UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*, -v- ELEK STRAUB, ANDRÁS BALOGH, and TAMÁS MORVAI, *Defendants*.	No. 11 Civ. 9645 (RJS) **ORAL ARGUMENT: January 17, 2013** ECF Case Electronically Filed

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

In its Opposition Brief ("Opposition" or "Opp."), the SEC does not contest that, for jurisdictional purposes, none of the alleged conduct of the three defendants occurred in the United States. Instead, as an apparent afterthought because it is not alleged in the complaint, the SEC asserts vaguely that there were "foreseeable consequences" in the United States because Magyar Telekom filed annual and quarterly reports with the SEC that did not identify the alleged bribery.[1] In so doing, the SEC ignores the fact that the pertinent annual filing covering 2005 (*see* Complaint ¶¶ 62-70; Opp. at 7) *was not filed* by the Company that year, and that the Company instead disclosed that its certification of financials would be tabled while the Company conducted its internal investigation and cooperated with the DoJ and SEC. Disclosures in 2006 also accurately made this clear.

To somehow persuade this Court that it is important, nevertheless, to litigate this foreign matter in the Southern District of New York, the SEC spends much of its Opposition twisting the facts and presenting the complaint's bribery allegations as events that actually occurred. To set the factual record straight, the defendants feel the need to respond briefly. Specifically, the SEC's allegations of bribery are false, and there is no evidence of bribery. For example, the Opposition repeatedly refers to the so-called "secret" Protocol of Cooperation as the "smoking gun," but it is not. The Protocol was not a secret document; it was well known to several individuals at Magyar Telekom other than the defendants, as well as to "senior executives within

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[1] At the initial hearing on October 12, 2012, SEC counsel informed the Court that the SEC's contention on jurisdiction was "that the defendants' conduct *did injure shareholders* in the United States." 10/12/12 Tr. at 6 (emphasis added). There is no allegation of such injury in the complaint, and the SEC asserts no injury in its Opposition. As argued in the defendants' opening brief and below, a tangible injury in the United States is a necessary element of jurisdiction but is lacking here.

Deutsche Telekom" and the Macedonian government. (Complaint ¶ 23). Nor did the Protocol have anything to do with bribery. It was a memorandum of understanding between the two shareholders of the Macedonian Telecom—the Macedonian government and Magyar Telekom—reflecting negotiated business and political compromises and referencing (i) various legitimate payments (*e.g.*, frequency and subscription fees, and large shareholder dividends), (ii) financial investments, (iii) development of the nascent domestic telecommunications market, (iv) passage of Macedonian telecommunications laws "in accordance with the law and the European practice[,]" and (v) labor issues—precisely what one would reasonably expect government and private corporate partners and shareholders to negotiate and resolve in written fashion.[2] It says nothing about "officials' " receipt of "undisclosed bribe payments from Magyar Telekom." (*See id.*¶ 22; Opp. at 4). Moreover, there were no sham contracts in Macedonia as the SEC asserts, and there is no evidence that the contracts were phony. Rather, these contracts were legitimate and provided necessary lobbying and consultancy services as is well-documented and expressly stated on their face. Expenses relating to these contracts were fully included in the Company's financial records, and there is no allegation in the complaint that any United States investor was misled as to revenues, expenses, or profits by Magyar Telekom's annual or quarterly filings, was injured in any other fashion (*e.g.*, through manipulation of stock price), or that the defendants harbored or demonstrated any design or intent to injure anyone in the United States, including in the Southern District of New York.

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[2] As alleged, Magyar Telekom holds 51 percent of the Macedonian Telecom, Maktel, with the government holding a minority interest. *See id.* ¶ 16. Unsigned copies of the Protocol, executed between representatives of the Government of Macedonia (both the ruling and minority parties, each of which had governing obligations at the time) and Magyar Telekom (then known as "Matáv"), are attached to this Reply. *See* Exh. 1.

With regard to the precise legal issues now before the Court, the Opposition confirms the wholly foreign nature and nexus of this dispute, which bars United States jurisdiction over the defendants. The jurisdictional issue has now been distilled to whether alleged *omissions by Hungarian nationals to auditors in Hungary*, in connection with *financials of a Hungarian corporation* that were to be *reflected in an annual report that was not prepared, finalized, or filed in the United States*, constitute sufficient minimum contacts to give rise to specific jurisdiction over *foreign defendants* for alleged bribery and related misconduct *that occurred wholly outside the United States*. The SEC concedes that its position "may be breaking new ground" and is unsupported by direct precedent supporting jurisdiction. (10/12/12 Tr. at 8-10).

