UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	
v.	3:12-cr-238 (JBA)
LAWRENCE HOSKINS.	June 4, 2015

MEMORANDUM OF LAW IN SUPPORT OF LAWRENCE HOSKINS'S MOTION TO DISMISS COUNT 1 OF THE THIRD SUPERSEDING INDICTMENT

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Defendant Lawrence Hoskins respectfully submits this memorandum of law in support of his Motion to Dismiss the Third Superseding Indictment, returned April 15, 2015 ("Indictment"), pursuant to Rule 12 of the Federal Rules of Criminal Procedure.

PRELIMINARY STATEMENT

Eleven years ago, when Mr. Hoskins resigned from Alstom, this motion to dismiss would not have been necessary. At that time, the Fraud Section of the Department of Justice conceded the precise legal premise at the core of this motion: that the government cannot properly charge a conspiracy to violate the Foreign Corrupt Practices Act ("FCPA") unless the defendant falls within one of the specific categories of persons that Congress carefully targeted when it enacted the FCPA. In other words, had Mr. Hoskins's case been considered at the time of his actual alleged conduct, the Justice Department would have conceded the very point that they now—eleven years later—have decided to pursue with vigor.

The government's change in position on this point is particularly unfair when juxtaposed with the defendant in that prior case (Hans Bodmer) whose FCPA conspiracy charge was dismissed based on the government's previous interpretation of the FCPA. It hardly bears observing that similarly situated individuals receiving such disparate treatment at the hands of the same prosecuting entity violates fundamental notions of due process and implicates fair notice concerns. On this ground alone, the Court could dismiss the Count One conspiracy charge.

Yet, the government's about turn on this purely legal question also lays bare the impetuosity of its decision to charge Mr. Hoskins. In the eleven years since Mr. Hoskins's departure from Alstom, the government's ever-expanding view of the statute's reach has shifted such that individuals it previously acknowledged it could not charge with conspiracy to violate the FCPA now must answer such charges. But, case law and legislative history (discussed in

detail below) make plain that the government's position was legally sound in 2004. Congress placed purposeful limits on the classes of persons within the FCPA's reach, and courts have made clear that such legislative line-drawing cannot be circumvented by charging a person falling outside the FCPA's reach with conspiracy. The Court should thus follow these decisions, adhere to the law, and dismiss Count One of the Indictment on the grounds that the charge is an improper circumvention of congressional intent.

BACKGROUND AND PROCEDURAL POSTURE

On July 30, 2013, nine years after Mr. Hoskins resigned from his job at Alstom, a grand jury sitting in Connecticut indicted him for, among other things, engaging in a conspiracy to violate the FCPA during his thirty-five month tenure at Alstom. (*See* Second Superseding Indictment (ECF No. 50) at ¶ 26.)[1] Count One of that Indictment alleged that Mr. Hoskins conspired to violate the FCPA while "being" an agent of a domestic concern. At the time that Indictment was returned, however, Mr. Hoskins was unaware of the charges and had not yet challenged and exposed the government's flawed theory that—as a British citizen and senior executive working in Alstom's Paris headquarters—he was somehow subject to FCPA liability as an "agent" of Alstom's U.S. subsidiary, Alstom Power, Inc.

That all changed on July 31, 2014 (three months after he was unwittingly arrested) when Mr. Hoskins moved to dismiss the Second Superseding Indictment. (*See* ECF No. 149.) Among others, one central pillar of Mr. Hoskins's prior motion to dismiss attacked the government's agency allegations. Specifically, Mr. Hoskins moved to dismiss the FCPA counts, *inter alia*, on the basis that the Indictment failed to state an FCPA offense because it failed to allege Mr. Hoskins was an "agent of a domestic concern." Mr. Hoskins also moved to dismiss the FCPA

[1] The original indictment did not name Mr. Hoskins as a defendant.

conspiracy charge (Count One) and aiding and abetting charges on the grounds that because he was not an "agent of a domestic concern" and, as such, did not fall into one of the specified classes of natural persons that may be held liable under 15 U.S.C. § 78dd-2, *Gebardi* v. *United States*, 287 U.S. 112, 121-23 (1932), and its progeny, barred the government from prosecuting him for conspiracy to violate the FCPA or for aiding and abetting an FCPA offense. Mr. Hoskins's argument was consistent with the position that the government had previously taken with respect to Mr. Bodmer.

On December 29, 2014, this Court denied Mr. Hoskins's motion to dismiss. In relation to the substantive FCPA charges, the Court held that whether Mr. Hoskins was an "agent of a domestic concern" was a "highly factual" inquiry that was "for a jury at trial in the first instance, and not the Court on a motion to dismiss, to determine." *United States* v. *Hoskins*, 2014 WL 7385131, at *7 (D. Conn. Dec. 29, 2014). Because the Court found that the question of whether Mr. Hoskins was an "agent of a domestic concern" was a factual one to be decided at trial, the purely legal question of whether Mr. Hoskins could be liable for conspiracy or aiding and abetting if he was not an "agent of a domestic concern" was left open as well. *See id.* The Court therefore did not rule on Mr. Hoskins's argument that under the principle set forth in *Gebardi* and its progeny, the FCPA conspiracy charge and FCPA aiding-and-abetting charges must be dismissed.

