UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F. Street N.E. SPIII
Washington, D.C. 20549-5949

DIVISION OF
ENFORCEMENT

Robert I. Dodge
Assistant Chief Litigation Counsel

Telephone: (202) 551-4421
Email: DodgeR@sec.gov

August 21, 2015

Via Electronic Mail
Hon. Richard J. Sullivan
U.S. District Court for the
Southern District of New York
40 Foley Square
New York, NY 10007

Re: SEC v. Straub, No. 11-CV-9645-RJS
Plaintiff's Pre-Motion Letter Regarding Summary Judgment

Dear Judge Sullivan:

Pursuant to the Court's August 11, 2015 Order and Rule 2.A of the Court's Individual Practices, plaintiff the U.S. Securities and Exchange Commission ("SEC") advises the Court of the summary judgment motions it intends to file. The SEC intends to move on five issues. Three of these are affirmative defenses: (1) personal jurisdiction over the defendants; (2) the statute of limitations under 28 U.S.C. § 2462; and (3) the defendants' "use of the mails or any means or instrumentality of interstate commerce" under Section 30A of the Securities Exchange Act of 1934. The SEC will also move affirmatively for judgment on its claims that the defendants violated Exchange Act Rules 13b2-1 (falsifying accounting records) and 13b2-2 (making false representations to an auditor). The SEC will move for judgment under Rule 13b2-1 as to defendants Balogh and Morvai and under Rule 13b2-2 as to Straub and Balogh.

Personal Jurisdiction. Section 27 of the Exchange Act "permits the exercise of personal jurisdiction to the limit of the Due Process Clause of the Fifth Amendment." *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir.1990). "The Court must first determine whether the defendant has sufficient contacts with the forum state to justify the Court's exercise of personal jurisdiction." *Metro. Life Ins. Co. v. Robertson–Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.1996). "If such contacts are found, the Court may assert personal jurisdiction so long as it is reasonable under the circumstances of the particular case." *SEC v. Softpoint, Inc.*, No. 95 Civ. 2951(GEL), 2001 WL 43611, at *2 (S.D.N.Y. Jan. 18, 2001). A court may exercise "specific jurisdiction" over a defendant where the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros*

Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 8 (1984).

The factual record fully supports the Court's exercise of personal jurisdiction over the defendants. There is no genuine issue that the defendants did, in fact, execute the management representation letters and sub-certifications alleged in the complaint. There is no genuine dispute that the defendants, all sophisticated senior corporate executives, were on notice that their representations were made in connection with the company's filings with the SEC. Further, because the defendants represented they knew of no fraud at the company, that Magyar's books and records were correct, and its internal controls sound, the SEC's causes of action "arise out of" the defendants' certifications.

Statute of Limitations. To the extent that the SEC's claims are subject to a statute of limitations, the catchall limitations period of 28 U.S.C. § 2462 applies. That statute provides that "an action . . . for the enforcement of any civil . . . penalty . . . shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender . . . is found within the United States in order that proper service may be made thereon." 28 U.S.C. § 2462. In its February 2013 ruling, the Court construed "the operative language" of the statute to require "by its plain terms, that an offender must be physically present in the United States for the statute of limitations to run." *SEC v. Straub*, 921 F.Supp.2d 244, 260 (S.D.N.Y. 2013).

The Court's ruling on Section 2462 was made as a matter of law. The only relevant factual predicate was whether the defendants were physically located in the United States long enough for the limitations period to run against them. *Id.* at 259. The defendants' physical presence, however, is not in dispute. Between 2006, when the defendants' scheme ended, and the filing of the SEC's complaint in December 2011, not one of the defendants set foot in the United States. Two of the defendants (Straub and Morvai) contend that they made brief visits to this country during 2005, while the scheme was still in progress. But because they were not present here for anything close to the five-year period of Section 2462, the limitations provision is unavailing as to them.

Interstate Commerce. The FCPA's bribery provisions require that the defendants "ma[de] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of any money . . . or . . . anything of value" to "any foreign official." 15 U.S.C. § 78dd–1(a). Congress did not require a showing of intent with respect to the use of interstate commerce. *Straub*, 921 F.Supp.2d at 263.

There is no genuine issue that defendant Balogh used electronic mail in furtherance of the bribe scheme by attaching drafts of the Protocol, the Letter of Intent, and copies of consulting contracts with third-party intermediaries. The emails were sent from locations outside the United States, but were routed through and stored on network servers located within the United States. The email messages sent by Balogh to a co-conspirator's "hotmail.com" email account have been identified, authenticated, and traced to Balogh's computer. Balogh has not denied sending them. Further, a witness from Microsoft will testify that during the relevant time all of its Hotmail servers were

located within the United States. As a result, all email messages sent to hotmail.com addresses would necessarily have been routed through U.S. interstate commerce.

Rule 13b2-1. SEC Rule 13b2-1 provides that "no person shall, directly or indirectly, falsify or cause to be falsified, any book, record, or account" subject to the Exchange Act's reporting provisions. 17 C.F.R. § 240.13b2-1. In order to establish a violation of Rule 13b2-1, the SEC need not demonstrate that a defendant acted with scienter. *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d. Cir. 1998). Nor does Rule 13b2-1 require that the falsification be material.

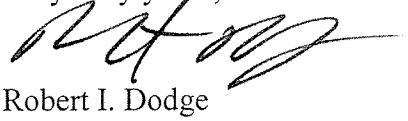
There is no genuine dispute that defendants Balogh and Morvai falsified Magyar Telekom's books and records when they signed a back-dated letter authorizing a subordinate to enter into two consulting contracts that were themselves back-dated. The defendants signed the authorization letter on or after August 31, 2005, as established by surrounding email correspondence, but they back-dated the letter to May 31, 2005. The associated contracts, worth a combined €1,970,000, were back-dated to June 1, 2005.

Rule 13b2-2. SEC Rule 13b2-2 provides that "no director or officer of an issuer shall, directly or indirectly, make or cause to be made a materially false or misleading statement to an accountant in connection with" an audit, review, or SEC filing. 17 C.F.R. § 240.13b2-2. The Rule also prohibits materially false or misleading omissions. *Id.* As with Rule 13b2-1, Rule 13b2-2 does not require a showing of scienter.

The management representation letters that defendant Straub signed, and to which defendants Balogh and Morvai attested, stated, "[A]ll financial and accounting records and related data have been made available to you. We are not aware of any accounts, transactions or material agreements not fairly described and properly recorded in the financial and accounting records underlying the financial statements." This statement was false as to defendants Straub and Balogh because they had entered into the Protocol of Cooperation with Macedonian government officials and had intentionally kept that agreement out of Magyar Telekom's books and records and inaccessible to its auditors.

The management representation letters define a "material" item as one "involving potential amounts normally greater than MHUF 500," or approximately €2 million. By its terms, the Protocol contained financial obligations far above than that threshold. Even through the Protocol was never meant to be a legally enforceable contract, Straub testified that it was an "important" agreement, in which Magyar "made certain promises to the government" of Macedonia and Magyar's "commitment to pay" was subject to reciprocal obligations by the government. *Straub Tr. at 152, 156, 181, 192-3, 216-7.*

Very truly yours,



Robert I. Dodge

cc: counsel of record