Apart from a lack of personal jurisdiction, this action—involving claims for punitive sanctions—is barred by the applicable five-year statute of limitations, 28 U.S.C. § 2462. The Opposition's purported "plain language" argument to the contrary ignores two critical clauses in § 2462 that expressly link its operation to subsequent legislative acts and the ability to properly serve process abroad. Taken as a whole, this statutory language requires a reading of § 2462 along with application of the Hague Service Convention, adopted subsequently by the United States and Hungary, which was used by the SEC to easily serve the defendants. There is no support for the SEC's myopic view, which selectively focuses on only a portion of § 2462 and ignores its historical context, that the five-year statute of limitations is tolled *forever* simply because the defendants are foreign nationals. Unsurprisingly, no authority cited by the SEC suggests Congress ever intended such an invidious result.

Finally, the SEC's arguments that the bribery and related counts are properly pled are unpersuasive and should independently lead to dismissal. The Opposition fails to confront the newly-demanding standards of dismissal ushered in by *Bell Atlantic Corp. v. Twombly*, 550 U.S.

544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and instead relies on earlier cases applying more lax standards. (*See* Opp. at 12). Further, the Opposition does not persuasively answer the defendants' arguments that the complaint fails to plead facts showing that the defendants (i) have themselves used a means or instrumentality of interstate commerce, (ii) bribed a particular Macedonian individual who was in fact a "foreign official" under the FCPA, or (iii) individually lied to auditors during the relevant time period and with the requisite intent.

For these reasons, the defendants' motion to dismiss should be granted with prejudice.

I. THE COURT LACKS PERSONAL JURISDICTION OVER THE DEFENDANTS.

A. The Defendants' Alleged Misconduct Was Not Expressly Aimed At The United States And Is Not Alleged To Have Proximately Caused Any Injury In The United States.

A court's lawful exercise of personal jurisdiction demands a finding that the defendant "purposefully directed his activities at residents of the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (internal quotation marks and citation omitted). This purposeful availment requirement ensures that a defendant will not be forced into court as a result of " 'some single or occasional acts' related to the forum" when " 'their nature and quality and the circumstances of their commission' create only an 'attenuated' affiliation with the forum." *Id.* at 476 & n.18 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). Jurisdiction is proper only when "the contacts *proximately result* from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id.* at 475 (first emphasis added) (citation omitted); *see also Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (the injury must be "*proximately caused* by [the defendant's] contacts" to give rise to jurisdiction (emphasis added)).

By anchoring its jurisdiction over the defendants merely to a "foreseeable consequences in the United States" test (Opp. at 1), the SEC contravenes the Supreme Court's admonition that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the

Due Process Clause," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). The Constitution instead commands a court to determine that an individual " 'purposefully directed' his activities at residents of the forum" prior to exercising jurisdiction. *Rudzewicz*, 471 U.S. at 472 (citation omitted).

The SEC cannot escape that the complaint makes no allegation that the defendants "expressly aimed" any of their alleged misconduct at the United States, rendering any conceivable causation here too attenuated to comport with constitutional due process principles. The complaint's pleading deficiency precludes the exercise of personal jurisdiction. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68 (2d Cir. 2012) (jurisdictional inquiry is "whether the plaintiffs can show that *the facts alleged in the complaint* in support of their claims are sufficient to establish personal jurisdiction" (emphasis added)); *Corning Inc. v. Shin Etsu Quartz Prods. Co.*, 242 F.3d 364, 2000 WL 1811067, at *3 (2d Cir. 2000) (unpublished table decision) ("To prevail on the effects test, [plaintiff] must, *on its pleadings*, make out a legally sufficient prima facie case . . . ." (emphasis added)).

Completely ignored in the Opposition, courts apply an even *heightened* causation standard when evaluating the constitutionality of asserting jurisdiction under an "effects" theory like the one advocated by the SEC. *See, e.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972) (stating that the effects test "must be applied with caution, particularly in an international context"). The Supreme Court has sanctioned jurisdiction based on the effects test only where defendants "expressly aimed" their "intentional" actions at the forum and consequently "knew that the brunt of [the] injury would be felt" in the forum. *Calder v. Jones*, 465 U.S. 783, 789–90 (1984). There is no claim remotely like this in the complaint. Arguments after the fact—that is, not in the complaint—that there were "foreseeable

consequences" in the United States are unavailing because "foreseeability is not the standard for recognizing personal jurisdiction." *In re Terrorist Attacks on Sept. 11, 2011*, 538 F.3d 71, 95 (2d Cir. 2008). Due process authorizes jurisdiction only where the plaintiff has shown something more than a defendant's mere knowledge that his acts might cause injury in the forum. *Id.* The Opposition does not grapple with any of these settled principles.