With the government now attuned to Mr. Hoskins's agency and *Gebardi*-related defense, on April 15, 2015, a grand jury returned a Third Superseding Indictment. (ECF No. 209). The new indictment made several alterations in an obvious attempt to shore up the government's theory that Mr. Hoskins was an "agent of a domestic concern."[2] The government also altered the

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[2] For example, the Third Superseding Indictment adds allegations that Mr. Hoskins worked for an Alstom subsidiary and that he merely "performed functions and support services for an on behalf of various other

charging language of the FCPA conspiracy charge to provide itself a safety net should it fail to prove at trial that Mr. Hoskins was in fact an "agent of a domestic concern." Specifically, the amendment removed the allegation that Mr. Hoskins conspired to violate the FCPA while "being" an agent of a domestic concern and replaced it with the allegation that Mr. Hoskins conspired to violate the FCPA while acting "together with" a domestic concern. (*Compare* Second Superseding Indictment ¶ 26(a), *with* Third Superseding Indictment ¶ 26(a).) In so doing, the government makes plain that its view of the law at the time of Mr. Hoskins's alleged conduct has changed—that now he could be prosecuted for conspiracy to violate the FCPA even when he himself was not subject to the statute. In other words, the government seeks to hold Mr. Hoskins responsible for a conspiracy that occurred at a time when it believed that such conduct could not actually be prosecuted as a conspiracy. This is wrong on many levels.

COUNT 1 OF THE THIRD SUPERSEDING INDICTMENT SHOULD BE DISMISSED

The new charging language of Count One confirms that the government is attempting to circumvent clear-stated congressional intent: that the FCPA was not intended to apply to individuals, like Mr. Hoskins, who do not otherwise fit within one of the FCPA's purposefully and carefully defined classes. It is beyond dispute that the criminal penalty for violating Section 78dd-2(a), applies only to non-resident foreign nationals who fall into one of five classes of natural persons: officers, directors, employees, or agents of a domestic concern, or stockholders acting on behalf of such domestic concern. 15 U.S.C. § 78dd-2(g)(2)(A). As re-pled, Count One does not allege Mr. Hoskins, a non-resident foreign national, was an officer, director, employee, agent or stockholder of a domestic concern. (*See* Third Superseding Indictment ¶26(a).) Rather,

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Alstom subsidiaries," in contrast to the description of a more prominent role (being an executive from headquarters) found in the Second Superseding Indictment. *See* Comparison of Second Superseding Indictment to Third Superseding Indictment ¶ 3 (attached hereto as Ex. 1).

the Indictment now merely alleges that Mr. Hoskins acted "together with a domestic concern." As such, Count One of the Indictment exposes Mr. Hoskins to liability for conspiracy to violate the FCPA even were a jury to find that the government failed to prove he was an agent of a domestic concern.

It is well settled, however, that where Congress has crafted a criminal statute to effect an affirmative legislative policy to exclude certain classes of persons from liability, as does the FCPA, the government cannot nullify that intent by charging such individuals with conspiracy to violate that statute. *See Gebardi* v. *United States*, 287 U.S. 112 (1932); *United States v. Castle*, 925 F.2d 831, 835-36 (5th Cir. 1991); *United States* v. *Bodmer*, 342 F. Supp. 2d 176, 181 & n.6 (S.D.N.Y. 2004); *cf. United States* v. *Amen*, 831 F.2d 373, 381-82 (2d Cir. 1987). Thus, because the new Count One conspiracy charge fails to allege that Mr. Hoskins falls into any defined FCPA class, it is defective and must be dismissed. *See Castle*, 925 F.2d at 835-36 (applying *Gebardi* and affirming dismissal of indictment charging conspiracy to violate the FCPA against a foreign official because Congress made clear that the FCPA was not intended to apply to such individuals); *Bodmer*, 342 F. Supp. 2d at 181 & n.6 (dismissing FCPA conspiracy charge against alleged "agent" where government conceded that *Gebardi* required dismissal of conspiracy charge if court concluded that the FCPA did not apply to the defendant).

A. CONGRESS INTENDED THAT NON-RESIDENT FOREIGN NATIONALS OUTSIDE OF CERTAIN SPECIFIED CLASSES OF PERSONS WOULD NOT BE SUBJECT TO FCPA LIABILITY UNDER SECTION 78dd-2.

Since its enactment in 1977, the FCPA has evinced an affirmative legislative policy to exclude certain foreign entities and foreign nationals from its coverage. Prior to the FCPA, Congress had drafted few statutes that targeted overseas conduct with such breadth. In crafting the statute, Congress recognized that the linchpin of the FCPA's prohibition—U.S. companies' bribery of foreign officials—could conceivably confer broad enforcement authority over

extraterritorial conduct and might draw foreign companies and nationals into U.S. enforcement crosshairs. To address diplomatic, jurisdictional and practical concerns, Congress sought to enact a statutory scheme that would reach the targeted conduct, but only in a measured way—a structure that would ensure that each case affected significant U.S. interests (beyond the mere use of the U.S. mails or wires), and thus act as a counter-balance to justify U.S. action abroad that might otherwise be seen as encroaching upon another country's sovereignty.

