012 to conspiracy to violate the FCPA. But those charges and the respective guilty pleas were all kept under seal at DOJ's request. That is because, as later revealed in court filings, DOJ was trying to locate and arrest Kowalewski and Jensen, who were by then living outside the United States. After more than a year under seal, the charges against all four defendants were unsealed on April 5, 2013, as the district court, which had permitted the matter to remain under seal for an extended period of time, moved forward with the sentencing of DuBois and Uhl.⁵ Jensen remains the last fugitive and is believed to be living abroad.

DOJ TRIES TO SHOW THE VALUE OF COOPERATION

Commentators often question whether there is substantial value in voluntary disclosure and cooperation. With the BizJet case, DOJ certainly tried to answer those critics. In March 2012, BizJet agreed to pay a criminal penalty of \$11.8 million in connection with the conspiracy. Although it filed a one-count criminal information charging BizJet with conspiring to violate the FCPA, DOJ agreed to defer prosecution of BizJet for three years. This was a substantial benefit to the company given that the Kowalewski, the company's CEO, and other high-level executives were personally involved in the bribery scheme.

The DPA credits BizJet for initiating an internal investigation and voluntarily disclosing the misconduct to DOJ after discovering the FCPA violations as a result of an internal audit.⁶ The DPA states that BizJet's cooperation was "extraordinary, including conducting an extensive internal investigation, voluntarily making U.S. and foreign

² *Id.* at 3, 12-13.

³ *Id.* at 8-14.

⁴ *Id.* at 14.

⁵ See DOJ Press Release, *Four Former Executives of Lufthansa Subsidiary BizJet Charged with Foreign Bribery* (Apr. 5, 2013), available at <http://www.justice.gov/opa/pr/2013/April/13-crm-388.html>.

⁶ *United States v. Bizjet Int'l Sales & Support, Inc.*, No. 12-CR-61-CVE, Deferred Prosecution Agreement at 3, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/bizjet/2012-03-14-bizjet-deferred-prosecution-agreement.pdf>.

Client Alert

employees available for interviews, and collecting, analyzing and organizing voluminous evidence and information for the Department . . .” The DPA also outlines extensive cooperation expected of BizJet by DOJ going forward.⁷ Finally, BizJet was credited for engaging in extensive remediation efforts, including “terminating the officers and employees responsible for the corrupt payments ”⁸ and agreeing to report periodically to DOJ about its continued compliance efforts, such as implementation of an enhanced compliance program and internal controls designed to prevent and detect future violations.⁹

DOJ also agreed not to prosecute BizJet’s indirect parent company, Lufthansa Technik AG, a German-based provider of aircraft-related services. DOJ cited Lufthansa Technik AG’s “timely, voluntary, and complete disclosure of the conduct; [its] extraordinary, real-time cooperation with the Department; [and] remedial efforts already undertak[en] and to be undertaken” going forward.¹⁰

DuBois and Uhl, who pleaded guilty to FCPA violations in January 2012, also provided substantial cooperation for which they received significant reductions to their sentences. DuBois, for example, worked with the government in an undercover capacity, which included recording conversations with former BizJet executives and other subjects of the ongoing investigation.¹¹ Both DuBois and Uhl received sentences of probation and eight months of home detention. DuBois was facing a potential sentence of between 108 to 120 months in prison, while Uhl faced a potential sentence of 60 months in prison.¹²

THE LONG ARM OF THE FCPA

In stark contrast to the substantial reductions in sentence enjoyed by DuBois and Uhl for their cooperation, Jensen and Kowalewski were secretly charged under seal. Jensen remains at large, but Kowalewski’s arrest in Amsterdam this past March demonstrates DOJ’s growing commitment to and success in bringing fugitives to justice in FCPA cases.

In announcing Kowalewski’s plea, newly appointed Assistant Attorney General of the Criminal Division, Leslie R. Caldwell, specifically noted that “[t]hough he was living abroad when the charges were unsealed, the reach of the law extends beyond U.S. borders, resulting in Kowalewski’s arrest in Amsterdam and his appearance in court . . . in the United States. [His] guilty plea is an example of [DOJ’s] continued determination to hold corporate executives responsible for criminal wrongdoing whenever the evidence allows.”¹³

Kowalewski’s arrest was a result of “investigators and prosecutors . . . work[ing] together across borders and jurisdictions to vigorously enforce the [FCPA].” One U.S. Attorney noted that, “[p]artnership is a necessity in all

⁷ *Id.* at 4-6.