B. The SEC Has Not Alleged A Forum-Based Injury.

A valid claim of specific jurisdiction[3] flows from a direct and non-attenuated connection between a defendant's forum-based conduct and the alleged particular harm that results proximately from that conduct. *Rudzewicz*, 471 U.S. at 472. Here, neither forum-based conduct nor a particular injury is alleged in the complaint. The SEC does not dispute that, for an assertion of jurisdiction to comport with due process, a defendant must have " 'purposefully directed' his activities at residents of the forum" *and* the litigation must result proximately from "alleged injuries that 'arise out of or relate to' those activities." *Id.* at 472–73 (citation omitted). Jurisdiction can be exercised only if there is a specific and plausible allegation of harm in the forum. *See Williams v. Advertising Sex LLC*, Civil Action No. 1:05CV51, 2007 WL 2570182, at *4 (N.D.W. Va. Aug. 31, 2007) ("[A]n individual will only be subject to personal jurisdiction . . . if there is manifest evidence that he both intended to enter a state *and actually did so*." (emphasis added) (citation omitted)).[4] An application of an "effects" test, as the SEC seeks here, can support jurisdiction only where the forum was "the focal point both of the [misconduct] *and* of

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[3] The SEC concedes that its case is premised on an assertion of specific, not general, jurisdiction. Opp. at 14.

[4] General allegations of some undefined harm are insufficient. A plaintiff must instead "sufficiently allege facts showing the knowing nature of [defendant's] actions to support its *prima facie* case of personal jurisdiction." *Corning*, 2000 WL 1811067, at *3.

the harm suffered[.]" *See Calder*, 465 U.S. at 789 (emphasis added); *Leasco*, 468 F.2d at 1341 (requiring the harm to be sufficiently palpable that the defendant would "know, or have good reason to know, that his conduct [would] have effects in the [forum]").

Essentially, the SEC's jurisdictional argument is based on the fact that Magyar Telekom was a United States registrant, and that the defendants performed certain executive functions in that regard.[5] However, the complaint does not allege that the defendants contributed to a single false statement that was filed with the SEC, injured anyone in the United States, or intended to do so. The complaint instead mentions alleged omissions in connection with preparation of Magyar Telekom's 2005 financial statements, which were not certified by the auditors or the subject of any filing in the United States until 2007. This was long after the defendants had left Magyar Telekom, and well after the Company's postponement of the 2005 filing and accurate disclosure of its internal investigation and cooperation with the DoJ and SEC. (*See, e.g.*, Complaint ¶¶ 62–64, 68–69; Opp. Exh. 1 at 15-16, 23-24).[6] No causal nexus is alleged between the defendants' alleged misconduct and any domestic injury.

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[5] The SEC attaches many filings to its Opposition, which are either not referenced in the complaint, do not cover the period (2005-2006) during which the alleged bribes occurred, or were not filed by Magyar Telekom during the pertinent time period. *See* Opp. at 9 n.3 ("The allegations here regarding Magyar's annual and quarterly SEC filings go beyond the four corners of the SEC's complaint."). By attaching these filings, the SEC attempts to use improperly the judicial-notice doctrine developed in *Kramer v. Time Warner Inc.*, 937 F.2d 767 (2d Cir. 1991). *See* Opp. at 9–11. *Kramer* does not authorize a party to rewrite its complaint with new attachments. *Kramer* merely crafted a narrow exception to the rule that a court may consult only the complaint when performing its personal jurisdiction analysis. *See* 937 F.2d at 774. Here, the SEC cannot show that the new filings "are the very documents that are alleged to contain the various misrepresentations or omissions" alleged in the complaint. *See id.* (Nor do these new filings cure jurisdictional shortcomings with regard to causation and injury, which are also fatal to the SEC's position.)