After extended debate reflected in voluminous legislative history, the scheme selected by Congress employed a system of classifications to limit the types of entities and natural persons who would be subject to the statute. Membership in each class required a demonstrable connection to the United States. Thus, as enacted, a company could be liable under the FCPA only if it was a U.S. securities "issuer" or U.S. "domestic concern." Likewise, U.S. citizens and nationals could be liable. But, significantly, a non-resident foreign national—like Mr. Hoskins—was subject to the FCPA only with sufficient U.S. connection: by being a director, officer, employee, agent or stockholder of a U.S. securities issuer or U.S. domestic concern. This original framework survives in Sections 78dd-1 and 78dd-2 of the FCPA today, notwithstanding two substantive statutory amendments, the latter of which added an additional class of persons who could be liable: non-resident foreign nationals who engaged in prohibited conduct while in the territory of the United States. *See* 15 U.S.C. § 78dd-3.

The underpinning of this framework is explored in more detail below, but the upshot of the scheme for non-resident foreign nationals, like Mr. Hoskins, is clear: Congress deliberately intended to exclude them from the statute's reach so long as they did not act while in the territory of the United States (Section 78dd-3) and did not fall into an enumerated class of persons with threshold ties to a U.S. securities issuer (Section 78dd-1) or U.S. domestic concern (Section

78dd-2). Congress's policy choice in this regard is demonstrated by (i) the background surrounding the enactment of the FCPA, (ii) the resulting statutory text, and (iii) the subsequent amendments to the FCPA.

1. Congressional Work Leading to the Enactment of the FCPA Demonstrates That the Statute Was Narrowly Tailored to Exclude Certain Classes of Non-Resident Foreign Nationals

As reflected below, the legislative history of the FCPA is extensive. The numerous hearings, debates, and draft bills that culminated in the statute described above vividly portray the deep congressional tension inherent in crafting such a finely tuned statute—a statute that, at once, addresses the primary goal of ending foreign corruption sponsored by U.S. companies and U.S. persons, while simultaneously guarding against any undue infringement on foreign sovereignty and diplomatic relations that might result from extraterritorial application of the statute to foreign entities and foreign nationals. The tour through the legislative history that follows illustrates this tension and provides the necessary foundation from which to view Congress's considerable efforts to carefully calibrate limitations on the FCPA's reach, limitations that the government now seeks to circumvent in Count One, and in a manner that the Department of Justice has previously conceded was impermissible.

(a) Initial congressional hearings and disclosure bills

"Congress enacted the FCPA in 1977, in response to recently discovered but widespread bribery of foreign officials by United States business interests. Congress resolved to interdict such bribery, not just because it is morally and economically suspect, but also because it was causing foreign policy problems for the United States." *United States* v. *Kay*, 359 F.3d 738, 746 (5th Cir. 2004). From the outset, legislators focused on bribe payments made through foreign third-party agents. A series of hearings in 1975 and 1976 left little doubt that Congress needed to act. Or, as Senator Frank Church put it during a subsequent floor debate, "If we want to get to

the root of this problem, we must require these companies to disclose publicly the fees and commissions they pay to their agents abroad." 122 Cong. Rec. 30,421 (1976) (attached hereto as Ex. 2).

Indeed, the then-current Chairman of the Securities and Exchange Commission ("SEC") gave testimony referring to tens of millions of dollars paid by U.S. companies to consultants abroad. *Abuses of Corporate Power: Hearings Before the Subcomm. On Priorities & Econ. in Gov't of the Joint Comm. Cong. of the U.S.*, 94th Cong. 13 (1976) (statement of Hon. Roderick M. Hills) (attached hereto as Ex. 3). The Senate Committee on Banking, Housing and Urban Affairs held an entire hearing on Lockheed Martin's widespread efforts to win foreign military sales contracts by paying more than $100 million in bribes through foreign marketing consultants and other agents. *Lockheed Bribery Hearings Before the S. Comm. On Banking, Housing & Urban Affairs*, 94th Cong. (1975) (excerpts attached hereto as Ex. 4). The House, too, held hearings focusing specifically on agents' fees in military sales contracts. *See The Activities of American Multinational Corporations Abroad: Hearings Before the H. Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 151-164 (1975) (excerpts attached hereto as Ex. 5) (hereinafter "1975 House Subcomm. Hearings"). And President Ford established a task force to address the problem, stating: "The full dimensions of this problem are not yet known but it is clear that a substantial number of U.S. corporations have been involved in questionable payments to foreign officials, political organizations or business agents." Gerald R. Ford, Memorandum Establishing the Task Force on Questionable Corporate Payments Abroad, *available at* Am. Presidency Project, http:// www.presidency.ucsb.edu/ws/?pid=5772 (memorandum from Mar. 31, 1976) (attached hereto as Ex. 6).

In response to these concerns, Congress considered bills requiring companies that were U.S securities issuers to make complete disclosure of, among other things, payments and commissions to foreign sales agents, as well as outright bribes. *See* S. 3379, 94th Cong. § 3 (1976) (attached hereto as Ex. 7); H.R. 14340, 94th Cong. (1976) (attached hereto as Ex. 8). These disclosure-focused bills were soon superseded by tougher legislative proposals seeking to criminalize the conduct of U.S. companies.

