UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	CRIMINAL NO. 3:12CR238 (JBA)
v.	
LAWRENCE HOSKINS	May 6, 2015

GOVERNMENT'S MOTION *IN LIMINE*
TO PRECLUDE THE DEFENDANT FROM ARGUING THAT AGENCY
IS SOLE BASIS FOR CONVICTION ON SUBSTANTIVE FCPA VIOLATIONS

The Government moves the Court *in limine* to preclude the defendant from arguing at trial that, in order to find the defendant guilty of Counts 2 through 7 (the substantive Foreign Corrupt Practices Act violations), the jury necessarily must find that the defendant was acting as an "agent" of Alstom Power, Inc. In addition to direct liability,[1] the Indictment also charges the defendant with aiding and abetting, causing, and conspiring to commit such violations, and the Court has denied the defendant's motion to dismiss these charges. Thus, the jury will properly be instructed regarding accomplice liability and *Pinkerton* liability, and the defendant should not be permitted to confuse the jury, or to argue nullification, by contradicting the charges and Court's instructions in this case.

I. Background

On July 30, 2013, a grand jury sitting in New Haven, Connecticut returned a twelve-count Second Superseding Indictment against the defendant relating to his participation in a scheme to pay bribes to foreign officials in Indonesia to secure a power project (the "Tarahan Project") on behalf of Connecticut-based Alstom Power, Inc. and its consortium partners.

[1] To avoid confusion, the Government will use the term "direct" liability as opposed to liability as a "principal," because "principal" also has meaning in the agency context.

The Indictment charges the defendant with conspiring to violate the Foreign Corrupt Practices Act ("FCPA"), in violation of 18 U.S.C. § 371 (Count 1), substantive violations of the FCPA, in violation of 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2 (Counts 2-7), conspiring to launder money, in violation of 18 U.S.C. § 1956(h) (Count 8), and substantive money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A) and 18 U.S.C. § 2 (Counts 9-12).[2] Notably, the FCPA charges include reference to causing and aiding and abetting the violations under 18 U.S.C. § 2, and the defendant was also charged with conspiracy to violate the FCPA.

On July 31, 2014, the defendant filed a motion to dismiss the Indictment on several grounds. Of particular relevance here, the defendant moved to dismiss the substantive FCPA counts, arguing that he could not have acted as an "agent" of Alstom Power, Inc. (a subsidiary of Alstom) because he was an employee of the parent company. *See* Doc. 149 at 28-30.[3] He then argued that the FCPA does not apply extraterritorially and that, based on the foregoing arguments, he could not be charged with aiding and abetting, causing, or conspiring to commit FCPA violations because he is part of an excepted class of persons intended to be immune from prosecution under the FCPA. *See generally*, *id.* at 30-38.

On December 29, 2014, the Court denied the defendant's motion to dismiss in its entirety. *See* Doc. 190. In so doing, the Court held that the allegations in the Indictment were not an extraterritorial application of the FCPA because they relied on "domestic wire transfers." *Id.* at

[2] A grand jury sitting in Hartford, Connecticut returned a Third Superseding Indictment against the defendant on April 15, 2015, but the charges remain the same.

[3] Despite the defendant's assertion in his affidavit submitted in support of the motion to dismiss that he was an employee of the parent company, (Doc. 149-3 ¶ 4), the defendant was in fact an employee of a subsidiary of Alstom (Alstom UK Ltd.) and was stationed at another subsidiary (Alstom Resources Management SA). The Government—which obviously did not have the benefit of the defendant's own experience as an Alstom employee—acknowledges that the Second Superseding Indictment had incorrectly reported the defendant to be an executive of Alstom S.A. *See* Second Superseding Indictment at ¶¶ 2, 7. However, the Government has since obtained the defendant's personnel file (and produced it to the defendant), and the grand jury amended the description of the defendant's employment accordingly in the Third Superseding Indictment.

19. Therefore, "[t]hat Mr. Hoskins may have never entered the United States in connection with his Alstom employment (Hoskins Aff. ¶ 9) is not dispositive. . . ." *Id.* (citing *Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 666 (2d Cir. 1983); *United States v. Gilboe*, 684 F.2d 235, 238 (2d Cir. 1982)).