[6] The complaint's citation to Deutsche Telekom's financials is also beside the jurisdictional point. *See, e.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("[J]urisdiction over an employee does not automatically follow from jurisdiction over the

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When applying the effects test, courts require a sufficient degree of harm in the United States to support the exercise of personal jurisdiction. "Not every securities law violation involving shares of a United States corporation will have the requisite effect within the United States." *SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990); *see also Calder*, 465 U.S. at 789–90 (authorizing jurisdiction where defendants' misconduct had the potential for "devastating impact" and "the brunt of that injury would be felt [in the forum]"). Courts have been cautious when evaluating the constitutionality of asserting jurisdiction based on the effects test, mandating that a plaintiff show significant actual injury in the United States. *Compare SEC v. Euro Sec. Fund, Coim SA,* No. 98 CIV. 7347, 1999 WL 76801, at *3 (S.D.N.Y. Feb. 17, 1999) (asserting jurisdiction where insider trades were alleged to have exceeded $6 million in a one-month period), *with SEC v. Alexander*, 160 F. Supp. 2d 642, 657 (S.D.N.Y. 2001) (finding no jurisdiction where insider trades of roughly $20,250 were at issue). Far from alleging an adequate magnitude of harm caused by the defendants' alleged misconduct, the complaint alleges no injury to United States investors or markets, no claim of securities fraud, no claim of market manipulation or insider trading, and no claim that the revenues, expenses, or profits of the Company were misstated, smoothed, or deferred. This deficiency is fatal to the SEC's claims. *See, e.g.*, *Rudzewicz*, 471 U.S. at 472 (authorizing jurisdiction only where litigation results from "injuries that arise out of or relate to . . . activities" directed at the forum.

C. The Authorities Relied On By The SEC Are Inapposite.

The SEC has not cited a single case in which a United States court exercised jurisdiction over individual foreign defendants where the core of the claims involved foreign bribery of

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corporation which employs him. . . . Each defendant's contacts with the forum State must be assessed individually." (citations omitted)).

foreign government officials, the conduct was committed completely outside the United States and aimed at a foreign country, and no harm occurred in the United States. Its citation to "a long line of precedent" purportedly justifying jurisdiction is unavailing. (*See* Opp. at 16–17). Instead, in each case cited by the SEC, the defendants' actions—involving securities fraud and insider trading—had a direct effect in the United States and allegedly were designed to, intended to, and proximately did cause demonstrable and quantifiable injury to United States investors.[7] These cases are miles from the circumstances alleged in this case, and thus are easily distinguishable and of no assistance to the SEC's position. They do confirm, however, the SEC's statement that its attempt at jurisdiction here, where no such effect, design, intent, or cause is alleged in the complaint, "may be breaking new ground." (10/12/12 Tr. at 10).

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[7] *See SEC v. Stanard*, No. 06-cv-7736 (GEL) (S.D.N.Y. May 16, 2007), Opp. Exh. 2 at 3 ("fraud directed to deceiving United States shareholders" where complaint alleged defendant "specifically intended" that "sham transaction . . . would result in false statements by [the company] in its publicly-filed financial statements in the United States"); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 449, 456–57 (S.D.N.Y. 2005) (false statements caused harm to United States investors who purchased affected securities); *Landry v. Price Waterhouse Chartered Accountants*, 715 F. Supp. 98, 99–102 (S.D.N.Y. 1989) (false filings caused harm to United States investors who purchased stock in reliance on misleading statements); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1259–60 (S.D.N.Y. 1984) (defendant knew that United States investors would rely on misleading statements, which "misled the public and distorted the market"); *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 295 (E.D.N.Y. 2002) (fraudulent filings "target[ed] primarily American investors" and caused "hundreds of millions of dollars" in damages to United States investors); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 521–22 (D.N.J. 2005) (defendant had substantial physical contacts with the United States and produced false financial statements that were expressly relied on by investors to their detriment); *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1006, 1014 (D.N.J. 1996) (defendants disseminated financial statements that defrauded "thousands of U.S. investors"); *Itoba Ltd. v. LEP Grp. PLC*, 930 F. Supp. 36, 39 (D. Conn. 1996) (fraudulent filings in the United States caused value of shares to be "substantially less than the prices paid by plaintiff").