⁸ *Id.*

⁹ *Id.* at 7-9.

¹⁰ See Letter Agreement Between Lufthansa Technik AG and U.S. Department of Justice at 1 (Dec. 21, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/lufthansa-technik/2011-12-21-lufthansa-ntpa.pdf>.

¹¹ *United States v. DuBois*, No. 11-CR-183-GKF, Application Temporarily to Seal Docket, All Files (Including this Application), and All Orders (Including Any Order on this Application) at 6 (N.D. Cal.) (filed Dec. 27, 2011) (“DuBois Motion to Seal”).

¹² See DOJ Press Release, *Four Former Executives of Lufthansa Subsidiary BizJet Charged with Foreign Bribery* (Apr. 5, 2013), available at <http://www.justice.gov/opa/pr/2013/April/13-crm-388.html>.

¹³ See DOJ Press Release, *Former Chief Executive Officer of Lufthansa Subsidiary BizJet Pleads Guilty to Foreign Bribery Charges* (July 24, 2014), available at <http://www.justice.gov/opa/pr/2014/July/14-crm-778.html>.

Client Alert

investigations. By forging and strengthening international partnerships to combat bribery, the Department of Justice is advancing its efforts to prevent crime and to protect citizens.”¹⁴

Court papers in the case, which were later unsealed, reflect that determination. In 2011, the government sought to temporarily seal the indictment against DuBois in order to protect and keep secret the undercover operation until Kowalewski and Jensen, both of whom are foreign nationals, were arrested.¹⁵ DOJ argued that “[p]ublic identification of Mr. DuBois as a defendant who likely is cooperating with the government may jeopardize the undercover aspect of the government’s investigation . . . [T]he government intends to seek the indictment of two foreign nationals who no longer reside in the United States in the near future. To bring those individuals to justice, the government must effect the arrest and extradition of those individuals from foreign countries. Should Mr. DuBois’s plea become public, the putative defendants may take steps to evade arrest and/or decrease the likelihood of extradition.”¹⁶

DOJ’s practice of keeping indictments sealed bucks the adage that no news is good news. Companies and particularly individuals involved in FCPA investigations must be aware that silence from the government may simply be the result of DOJ striving to keep its enforcement efforts under wraps until measures are in place to arrest and bring to justice individuals who are the target of the investigation. Indeed, in its court papers in the BizJet case, the government made plain its intention to indict and arrest Kowalewski and Jensen “in whatever countries they are found.”¹⁷ So far, DOJ has made good on that promise with respect to Kowalewski.

DOJ can exercise a number of options to bring to justice foreign nationals residing outside the United States. DOJ can file a red notice, which is circulated by INTERPOL to all member states and seeks the location and arrest of a person wanted by a judicial jurisdiction or an international tribunal with a view to extraditing the person to the issuing country.¹⁸ DOJ through its law enforcement agency partners can also “lure” a target back to the United States, or simply establish a “border watch” to alert law enforcement when an individual presents himself or herself at the U.S. border. DOJ can also seek provisional arrest warrants and pursue the extradition of individuals from other countries pursuant to extradition treaties. Growing cooperation between U.S. and foreign authorities only increases the likelihood that DOJ’s efforts will be successful, ensuring that individuals being investigated for or charged with FCPA violations or other crimes will not be able to evade the long arm of the U.S. government simply by remaining abroad.

Indeed, Kowalewski is only one in a growing list of examples where DOJ has been able to bring individuals living abroad back to the U.S. to face criminal charges. Frederic Pierucci, a French citizen, was arrested on April 14, 2013, in FCPA-related charges stemming from French engineering company Alstom SA’s bribing of Indonesian government officials. Pierucci was arrested when his plane landed at John F. Kennedy International Airport in New York. The indictment against him had been filed the previous year under seal and only unsealed after his arrest.¹⁹ Pierucci later pleaded guilty.

¹⁴ *Id.*

¹⁵ DuBois Motion to Seal at 4.

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ For a discussion of INTERPOL red and other notices, see <http://www.interpol.int/INTERPOL-expertise/Notices>.

¹⁹ See DOJ Press Release, *Foreign Bribery Charges Unsealed Against Current and Former Executives of French Power Company* (Apr. 16, 2013), available at <http://www.justice.gov/opa/pr/2013/April/13-crm-434.html>.