On April 2, 2015, the defendant filed a motion to compel discovery by the Government. The defendant claimed that he needed additional evidence relating to whether he acted as an "agent" of Alstom Power, Inc. under the FCPA. In his motion, the defendant made the following incorrect assertion: "The sole basis for applying the Foreign Corrupt Practices Act to this case is the allegation that over a decade ago, when Mr. Hoskins worked at Alstom's headquarters in Paris, he served as an agent of a domestic concern, Alstom's subsidiary in Windsor, Connecticut. . . . For, if he was not an agent of the Windsor subsidiary, at a minimum, the FCPA charges necessarily fail." Doc. 204 at 1.[4]

II. The Defendant Should Be Precluded from Arguing Incorrect Legal Theories to the Jury

It is well established that "[d]efense counsel may not argue incorrect or inapplicable theories of law to a jury. 'Counsel is confined to principles that will later be incorporated and charged to the jury.'" *United States v. Valdes-Guerra*, 758 F.2d 1411, 1416 (11th Cir. 1985) (quoting *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir.1983)) (in currency structuring case, affirming district court's ruling precluding defendant from arguing that the government must prove an illegal act other than the currency transfers themselves, a theory the court had already rejected).

[4] In his reply brief in support of his Motion to Compel, the defendant takes this one step further, arguing that "the purely legal question of whether Mr. Hoskins can be prosecuted for conspiring to violate the FCPA" if he is not an agent "is ripe for adjudication," (Doc. 225 at 13 n.3), despite the fact that the parties fully briefed this very issue in the defendant's motion to dismiss, the Government's opposition, and the defendant's reply, (Doc. 149 at 34-38, Doc. 161 at 37-47, Doc. 174 at 12-13).

Here, the defendant is appropriately charged in the Third Superseding Indictment with directly violating the FCPA as an agent of a domestic concern, as well as aiding and abetting, causing, and conspiring with a domestic concern to commit FCPA violations. The Government is therefore entitled to have the jury instructed on all four theories of liability—direct, aiding and abetting, causing, and *Pinkerton*. *See United States v. Ferguson*, 676 F.3d 260, 279-80 (2d Cir. 2011) (permitting instruction on theories of direct, accessorial, and *Pinkerton* liability). Indeed, the Second Circuit has held that the jury need not even unanimously agree on whether a defendant is guilty based on direct liability or aiding and abetting. *See id.* at 279. Thus even were the jury to find that the defendant was not an "agent" of a domestic concern, they may still convict the defendant on one or more of the remaining accomplice theories. *See, e.g., United States v. Tannenbaum*, 934 F.2d 8, 14 (2d Cir. 1991) ("One purpose of 18 U.S.C. § 2 is to enlarge the scope of criminal liability under existing substantive criminal laws so that a person who operates from behind the scenes may be convicted even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal by Congress." (citation omitted)).

The defendant has already tried—and failed—to have these accomplice theories of liability dismissed on the ground that (1) the FCPA does not apply extraterritorially, and (2) the defendant is part of an excepted class of persons intended to be immune from prosecution under the FCPA. Doc. 149-1 at 36-38. In short, as the Government argued in its response to the defendant's motion to dismiss, Congress made clear that it did not intend to exempt foreign executives like the defendant from criminal liability, and the defendant is not a class of persons whose participation was necessary for the commission of the crime, akin to the Mann Act victim in *Gebardi v. United States*, 287 U.S. 112 (1932). *See* Doc. 161 at 43-47. Indeed, under the defendant's theory, he could be liable for an FCPA violation if employees of Alstom Power, Inc. instructed him to take

action in furtherance of the corrupt scheme (i.e., direct liability as an agent), but he could not be liable if he instructed and caused employees of Alstom Power, Inc. to take the very same corrupt actions (i.e., accomplice liability). The defendant's theory of the law, essentially immunizing from prosecution the foreign ring-leaders of a U.S. bribery scheme, has no logical or legal support. *See id.* Most importantly, the defendant's motion to dismiss was denied. *See* Doc. 190.

Despite the fact that the defendant is well aware of the aiding and abetting, causing, and conspiracy theories of FCPA liability in the Indictment—indeed, he moved to dismiss them—and despite the fact that the Court denied his motion to dismiss, the defendant persists in claiming that "if he was not an agent of the Windsor subsidiary, at a minimum, the FCPA charges necessarily fail." Doc. 204 at 1; *see also* Doc. 225 at 13 n.3 ("[T]he government wrongly assumes that Mr. Hoskins can be found guilty of conspiring to violate the FCPA or aiding and abetting FCPA violations even if a jury found that Mr. Hoskins was not an agent of a domestic concern."). Indeed, the defendant even accuses the Government of ignoring *Gebardi* and altering theories in the Third Superseding Indictment to make, in his words, an "end-run" around Congress's intent. *See* Doc. 225 at 13, n.3. Yet this theory—that the defendant can be held accountable as an accomplice to or co-conspirator with a domestic concern—was already contained in the Second Superseding Indictment. First, accomplice liability was charged as a matter of statute in the Second Superseding Indictment and, in any event, was certainly available as a theory of liability as it is in every case. *See, e.g.*, *United States v. Mucciante*, 21 F.3d 1228, 1234 (2d Cir. 1994) ("[T]he inclusion of an aiding and abetting charge to the jury will rarely, if ever, constructively amend an indictment because an aiding and abetting charge is arguably implicit in every indictment." (citation omitted)). Similarly, the alteration to Count One, which came along with the removal of Mr. Pomponi (himself a domestic concern) from the charging language, did nothing to alter the