II. THE SEC'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The SEC does not dispute that the five-year statute of limitations found in 28 U.S.C. § 2462 applies to claims for pecuniary and other penalties, and that more than five years have elapsed since the claims here first accrued. It maintains, however, that the statute tolls in perpetuity any claims it makes against individuals, like the defendants, who are not physically present in the United States. (*See* Opp. at 23–24).[8] In addition to invidiously discriminating against foreign defendants, this argument ignores two critical clauses of § 2462: one clause instructing that its terms apply "[e]xcept as otherwise provided by Act of Congress," and another clause that ties the statute's operation directly to "proper service" of process. Examination of the statute's plain language *in its entirety*, instead of selectively as the Opposition attempts, shows that § 2462 should be construed in tandem with the Hague Service Convention, which was ratified by the United States and Hungary after re-codification of § 2462, and used by the SEC to easily serve the defendants. The statutory language does not state, as the SEC argues, that the statute of limitations is tolled *forever* simply because the defendants reside abroad. No authority cited by the SEC supports this construction, which ignores not only the full text but also important purposes served by statutes of limitation that have been long-recognized by Congress and the courts. Instead, because the complaint fails to allege that the defendants could not have been served easily via the Hague Service Convention during any part of the applicable five-year period, § 2462 bars this action.[9]

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[8] Because the complaint fails to allege a basis for tolling, it should be dismissed. *See SEC v. Jackson*, No. H-12-0563, slip op. at 50 (S.D. Tex. Dec. 11, 2012) (concluding that the SEC "should have pled the existence of . . . tolling agreements").

[9] The SEC concedes that civil monetary penalties are subject to § 2462. Opp. at 26-27. Examination of the complaint compels the conclusion that other remedies it seeks are punitive as well and therefore barred. *See SEC v. Schiffer*, No. 97 Civ. 5853(RO), 1998 WL

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A. The SEC's Argument Ignores Critical Statutory Language And The Operation Of The Hague Service Convention.

The SEC, in advancing its purported "plain language" interpretation of § 2462, conveniently overlooks two critical qualifiers in the statute: that its terms apply "[e]xcept as otherwise provided by Act of Congress," and that the defendant be found within the United States specifically "in order that proper service may be made thereon." (*See* Opp. at 23–24). These two statutory clauses must carry significance. *See Corley v. United States*, 556 U.S. 303, 315 (2009). The SEC's statutory argument ignoring them is therefore fatally incomplete.[10]

Congress enacted the first precursor to § 2462 in 1790, *Stimpson v. Pond*, 23 F. Cas. 101, 101–02 (C.C.D. Mass. 1855) (No. 13,455), when legislators could authorize proper service of process only within United States borders and were concerned that people would flee the United States to avoid service.[11] Congress added the tolling provision to ensure that an action would not

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226101, at *2 (S.D.N.Y. May 5, 1998) (examining nature of remedy); *SEC v. Lorin*, 869 F. Supp. 1117, 1122 (S.D.N.Y. 1994) (labeling remedy as equitable is "not dispositive"). Here, there is no allegation that equitable or injunctive relief would be remedial. For example, there is no claim that the defendants were unjustly enriched by their alleged misconduct, precluding a finding that disgorgement would be equitable. *See, e.g.*, *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (concluding that disgorgement is used to "forc[e] a defendant to give up the amount by which he was unjustly enriched").

[10] Relying on *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008), the SEC argues that § 2462's "proper service" language is mere surplusage. Opp. at 24 n.6. This reliance is misplaced given *Heller* was a constitutional case and clarified that its analysis applied only to "legal documents of the founding era[.]" 554 U.S. at 577. Congress re-codified § 2462 in 1948, nearly two centuries after that era.

[11] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 23 (2002) (19th Century "principle of absolute authority within a sovereign territory was accompanied by an absolute lack of authority beyond it"); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (Holmes, J.) (statute is "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

become time-barred until law enforcement had an opportunity to serve the defendant properly; that is, in the United States. *See United States v. Brown*, 24 F. Cas. 1263, 1264 (D. Mass. 1873) (construing tolling provision in 1839 precursor to § 2462 as meaning "that in suits for pecuniary penalties there must have been, within the five years, *an opportunity for personal service on the defendant*" (emphasis added)). At the time, the location of the defendant outside the United States was significant only insofar as it precluded service of process.