Client Alert

In July 2009, Ousama Naaman, a Lebanese-Canadian national charged with paying \$150,000 in bribes to Iraqi government officials on behalf of a UK company in an eight-year conspiracy to defraud the United Nations Oil for Food Program, was arrested in Germany.²⁰ The charges against Naaman had been filed the previous year under seal. Naaman subsequently was extradited to the United States, where he pleaded guilty in June 2010.²¹ In December 2011, Naaman was sentenced to 30 months in prison.²²

Similarly, in March 2009, DOJ announced that it had charged two British citizens—Jeffrey Tesler and Wojciech Chodan—with participating in a long-running scheme to “bribe Nigerian government officials to obtain engineering, procurement and construction contracts.”²³ Tesler, a U.K. solicitor who had both British and Israeli citizenship, was arrested by police in London and was extradited back to the United States in March 2011, at which time he pleaded guilty.²⁴ Tesler was sentenced to 21 months in prison and ordered to forfeit \$148 million, the largest individual forfeiture in FCPA history.²⁵ Chodan was extradited back to the United States in December 2010.²⁶ He pleaded guilty, too, and was sentenced to a year of probation and fined \$20,000.²⁷

This is not to say that DOJ has always been successful at apprehending fugitives in FCPA cases. Indeed, there is a lengthy list of FCPA fugitives.²⁸ For example, the case of Victor Kozeny, who remains in the Bahamas in spite of substantial efforts to have him extradited to face FCPA charges, highlights the limitations of some U.S. extradition efforts. In that case, the Privy Council, which serves as the highest court of appeals for many British Commonwealth countries, upheld a Bahamian court’s rejection of a U.S. extradition request.²⁹ Kozeny and others, including Frederic Bourke, who was tried and convicted in 2009 for his role in the scheme, allegedly conspired to pay bribes and caused bribes to be paid to Azeri government officials to ensure that an investment consortium, which included Kozeny’s company, participated in the privatization of the State Oil Company of the Azerbaijan Republic.³⁰

²⁰ See DOJ Press Release, *Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil for Food Program* (July 31, 2009), available at <http://www.justice.gov/opa/pr/2009/July/09-crm-757.html>.

²¹ See DOJ Press Release, *Innospec Agent Pleads Guilty to Bribing Iraqi Officials and Paying Kickbacks Under the Oil for Food Program* (June 25, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-747.html>.

²² See The Legal Times, *D.C. Judge Orders 30-Month Term in Foreign Bribery Case* (Dec. 22, 2011), available at <http://legaltimes.typepad.com/blt/2011/12/dc-judge-orders-30-month-term-in-foreign-bribery-case-.html>.

²³ See DOJ Press Release, *Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme* (Mar. 5, 2009), available at <http://www.justice.gov/opa/pr/2009/March/09-crm-192.html>.

²⁴ See DOJ Press Release, *UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme* (Mar. 11, 2011), available at <http://www.justice.gov/opa/pr/2011/March/11-crm-313.html>.

²⁵ See The Guardian, *Second British Man Sentenced Over Nigerian Government Bribes* (Feb. 23, 2012), available at <http://www.theguardian.com/world/2012/feb/23/british-jeffrey-tesler-jailed-nigeria>.

²⁶ See DOJ Press Release, *UK Citizen Pleads Guilty to Conspiring to Bribe Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme* (Dec. 6, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1391.html>.

²⁷ See The Guardian, *British Man Sentenced in US over Bribes to Nigerian government* (Feb. 22, 2011), available at <http://www.theguardian.com/law/2012/feb/22/us-extradition-british-man-sentenced-bribes-nigeria>.

²⁸ The FCPA Blog maintains an informal list of FCPA fugitives. The latest iteration contains over 15 names. See <http://www.fcpcbog.com/blog/2012/9/18/the-fcpa-fugitive-list-september-2012.html>.

²⁹ See Bloomberg News, *Kozeny Won't Be Sent to U.S., U.K. Privy Council Rules* (Mar. 28, 2012), available at <http://www.businessweek.com/news/2012-03-28/kozeny-won-t-be-extradited-to-u-dot-s-dot-u-dot-k-dot-privy-council-rules>.

³⁰ See <https://www.traceinternational2.org/compendium/view.asp?id=136>.