(b) The Senate's proposed criminal prohibition was limited to U.S. citizens and nationals

On July 2, 1976, the Senate Committee on Banking, Housing and Urban Affairs unveiled a bill making it unlawful for any U.S "issuer" or "domestic concern" to use any means or instrumentality of interstate commerce to authorize or pay a bribe to (i) foreign officials or (ii) any person for whom the issuer or domestic concern "had reason to know" would use the payment to pay such a bribe. S. 3664, 94th Cong. (1976) (attached hereto as Ex. 9). Underscoring the U.S.-centric focus of the intended legislation, the bill defined "domestic concern" to include (i) U.S. citizens and nationals and (ii) entities owned or controlled by U.S. citizens and nationals that either had a principal place of business in the United States or were organized under the laws of any U.S. state. S. Rep. No. 94-1031, at 9-10 (1976) (attached hereto as Ex. 10). Thus, notably, the proposed legislation excluded from liability all natural persons who were not U.S. citizens or nationals, as well as affiliates of U.S. companies that were principally located outside of the United States. *See id.* While issuers and domestic concerns would, under this proposal, be liable for payments to "foreign sales agents" that they "had reason to know" would be used as bribes, the agents themselves—many of whom, as Senator William Proxmire put it in reporting the bill, "act essentially as influence peddlers"—were excluded from liability under the bill. *Id.* at 9.

Reflecting extraterritoriality concerns, the scope of the bill was deliberately limited. The Senate report described the proposed criminal prohibitions as "narrowly defined" and stated that criminal jurisdiction, specifically, was "limited" by the definition of domestic concern. To this end, the report explained the significance of tying liability to significant U.S. interests:

> The Committee recognizes that principles of international law and comity generally operate to preclude a nation from establishing laws applicable to conduct which takes place outside that country's territorial boundaries. However, it is clear that a nation may adopt and enforce laws covering foreign conduct of its own nationals and covering foreign conduct which has significant effects within that nation.

Id. at 10 (citations omitted). Indeed, the committee chairman requested and included in the report a memorandum which concluded that neither international nor constitutional law limited "the authority of Congress to prescribe rules of conduct *for citizens or nationals of the United States* abroad." *Id.* at 17 (emphasis added).

(c) A new Senate proposal expanded individual liability in a measured way that would ensure a nexus to U.S. business interests

On January 18, 1977, the Senate introduced a bill (S. 305) that eventually, in compromise with a competing House proposal, would become the FCPA. As reflected in an April 1977 markup session of the Senate bill, the Carter administration requested broader and more clearly defined individual liability for persons making bribe payments; the administration also wanted the bill to reach foreign subsidiaries of U.S. companies as well as liability for U.S.-resident aliens. Markup Session on S. 305, Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 8-9 (Apr. 6, 1977) (attached hereto as Ex. 11).

On May 2, 1977, the Committee reported an amended bill that reacted to the administration's requests. S. Rep. No. 95-114, at 1 (attached hereto as Ex. 12). With respect to individual liability, the definition of "domestic concern" was left unchanged, meaning that U.S.

citizens and nationals remained a class of natural persons who could be found liable. *See* S. Rep. No. 95-114, at 11; 123 Cong. Rec. 13817 (1977) (attached hereto as Ex. 13). But the proposal added four classes of natural persons who may directly violate the statute: officers, directors, employees and stockholders acting on behalf of U.S. issuers or U.S. domestic concerns. *See* S. Rep. No. 95-114, at 11; 123 Cong. Rec. 13817 (1977). Because the classes were not limited by nationality of the person, foreign nationals who were officers, directors, employees and stockholders could fall within the proposal's reach. *See* S. Rep. No. 95-114. Separately, despite the administration's request, the bill declined to extend liability to foreign subsidiaries of U.S. companies. *See id.*

(d) The House proposed a substantially broader scope of individual liability, particularly as to non-resident foreign nationals

The competing House bill contemplated a broader scope of liability when it was introduced by the Committee on Interstate and Foreign Commerce on February 22, 1977. H.R. 3815, 95th Cong. (1977) (attached hereto as Ex. 14). Its focus, like its Senate counterpart, was on U.S. issuers and U.S. domestic concerns; those entities would be liable for using U.S. mails or wires to bribe foreign officials. *See id.* As to individuals, and similar to the Senate proposal, the House bill extended liability to officers, directors, employees or persons in control of an issuer or domestic concern, irrespective of nationality, who "ordered, authorized, or acquiesced" in a bribe payment. *Id.* at § 30A(c)(1) (issuer); *id.* § 3(c)(1) (domestic concern).

Yet, two other provisions made clear that the House sought to reach a broader cache of non-resident foreign nationals than the Senate bill. First, the bill provided that any "agent" of an issuer or domestic concern who "carried out" a bribe would be liable. *Id.* at § 30A(c)(2) (issuer); *id.* § 3(c)(2) (domestic concern). Those targeted by this proposal would likely be non-resident foreign nationals, for as the congressional hearings had made clear, it was foreign commercial

agents whom U.S. companies were using to facilitate bribery of foreign officials.[3] Second, the bill featured a more expansive definition of "domestic concern," which included foreign-based affiliates of U.S. companies (the provision sought by the Carter administration, but rejected by the Senate bill). *See id.* § 3(f)(2)(A). This contemplated an inordinate foreign footprint: all officers, directors, or employees of foreign affiliates would be subject to the statute, irrespective of nationality.

This extraterritorial expansion generated significant resistance and was ultimately rejected. For instance, a representative of the New York City Bar Association objected to the extent of liability on several grounds, including "considerations of comity" and the "potential foreign relations impact" of criminalizing overseas conduct; practical difficulties with respect to prosecuting such offenses; and fairness and due process concerns arising from the inevitable difficulties and disadvantages the accused would have in obtaining witnesses and evidence from overseas (particularly prescient objections as reflected in the instant case). *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the H. Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 55 (1977) (excerpts attached hereto as Ex. 15). Likewise, the general counsel of the SEC, Harvey L. Pitt, expressed jurisdictional and due process concerns in his testimony. *Id.* at 232.