Congress provided in § 2462 that subsequent legislative acts could alter application of the statute's provisions, and courts have given effect to the "[e]xcept as otherwise provided by Act of Congress" language. *See, e.g., Bernstein v. Sullivan*, 914 F.2d 1395, 1397–1400 (10th Cir. 1990) (newly-enacted statute displaced operation of § 2462). A subsequent enactment discussed by the defendants (Opening Br. at 19 & n.14) but ignored by the SEC, the Hague Service Convention, was ratified in 1969 after passage of § 2462 (last re-codified in 1948). The Hague Service Convention expanded the historical territorial conceptions of proper service of process to the global stage, and therefore trumps the SEC's wooden conception that no statute of limitations applies *today* to foreign defendants because, historically but *not today*, proper service could not be made abroad.[12] In effect, read as a whole, operation of the "proper service" clause and the "[e]xcept as otherwise provided" clause should compel this Court to construe § 2462 as modified by the Hague Service Convention, used here by the SEC to easily serve the defendants, and find that for service purposes each defendant was functionally equivalent to an "offender . . . found

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[12] The Hague Service Convention is an Act of Congress falling within the opening clause of § 2462. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . When [a statute and treaty] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other.").

within the United States in order that proper service may be made thereon." Because the Hague Service Convention was ratified after § 2462 was re-codified, as a matter of law the treaty controls and renders the instant complaint untimely. *See Whitney*, 124 U.S. at 194.[13]

B. Important Purposes Underpinning Statutes Of Limitation Militate Against Perpetual Liability For Individuals Properly Served But Living Abroad.

The SEC has no answer to the defendants' argument that construing § 2462 as having no application, indefinitely, would contravene important purposes served by statutes of limitations, and mark an invidious discrimination against foreign defendants in a situation where there is no evidence this bizarre result was intended by Congress. (Opening Br. at 19). "Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' " *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)). Strict application of statutes of limitations also has the salutary effect of encouraging governmental promptness when it comes to investigation and enforcement. *See Toussie v. United States*, 397 U.S. 112, 114–15 (1970). Moreover, core notions of fairness underpin statutes of limitations, linked to feasibility of service. *Bancorp Leasing & Fin. Corp. v.*

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[13] The SEC argues that a purportedly "parallel tolling prevision" in the Internal Revenue Code, 26 U.S.C. § 6531, supports its construction of § 2462. Opp. at 25. This unrelated provision shares none of the history outlined above, does not include any reference to service of process, and therefore is not affected by the Hague Service Convention. In fact, § 6531 supports interpreting § 2462 to toll the limitations period only when service of process is not possible abroad. This is because, in § 6531, Congress expressly stated that the tolling provision applied *whenever* a defendant is outside the United States—omitting a "service of process" qualifier. *See* 26 U.S.C. § 6531. Section 2462 is different. *See Astrue v. Ratliff*, 130 S. Ct. 2521, 2527 (2010) (examining import of differences in congressional language when comparing two statutes).

Agusta Aviation Corp., 813 F.2d 272, 276 (9th Cir. 1987) ("To toll the statute where a defendant is amenable to service would subvert the defendant's right to a speedy adjudication of claims.").

The complaint fails to allege, and the SEC fails to offer otherwise, any explanation for its delay in bringing the allegations here. There is simply no reason to countenance its tardiness. *See Toussie*, 397 U.S. at 114–15. Leaving foreign defendants completely exposed to litigation, forever, even though the SEC does not dispute that it easily could have served the defendants with process any time after the claims accrued, would offend principles of fairness animating § 2462. *See Bancorp*, 813 F.2d at 276. The instant complaint should be dismissed as untimely.

III. THE COMPLAINT FAILS TO ALLEGE THE CORRUPT USE OF AN INSTRUMENTALITY OF INTERSTATE COMMERCE BY THE DEFENDANTS.

It is uncontested that the emails on which the government relies to satisfy the essential "instrumentality" element of the FCPA were sent from one foreign country to another foreign country. (Complaint ¶ 39). It is also uncontested that, if those emails passed through the United States at all, it was without the knowledge, and not at the direction, of the defendants. (*Id.*). The SEC has therefore failed to allege that the defendants "made use of" an instrumentality of United States interstate commerce corruptly, as required expressly by the FCPA. (Opening Br. at 22–25). Indeed, the SEC effectively concedes that no court has concluded that such a tangential connection to the United States is sufficient to show that an individual personally "made use of" an instrumentality of United States interstate commerce corruptly. (*See* Opp. at 31 n.10).

The Opposition answers the wrong question by claiming that the interstate commerce element is satisfied merely by emails passing through the United States. (*See* Opp. at 27–28). The correct question is whether the happenstance of United States servers being used by unseen data managers not known to, affiliated with, or directed by the defendants constitutes a "corrupt use" *by the defendants* of the means of interstate commerce *at all*. As alleged in the complaint, it

did not constitute such use. The SEC has no answer to the contention that it was unnamed, independent, and unseen data managers, not the defendants, who allegedly routed emails into and through the United States and who therefore used the means of United States interstate commerce. (Opening Br. at 22–24).