elements of § 371 that the Government is obliged to prove, none of which include the defendant's status as an "agent." *See United States v. Snype*, 441 F.3d 119, 142 (2d Cir. 2006) ("The elements of a § 371 conspiracy are clearly established: (1) an agreement between two or more persons to commit a specified federal offense, (2) the defendant's knowing and willful joinder in that common agreement, and (3) some conspirator's commission of an overt act in furtherance of the agreement.").

Most importantly, the defendant cannot now claim that the Third Superseding Indictment advanced new legal theories when nine months ago he moved to dismiss Count 1 (conspiracy) as well as the aiding and abetting aspect of Counts 2-7 (substantive FCPA charges) on the very same grounds, and assuming the very same charging theories, that he suggests are new. *See* Doc. 149-1 at 37 ("Allowing the conspiracy or aiding-and-abetting charges to proceed, where the substantive FCPA charges fail, would contravene Congress's intended exemption."). Far from ignoring *Gebardi*, the Government fully explained its inapplicability—in particular that the defendant is not a necessary party to a bribe transaction and thus not an excepted class of persons—in its opposition to the defendant's motion to dismiss. *See* Doc. 161 at 37-47. And far from being "ripe for adjudication," as the defendant claims, the defendant's *Gebardi* claim has been proffered and briefed, and the Court has denied dismissal. *See* Doc. 149 at 34-38, Doc. 161 at 37-47, Doc. 174 at 12-13. Any new motion to dismiss would be nothing more than an attempt to re-brief and re-litigate the issue. *See United States v. Carr*, 557 F.3d 93, 102 (2d Cir. 2009) (Under the law-of-the-case doctrine, "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case" (internal quotation marks omitted)).[5]

[5] This is not a "compelling circumstance" where reconsideration is justified by "(1) an intervening change in controlling law, (2) new evidence, or (3) the need to correct a clear error of law or to prevent manifest injustice." *Carr*, 557 F.3d at 102. (citation omitted).

Therefore, the defendant should be precluded from arguing to the jury that the only basis for convicting the defendant of the substantive FCPA violations is if the jury finds that the defendant was an agent of Alstom Power, Inc. Such an argument, if made to the jury, has the potential to seriously undermine the Court's instructions and confuse important issues of law. *See, e.g.*, *United States v. Sawyer*, 443 F.2d 712, 714 (D.C. Cir. 1971) ("It is often suggested that permitting counsel to argue questions of law tends to confuse the jury. If counsel's view of the applicable law differs from that of the court, then of course there is great danger of confusion. In that case the jury should hear a single statement of the law, from the court and not from counsel." (citations omitted)); *United States v. Smith*, 235 F. App'x 971, 973 (4th Cir. 2007) ("Because it is evident Smith wished to argue to the jury that the Government's legal definition of 'custody' was incorrect and that this legal argument would only have confused the jury, we conclude the district court did not abuse its discretion in limiting Smith in his closing argument."); *United States v. Scales*, 599 F.2d 78, 81 (5th Cir. 1979) ("The district court did not err in refusing to permit defense counsel to argue to the jury the inapplicable theories of law that were embraced in the refused instructions, discussed above.").

In sum, although the Government gathered evidence throughout its investigation related to the defendant's role as an agent of Alstom Power, Inc. in connection with the Tarahan Project, properly charged the defendant under this theory, and intends to prove it at trial, the Government is within its right to advance alternative theories of liability, both in the form of a conspiracy charge under 18 U.S.C. § 371 and accessorial liability for the substantive charges under 18 U.S.C. § 2. The defendant has tried and failed to have those alternative theories dismissed. The Government respectfully requests that the defendant be precluded not just from re-litigating this point before the Court, but also from arguing in contradiction before the jury.

III. Conclusion

Wherefore, based on the foregoing, the United States respectfully submits that the Court should preclude the defendant from arguing to the jury that they may only convict him of the substantive FCPA violations through direct liability as an agent of Alstom Power Inc. and cannot convict him for aiding and abetting, causing, or conspiring to commit (through *Pinkerton* liability) FCPA violations.

Respectfully submitted,

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CERTIFICATION OF SERVICE

This is to certify that on May 6, 2015, a copy of the foregoing Motion 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 on 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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