Even the Secretary of the Treasury, Michael W. Blumenthal, opposed the extension of liability to foreign affiliates of U.S. companies. When asked whether Congress had the "right" to impose either on American businessmen or on other countries "our standard of what is moral or not," the Secretary refocused the legislators' attention:

> *We are talking about our own citizens and acts of our citizens and our own companies. We are not imposing on foreigners.* Under

[3] *See, e.g.*, 1975 House Subcomm. Hearings 99-103 (Ex. 5).

> this proposed legislation we are only seeking to impose standards on subsidiaries and executives of those subsidiaries which are controlled, in this case more than 50 percent controlled, by Americans and American capital and shareholders and who therefore have to conform to our laws and practices.

Id. at 193 (emphasis added).

On September 28, 1977, the House Committee on Interstate and Foreign Commerce reported an amended bill, which addressed some of the extraterritorial concerns. H.R. Rep. No. 95-640, at 1 (1977) (attached hereto as Ex. 16). The Committee's report reflected its focus on two areas: liability of agents and foreign subsidiaries. Agents of U.S. issuers or domestic concerns would remain within the scope of liability in the House bill, but (along with employees of issuers or domestic concerns) would be "distinguished from an officer, director or other person in a policymaking position" at the company. *Id.* at 11. As a result, agents and employees would not be liable until it was shown in a separate proceeding, or in the proceeding against such agent, that the issuer or domestic concern was itself liable. *Id.* The report explained the basis for the special treatment, under the heading "Liability of agents":

> This provision reflects the Committee's concern that in some instances a low level employee or agent of the corporation—perhaps the person who is designated to make the payment—might otherwise be made the scapegoat for the corporation. The essential elements of these prosecutions will presumably take place on foreign soil. Such an agent or employee unlike the corporation possibly would not have the resources, legal or financial, to provide witnesses necessary to his defense.

Id.

No change was made with respect to foreign affiliates. As the Committee's report explained, "the committee intends to reach not only all [domestic concerns], but also foreign subsidiaries of any U.S corporation." *Id.* at 12. The report justified the decision based on the Committee's finding of "extensive use of such entities as a conduit for questionable or improper

foreign payments authorized by their domestic parent." *Id.* Noting the need to avoid a "massive loophole," the report stated that "this extension of U.S. jurisdiction to so-called foreign subsidiaries is necessary if the legislation is to be an effective deterrent to foreign bribery." *Id.*

Eight members of the House Committee, however, were unconvinced. In a statement of "minority views" attached to the report, they echoed Secretary Blumenthal's misgivings about overseas enforcement and expressed concern that the legislation could have the SEC "running all over the world either reincarnating the 'ugly American' or creating SEC American foreign policy." *Id.* at 21.

2. As Enacted, the FCPA Reflects a Measured Approach with Respect to Subjecting Non-Resident Foreign Nationals to FCPA Liability

The original FCPA, as noted, represented a compromise between the Senate and House bills. Section 78dd-2 of the enacted statute prohibited any "domestic concern," or any "officer, director, employee, or agent of such domestic concern," from engaging in specified conduct in furtherance of bribery of a foreign government official. 15 U.S.C. § 78dd-2(a) (1977) (attached hereto as Ex. 17). Section 78dd-1, prohibited U.S. "issuers" and their officers, directors, employees, agents and stockholders from engaging in the same conduct.

In terms of the classes of persons subject to liability under the statute, U.S. resident aliens were added to the Senate's definition of domestic concern, such that coverage included U.S. citizens, nationals and residents. The Senate yielded to the House on the inclusion of "agents" as class or persons subject to the prohibition. But to "provide additional protection for agents and employees," the statute predicated an employee's or agent's liability upon a finding that the issuer or domestic concern had violated the FCPA. H.R. Rep. No. 95-831, at 13 (attached hereto as Ex. 18). In addition, only employees and agents of a domestic concern who were "subject to the jurisdiction of the United States" were exposed to liability. 15 U.S.C. § 78dd-2(b)(3) (1977).

Despite the advocacy from the House and the Carter administration, foreign affiliates of U.S. companies were excluded from the FCPA as enacted. The House's contrary proposal was rejected due to the "inherent jurisdictional, enforcement and diplomatic difficulties" associated with including foreign companies. H.R. Rep. No. 95-831, at 14. The House conference report emphasized the importance of tying liability to a sufficient U.S. interest by citing two examples of conduct relating to foreign companies that *would* be covered by the statute. First, where a U.S. issuer or domestic concern engaged in bribery of foreign officials through "any person or entity" wherever located, the U.S. issuer or domestic concern "would itself be liable under the bill." *Id.* Second, U.S. persons would in all circumstances be covered by the statute. To this end, Congress "recognized that such jurisdictional, enforcement and diplomatic difficulties may not be present in the case of individuals who are U.S. citizens, nationals, or residents." *Id.* As a result,

> Individuals other than those specifically covered by the bill (*e.g.*, officers, directors, employees, agents, or stockholders acting on behalf of an issuer or domestic concern) will be liable when they act in relation to the affairs of any foreign subsidiary of an issuer or domestic concern *if they are citizens, nationals or residents of the United States*.