The defendants are not alleged to have made "use of" United States interstate commerce corruptly. (*See* Complaint ¶ 39) (documents "were transmitted through the means or instrumentalities of interstate commerce"). Yet this is what the FCPA expressly requires. *See* 15 U.S.C. § 78dd-1(a) ("It shall be unlawful for . . . any officer . . . *to make use of* the mails or any means or instrumentality of interstate commerce corruptly . . ." (emphasis added)). This language requires proof that the defendants *personally* utilized the instrumentality corruptly, which did not occur here.[14]

The cases cited by the SEC to establish that the internet is an instrumentality of interstate commerce do not help its argument, but rather reinforce the defendants' argument that the complaint is deficient. Those cases all deal with United States persons personally making use of

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[14] The FCPA is unlike the mail and wire fraud and money laundering statutes, which do not require that the defendants themselves use an instrumentality of interstate commerce. The mail and wire fraud statutes cover someone who "deposits *or causes to be* deposited" or "*causes to be* delivered by mail" (18 U.S.C. § 1341), and "transmits *or causes to be transmitted*" by the wires (18 U.S.C. § 1343). Money laundering also has a broad definition of what it means to "conduct" a prohibited transaction, 18 U.S.C. § 1956(c)(2). These statutes demonstrate that when Congress intends to reach conduct that indirectly, passively, or through a third party involves an instrumentality of interstate commerce, it knows how to do so. *See, e.g.*, *United States v. Zichettello*, 208 F.3d 72, 105-06 (2d Cir. 2000); *United States v. Bortnovsky*, 879 F.2d 30, 36, 39 (2d Cir. 1989). The FCPA does not reach as far. It requires proof that the defendants themselves made use of an instrumentality of interstate commerce, an allegation that is absent here. "When Congress uses different words in similar statutes, the difference is presumed to be meaningful." *United States v. Knauer*, 707 F. Supp. 2d 379, 386 (E.D.N.Y. 2010) (*citing Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 63 (2006) ("We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion.")).

the internet as an instrumentality of United States interstate commerce.[15] They therefore prove only an undisputed point; namely, that intentional use of the internet by a defendant himself, in or directed to the United States, is enough to state the claim. None of these cases involves a complete lack of use of an instrumentality of interstate commerce by foreign defendants, as is alleged here, or confronts use of the United States cyberspace by independent third-party data managers not acting at the direction of the defendants and independent of and not known to them.

The SEC's attempt to minimize the FCPA's interstate commerce requirement as "merely [] jurisdictional" (Opp. at 30) similarly misses the mark. First, none of the cases cited by the SEC actually interprets the FCPA or concludes that the interstate commerce element of the FCPA is "merely jurisdictional." There is good reason, given the FCPA's primarily foreign focus, to believe that the personal use of United States interstate commerce requirement mandates some knowledge or intent by the defendant to satisfy the element. (Opening Br. at 23).[16] As such, there is no persuasive analogy to cases discussing the application of SEC Rule 10(b)-5. *Accord United States v. Langford,* 946 F.2d 798 (11th Cir. 1991); *United States v. Victor Teicher & Co.*, 726 F. Supp. 1424 (S.D.N.Y. 1989); *SEC v. Boock*, No. 90 Civ.

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[15] Thus, in *United States v. MacEwan*, 445 F.3d 237 (3d Cir. 2006), the defendant was convicted of transmitting child pornography over the internet; in *United States v. Hornady*, 392 F.3d 1306 (11th Cir. 2004), the defendant was convicted of soliciting a minor for sexual activity over the internet; and in *SEC v. Solucorp Industries Ltd.*, 274 F. Supp. 2d 379, 419 (S.D.N.Y. 2003), the defendants were found liable for securities violations where "[defendants] used the means and instrumentalities" of interstate commerce. *See* Opp. at 28.

[16] The Supreme Court observed in *Morrison v. Nat'l Australia Bank Ltd.* that "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." 130 S. Ct. 2869, 2883 (2010). As the Court also observed, "Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications." *Id.* at 2883 n.8.

8261(DLC), 2011 WL 3792819 (S.D.N.Y. Aug. 25, 2011).[17] Other cases the SEC relies on fall into the same pattern. *See e.g. United States v. Edelman*, 873 F.2d 791 (5th Cir. 1989) (murder-for-hire conviction under 18 U.S.C. § 1952A (now § 1958) affirmed where statute required that defendant "use[d] or *cause[d] another . . . to use* the mail or any facility in interstate or foreign commerce" and mails were used by co-conspirator (emphasis added)). Further, the cases cited by the SEC do not involve an instance, as here, where independent third parties (the data managers) are the ones who used the United States instrumentality—quite apart from anything intended, directed, or reasonably foreseen by the defendants.