Client Alert

Similarly, James Tillery, a former executive of Willbros International, Inc., a subsidiary of the Houston-based Willbros Group, avoided extradition by renouncing his U.S. citizenship and becoming a naturalized Nigerian citizen. Tillery is the last of a group of former Willbros executives to face charges for their roles in a conspiracy to pay more than \$6 million in bribes to government officials of the Federal Republic of Nigeria and officials from a Nigerian political party to assist Willbros and its joint venture partner, a construction company based in Mannheim, Germany, in obtaining and retaining a gas pipeline project valued at approximately \$387 million. Tillery was indicted for one count of conspiracy to violate the FCPA, and two substantive counts of violating the FCPA in connection with the authorization of specific corrupt payments to Nigerian and Ecuadoran officials. In 2010, Tillery was arrested in Lagos, Nigeria by the FBI and held by American authorities until the intervention of the Nigerian high court, which halted his extradition. He apparently then renounced his United States citizenship and became a naturalized citizen of Nigerian. To date, he remains in Nigeria, a fugitive.³¹

Perhaps the most high-profile and challenging extradition to date, the case against Ukrainian billionaire, Dmitry Firtash, has yet to be decided. Firtash posted a record-setting \$147 million bond after being arrested during a trip to Austria. As with other FCPA cases, the charges were filed under seal and only unsealed after Firtash was arrested. With substantial resources at his disposal, the battle over his extradition will certainly be one to watch.³²

While there have certainly been setbacks and the occasional defeat, recent events nevertheless display DOJ's resolve in pursuing foreign fugitives, and FCPA cases are not the only area where DOJ has been successful recently in bringing foreign nationals and others residing outside the United States back into the country to face charges. On April 4, 2014, DOJ announced its first successful extradition of a foreign national to the United States to stand trial for alleged violations of criminal antitrust law. Romano Piscioti, an Italian national and a former executive with Parker ITR Srl, headquartered in Italy, was extradited to Miami to face charges that he participated in an international cartel involving sales of marine hose in violation of the Sherman Act. Piscioti has been under indictment in the United States since 2010. In announcing Piscioti's extradition from Germany, Assistant Attorney General of the Antitrust Division, Bill Baer, lauded this development: "This marks a significant step forward in our ongoing efforts to work with our international antitrust colleagues to ensure that those who seek to subvert U.S. law are brought to justice."³³

In addition to extradition, the Antitrust Division uses the same methods the Criminal Division employs in FCPA cases. For example, in 2007, seven British, French, and Italian executives attending an energy industry convention in Houston were arrested to face charges in connection with the same marine hose investigation in which Piscioti is charged. And, in July 2011, Homy Hong-Ming Hsu, a Taiwanese national and executive of auto lights manufacturer Eagle Eyes Traffic Industrial, was arrested as a result of a border watch when his plane landed at Los Angeles International Airport. Hsu's ultimate destination was Mexico.

³¹ See JDSupra Business Advisor, *And Then There Was One – Willbros Related FCPA Enforcement Continues* (May 6, 2013), available at <http://www.ldsupra.com/legalnews/and-then-there-was-one-willbros-relate-44779/>.

³² See The New York Times, *Brash Ukrainian Mogul Prepares to Fight U.S. Bribery Charges* (May 6, 2014), available at http://www.nytimes.com/2014/05/07/world/europe/brash-ukrainian-mogul-prepares-to-fight-us-bribery-charges.html?_r=0.

³³ See DOJ Press Release, *Former Marine Hose Executive Extradited from Germany to Face Charges of Participating in Worldwide Bid-Rigging Conspiracy* (Apr. 4, 2014), available at http://www.justice.gov/atr/public/press_releases/2014/304888.htm.

Client Alert

CONCLUSION

Kowalewski's arrest and extradition are more than simply the latest chapter in DOJ's investigation and prosecution of BizJet and its former executives. They serve to highlight that executives should heed Kowalewski's arrest and extradition as another example of DOJ's increasing willingness and ability to bring international business people back to the United States to face charges. As the Kowalewski case shows, DOJ continues to invoke, and make good on, its promise to pursue individuals wherever possible.

For more information, please contact:

Charles E. Duross

Washington, D.C.
(202) 887-1576
cduross@mofo.com

Paul T. Friedman

San Francisco
(415) 268-7444
pfriedman@mofo.com

Carl H. Loewenson, Jr.

New York
(212) 468-8128
cloewenson@mofo.com

Demme Doufekias

Washington, D.C.
(202) 887-1553
ddoufekias@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 11 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.