Id. (emphasis added).

The explanation demonstrates that while Congress was comfortable exposing U.S. citizens, nationals or residents to FCPA liability based on a mere connection to a U.S. company's overseas affiliate, it did not want the FCPA to reach non-resident foreign nationals unless they fit within one of the defined classes. Indeed, such exposure might trigger "jurisdictional, enforcement and diplomatic difficulties [that] may not be present in the case of individuals who are U.S. citizens, nationals, or residents." *Id.* Thus, to overcome those difficulties in the case of non-resident foreign nationals, a U.S. interest stronger than ties to an overseas affiliate would be

required. In other words, Congress made clear that a non-resident foreign national would not be liable under the FCPA unless they were an officer, director, employee or agent of a U.S. issuer or U.S. domestic concern.

3. The 1988 Amendments to the FCPA Maintained Congress's Class Scheme

The FCPA was amended in 1988. Among other things, Congress made two changes with respect to agents and employees: (i) their liability would no longer be predicated on liability of the issuer or domestic concern, *see* H.R. Rep. No. 100-576, at 923-24 (1998) (attached hereto as Ex. 19) and (ii) non-resident foreign national employees and agents of a domestic concern who were not "subject to the jurisdiction of the United States" would be subject to civil FCPA liability, *see* 15 U.S.C. § 78dd-2(g)(2)(C) (1998) (attached hereto as Ex. 20).

The other changes were largely of the technical variety. The statutory structure, including the system of classification, and the classes themselves, remained unchanged.

4. The 1998 Amendments to the FCPA Reaffirmed Congress's Measured Approach with Respect to Subjecting Non-Resident Foreign Nationals to FCPA Liability

In 1998, Congress again amended the FCPA to implement the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). S. Rep. No. 105-277, at 1 (1998) (attached hereto as Ex. 21). The OECD Convention called for signatories to, among other things, "take such measures as may be necessary to establish that it is a criminal offense under its law for *any person* intentionally to" bribe a foreign official to obtain or retain business. See OECD Convention art. 1(1) (emphasis added) (attached hereto as Ex. 22). The manner in which Congress gave effect to the OECD Convention's broad "any person" mandate revealed its ongoing intent to exclude non-resident foreign nationals with insufficient connection to the United States.

First, Congress added to Sections 78dd-1 and 78dd-2 an alternative basis for FCPA liability for U.S. citizens, nationals and residents and U.S. businesses. The amendment subjected such U.S. persons to FCPA liability for prohibited acts overseas irrespective of whether they used an instrumentality of interstate commerce. *See* 15 U.S.C §§ 78dd-1(g), 78dd-2(i).

Second, Congress amended the penalty provisions of Sections 78dd-1 and 78dd-2 to eliminate the disparity in treatment between non-resident foreign nationals "subject to the jurisdiction of the United States" (and U.S. citizens, nationals or residents) who were employees or agents of U.S. issuers or domestic concerns (subject to civil or criminal sanctions) and non-resident foreign nationals who were employees or agents of U.S. issuers or domestic concerns (subject only to civil sanctions). *See* 15 U.S.C § 78dd-2(g)(2).

Third, Congress created a new subsection of the FCPA for domestic conduct of non-resident foreign nationals. *See* 15 U.S.C. § 78dd-3. Section 78dd-3 covered "any person" who acted in furtherance of prohibited conduct "while in the territory of the United States." *See* 15 U.S.C. § 78dd-3(a).

These amendments further demonstrated Congress's intent to tether FCPA liability to sufficient U.S. interests and avoid "inherent jurisdictional, enforcement and diplomatic difficulties" associated with exceeding that scope. In the face of the OECD Convention's requirement to reach "any person," Congress opted instead to maintain the limiting statutory structure of the FCPA, which reached only clearly defined categories of persons and entities as a means of ensuring sufficient connection to U.S. commercial and jurisdictional interests. Thus, the class of U.S. citizens, nationals and residents was preserved, even as more such persons would come within the statute's reach, given the elimination of the restriction pertaining to U.S.

mails and wires. The classes of employees and agents of U.S. issuers and domestic concerns remained intact, even though the penalties changed.

The only area of expansion was in the addition of Section 78dd-3, a new class of persons who would be liable under the statute. While the section targeted non-resident foreign nationals, widely accepted principles of territorial jurisdiction guaranteed a sufficient accompanying U.S. interest. In other words, covering non-resident foreign nationals who engaged in prohibited conduct within the territory of the United States, as opposed to abroad, did not carry the same risk of "jurisdictional, enforcement and diplomatic difficulties."

Taken together, the vast legislative history of the FCPA, as well as the amendments to Sections 78dd-1 and 78dd-2, and the creation of Section § 78dd-3, all confirm that Congress was acutely aware of where it intended non-resident foreign nationals to be subject to liability under the FCPA and where it did not. And, under Sections 78dd-1 and 78dd-2, Congress intended to maintain its purposeful exclusion of non-resident foreign nationals who do not fall into one of the classes of natural persons that may be liable.