The lack of the defendants' personal use of United States interstate commerce corruptly is fatal to the bribery (and therefore related) claims. The complaint must be dismissed.

IV. THE COMPLAINT FAILS TO ALLEGE THE IDENTITY OF THE BRIBERY RECIPIENTS.

The complaint fails to adequately allege basic facts (as opposed to legal conclusions) regarding the alleged recipients of bribes in Macedonia. As the SEC concedes, "unadorned accusations and legal conclusions" are insufficient to state a cause of action. (Opp. at 32). Yet the SEC makes no effort to defend the complaint as containing anything but this. The Opposition offers nothing but a circular recitation of the FCPA's elements, and citation to allegations in the complaint that do nothing but parrot those terms. The Opposition cites the complaint and tautologically claims that the alleged government "officials" "were 'acting in an official capacity' by virtue of the actions those officials were authorized to take on behalf of the Macedonian government." (*Id.* at 33). In this fashion, the Opposition reveals that the complaint

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[17] Rule 10(b)-5, like the mail and wire fraud and money laundering statutes discussed above in footnote 14, expressly applies to "direct[] *or indirect*[]" use of an instrumentality of interstate commerce. 17 C.F.R. § 240.10b-5 (emphasis added).

presents nothing more than a more verbose version of the statute. It is similarly unhelpful for the SEC to suggest that "the defendants made their bribe payments to particular officials, whose identities were known to the defendants." (*Id.* at 34). It turns the pleading requirement on its head to suggest that the defendants "know what they did" and therefore the complaint does not have to allege it.

The SEC acknowledges that Rule 8(a) requires a "short and plain statement of the claim." (*Id.* at 32). The SEC's inability to allege succinctly and plainly who received bribes suggests that it cannot do so. The defendants, who deny they bribed anyone, should not and cannot be forced to defend themselves against such undeveloped accusations. Accordingly, the bribery and related claims must be dismissed.[18]

V. THE COMPLAINT FAILS TO ALLEGE THAT THE DEFENDANTS LIED TO AUDITORS.

The SEC concedes that its Rule 13b2-2 claim is subject to Rule 9(b). (Opp. at 35). The parties disagree about whether the allegations in ¶¶ 62-70 of the complaint are sufficient to meet that standard. As the defendants argue, ¶¶ 62-70 impermissibly group them and fail to adequately allege the "time, place and manner" of the alleged fraudulent statements. (Opening Br. at 29–30). For example, while the complaint references "management representation" letters, it does not state when those letters were signed or, indeed, even such basic facts as how many

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[18] The recent ruling in *Jackson*, referenced above in footnote 8, is instructive here. In that case, Judge Ellison acknowledged that there are instances "where, in order to show that the payment was intended to influence the official to neglect some particular duty, the government would have to plead that the official had that duty in the first place." Slip op. at 20. Here, where corruption of governmental functions is alleged, the lack of detail about the "foreign official(s)" supposedly bribed, and their duties, is accordingly fatal. Without such detail, preparing a defense is impossible. In any event, *Jackson*'s holding conflicts with the court's statements in *United States v. O'Shea*, No. 09-CR-629 (S.D. Tex. Jan. 16, 2012). *See Jackson*, slip op. at 25 n.10; *see also* Opening Br. at 28 n.20 (citing *O'Shea*).

such letters are alleged to have been signed by each of the defendants. (*See* Complaint ¶¶ 62–70). The alleged false statements contained in the complaint are nothing more than boilerplate quotations from the standard management letters themselves, precisely the type of allegations the court in *SEC v. Patel*, No. 07-cv-39-SM, 2009 WL 3151143, at *33–34 (D.N.H. Sept. 30, 2009) (a case the SEC relies on in its opposition (Opp. at 38)) found lacking.[19] Because the complaint fails to satisfy Rule 9(b), the fifth claim for relief should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss the complaint with prejudice.

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Respectfully submitted,

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[19] The SEC argues that the applicable "materiality" standard for a Rule 13b2-2 claim is what a reasonable "accountant," not a reasonable "investor," would consider important in the total mix of information. Opp. at 38. The Second Circuit has not held that the "accountant" standard applies to Rule 13b2-2 cases.

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