B. THE GOVERNMENT MAY NOT CIRCUMVENT CONGRESS'S INTENT BY CHARGING MR. HOSKINS WITH CONSPIRACY TO VIOLATE THE FCPA

In charging Mr. Hoskins with conspiracy to violate the FCPA, the government is improperly attempting to extend the reach of the FCPA beyond the scope of Congress's intent. Count One does not allege that Mr. Hoskins—a non-resident foreign national—was among any of the classes of persons to whom Congress deemed the FCPA would apply. As such, the government is seeking to do precisely what Congress has repeatedly rejected: subject a non-resident foreign national without a demonstrable tie to U.S. interests to criminal FCPA liability. As the government conceded in *Bodmer*, such an end-run around congressional policy is prohibited under *Gebardi* v. *United States* and its progeny, and Count One must therefore be

dismissed. *Bodmer*, 342 F. Supp. 2d 176, 181 & n.6 (granting motion to dismiss FCPA conspiracy charge); *see Castle*, 925 F.2d at 831-32 (affirming dismissal of FCPA conspiracy).

1. The *Gebardi* Principle

In *Gebardi*, the Supreme Court held that where Congress affirmatively chooses to exclude a certain class of individuals from liability under a criminal statute, the government cannot circumvent that intent by charging conspiracy to violate that statute. *See* 287 U.S. 112, 121-23 (1932). Despite the dearth of reported FCPA cases, the *Gebardi* rule has been twice applied in the FCPA context, both times in connection with the dismissal of an FCPA conspiracy charge. In *United States* v. *Castle*, the Fifth Circuit held that foreign officials not themselves subject to the FCPA's criminal penalties could not be held criminally culpable for conspiracy to violate the FCPA. *See* 925 F.2d at 831, 835-36 (5th Cir. 1991). The court observed that because Congress exempted foreign officials from direct liability under the statute, it would be "absurd" to take away that exemption by permitting prosecution for conspiracy under 18 U.S.C. § 371. *Id.* at 833, 836.

Similarly, in *United States* v. *Bodmer* (the case in which the government conceded the *Gebardi* point), Judge Scheindlin noted that where the FCPA did not apply to the defendant, a charge for conspiracy to violate the FCPA must be dismissed pursuant to *Gebardi*. 342 F. Supp. 2d at 181 & n.6 (S.D.N.Y. 2004) ("[W]here Congress passes a substantive criminal statute that excludes a certain class of individuals from liability, the Government cannot evade Congressional intent by charging those individuals with conspiring to violate the same statute."). *Bodmer* involved similar circumstances to those here. The defendant, a non-resident foreign national, was charged with conspiracy based on alleged acts as an "agent of a domestic concern." Though—unlike Mr. Hoskins—Mr. Bodmer was actually a true independent third-party agent

(and did not contest his status as such), he contended that, under the pre-1998 version of the FCPA, he could not be criminally liable as an agent of a domestic concern and, thus, under *Gebardi*, he could not be subject to prosecution for conspiracy. After finding that it was unclear under the earlier version of the statute whether the FCPA's criminal penalty applied to a non-resident foreign national alleged to have acted as an agent of a domestic concern, Judge Scheindlin held that the *Gebardi* principal was applicable, and dismissed the conspiracy count. *See Bodmer*, 342 F. Supp. 2d at 181 & n.6.

The government—including lawyers from the Fraud Section of the Department of Justice—filed a brief in *Bodmer* in which it conceded that under the *Gebardi* principle Mr. Bodmer could not be held liable for conspiracy if he was not covered by the FCPA. *See* Gov't Mem. of Law in Opp. to Def's Pretrial Mot. to Dismiss the Indictment, *United States* v. *Bodmer*, No. 03-947 at 26-27, 30 (S.D.N.Y. filed Mar. 31, 2004) (attached hereto as Ex. 23). In that case, the government advanced the same exact argument Mr. Hoskins now advances: "*while it is clear that Congress did not intend for the FCPA to apply to foreign nationals (who are not agents of domestic concerns or issuers)* who bribe foreign officials, Congress did intend to cover foreign agents in circumstances where the agent's principal, whether a domestic concern or issuer, had engaged in prohibited bribery conduct." *Id.* at 26-27 (emphasis added).

Although not in the FCPA context, the Second Circuit has likewise embraced the *Gebardi* principle, recognizing that where Congress has made a clear indication of its policy through legislation, the courts cannot permit the government to circumvent Congress's intent by charging the offense in an inchoate form. In *United States* v. *Amen*, the Second Circuit considered whether a person could be guilty of aiding and abetting a violation of the continuing criminal enterprise statute when the person could not himself violate the statute because he was

not the head of an enterprise. 831 F.2d at 373, 381 (2d Cir. 1987). Noting that the statute was carefully crafted to target ringleaders, not underlings, the Second Circuit, relying on *Gebardi*, stated that "[w]hen Congress assigns guilt to only one type of participant in a transaction, it intends to leave the other unpunished for the offense." *Id.* The court then focused on whether Congress's design was to target certain individuals while excluding others. Thus, the court recognized that it would be contrary to Congress's intent to hold defendants liable for conspiracy or aiding-and-abetting the violation of a statute that necessarily excluded them from direct culpability.

2. Count One Defies Congressional Intent

Count One of the Third Superseding Indictment, the conspiracy charge against Mr. Hoskins, should be dismissed under the reasoning of *Gebardi*, *Castle*, *Bodmer*, and *Amen*. Under Section 78dd-2, Congress intended to exempt non-resident foreign nationals who fall outside of certain designated classes, and Count One—deliberately—does not allege that Mr. Hoskins falls into any of those classes.[4]

As mentioned above, there can be no doubt that the FCPA features the type of classification scheme to which the *Gebardi* principle applies. At least two courts have so found. *See Castle*, 925 F.2d at 835-36; *Bodmer*, 342 F. Supp. 2d at 181 & n.6. The government previously conceded the point. And, as the government has memorialized in the very first paragraph of this Indictment, the FCPA "was enacted by Congress for the *purpose* of, among other things, making it unlawful *for certain classes of persons* and entities" to engage in prohibited conduct. (Third Superseding Indictment ¶ 1 (emphasis added).)

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[4] Likewise, Mr. Hoskins cannot be prosecuted for conspiracy to violate Section 78dd-3 because he does not fall within Section 78dd-3's class of non-resident foreign nationals who engage in prohibited conduct "while in the territory of the United States." The fact that Mr. Hoskins never entered the territory of the United States during the time he worked for Alstom is undisputed. *See* Affidavit of Lawrence Hoskins ¶ 9, ECF No. 149-3.

It is equally clear that Congress employed the statutory classification scheme to distinguish those persons and entities covered by the FCPA from those persons and entities excluded from coverage. Indeed, the FCPA drafters were "well aware of, and actively considered, the 'inherent jurisdictional, enforcement, and diplomatic difficulties' raised by the application of the bill to non-citizens of the United States." *Castle*, 925 F.2d at 835 (quoting H.R. Rep. No. 831, at 14)).

This is demonstrated in abundance by the FCPA's legislative history discussed above. For example, the Senate initially excluded non-resident foreign nationals from liability altogether; the only natural persons subject to the "narrowly defined" and "limited" scope of one of its initial bills were U.S. citizens and nationals. S. 3664, 94th Cong. § 3(c)(1) (1976). The Carter administration's requests for broader coverage of individuals and inclusion of foreign subsidiaries of U.S. companies were also addressed through the prism of U.S. interest: non-resident foreign nationals could be liable only if they were an officer, director, employee or stockholder of a U.S. issuer or U.S. domestic concern; foreign companies with mere U.S. affiliations (as well as the multitudes of their own officers, directors, employees and stockholders) were excluded. *See* S. Rep. No. 95-114. While Congress was willing to expose U.S. citizens, nationals and residents to FCPA liability based on a mere connection to a U.S. company's overseas affiliate, it refused to expose non-resident foreign nationals to liability without a stronger nexus to U.S. business interests. *See* H.R. Rep. No. 95-831, at 14.

The care with which Congress designated the classes of persons and entities for FCPA liability reflects its profound intent to exclude those who were left undesignated. Agents, as one of the designated FCPA classes, are but one example of Congress's deep consideration. While agents were, on the one hand, the "root of this problem" that Congress was addressing, *see* 122

Cong. Rec. 30,421 (1976), they were also referred to in debates, hearings, and reports as, among other things, "influence peddlers," S. Rep. No. 94-1031, at 9; their corporate stature was deemed to be "low level" and beneath a "policymaking position," H.R. Rep. No. 95-640, at 11; and the risk that they would be made "scapegoats" by U.S. companies, *id.*, was considered stark enough for Congress to give them "additional protection" under the FCPA, *see* H.R. Rep. No. 95-831, at 13 (predicating agent's liability on finding of corporate parent's liability). The extent of deliberation over agents as a class of persons subject to FCPA liability reflects Congress's commitment to the statutory scheme and its policy choice to restrict liability to persons among those classes.

Against this backdrop of purposeful congressional deliberation, the incongruity of Count One is readily apparent. Congress simply would not have spent the time and effort on delineating the classes for FCPA liability, if it intended for persons from outside of those classes to have exposure for the same conduct on inchoate theories of secondary liability. Congress would not have explained why only U.S. citizens, nationals or residents and "those specifically covered by the bill" could face FCPA liability for prohibited conduct in relation to a U.S. company's foreign affiliate, if it meant for non-resident foreign nationals *not* "specifically covered by the bill" to face liability for the same conduct under a theory of joint participation. *See id.* at 14. The drafters' commitment to excluding foreign affiliated companies from the statute's reach would be for naught if the employees and agents of those companies could so easily face liability as conspirators or aiders and abettors. In the most basic terms, Congress would not have crafted the classes for FCPA liability if it did not intend for them to have real meaning in determining who could and who could not be prosecuted under the FCPA for overseas bribery.

Count One does not allege that Mr. Hoskins, a non-resident foreign national who did not act within the territory of the United States, is among any one of the FCPA's enumerated classes of persons with threshold ties to a U.S. issuer or domestic concern, *i.e.*, by being a director, officer, employee, agent or stockholder of a U.S. issuer or domestic concern. Congress made a policy choice to limit the FCPA's reach by excluding from the statute's scope such non-resident foreign nationals. The government should not be permitted to circumvent Congress's policy choice by prosecuting Mr. Hoskins for conspiracy. The conspiracy charge should therefore be dismissed. *See Gebardi*, 287 U.S. at 121-23; *Castle*, 925 F.2d at 835-36; *Amen*, 831 F.2d at 381; *Bodmer*, 342 F. Supp. 2d at 181 & n.6.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Memorandum Law in Support of Lawrence Hoskins's Motion to Dismiss Count 1 of the Third Superseding Indictment, Mr. Hoskins's motion to compel should be granted.

Dated: New York, New York
June 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2015, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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