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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. STUART CARSON et al., Defendants.	NO. SA CR 09-00077-JVS GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNTS ONE, ELEVEN, TWELVE AND FOURTEEN OF THE INDICTMENT; MEMORANDUM OF POINTS AND AUTHORITIES Hearing Date & Time: August 12, 2011 1:30 p.m.

Plaintiff United States of America, by and through its attorneys of record, the United States Department of Justice,

Criminal Division, Fraud Section, and the United States Attorney for the Central District of California (collectively, "the government"), hereby files its Opposition to Defendants' Motion to Dismiss Counts One, Eleven, Twelve and Fourteen of the Indictment. The government's opposition is based upon the attached memorandum of points and authorities, the files and records in this matter, as well as any evidence or argument presented at any hearing on this matter.

DATED: July 18, 2011

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

MEMORANDUM OF POINTS AND AUTHORITIES

The Indictment charges violations of the Travel Act, a statute passed by Congress to impose criminal sanctions on individuals whose unlawful activities crossed state or national boundaries. Through their motion to dismiss, defendants seek to dismiss the conspiracy and substantive Travel Act counts on the grounds that the Travel Act does not apply extraterritorially and, thus, neither the Travel Act nor the California commercial bribery statute reach defendants' conduct. Because the majority of defendants' unlawful conduct was based in the United States, the statutes at issue reach defendants' conduct without any resort to extraterritorial application. Although the Court need not consider the question of whether the Travel Act applies extraterritorially, the plain language of the statute, the legislative history, and the case law all indicate that the Travel Act does apply extraterritorially. For the reasons set forth below, the Court should deny the motion to dismiss.

I. FACTUAL AND LEGAL BACKGROUND

A. The Travel Act

The Travel Act provides that "[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to- . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempt to perform- (A) an act described in paragraph (1) or (3) shall be" guilty of a crime. 18 U.S.C. § 1952(a). The statute defines "unlawful activity" to include "extortion, bribery, or arson in violation

of the laws of the State in which committed or of the United States." 18 U.S.C. § 1952(b)(i)(2).

The Travel Act was enacted in 1961 as a comprehensive response to state and local governments' inability to cope with the complex and multi-jurisdictional nature of criminal enterprises. See Perrin v. United States, 444 U.S. 37, 41 (1979). The legislative history makes clear that Congress was concerned about criminal activity that crosses both state and international borders, and stated that the Travel Act "impose[s] criminal sanctions upon the person whose work takes him across State or national boundaries in aid of certain 'unlawful activities.'" H.R. Rep. No. 966, at 4 (1961) (emphasis supplied), reprinted in 1961 U.S.C.C.A.N. 2664, 2666 (letter from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives). The Travel Act is, "in short, an effort to deny individuals who act [with the requisite] criminal purpose access to the channels of commerce." Erlenbaugh v. United States, 409 U.S. 239, 246 (1972).

B. The Indictment

A federal grand jury returned a 16-count indictment on April 9, 2009, charging defendants Stuart Carson ("S. Carson"), Hong "Rose" Carson ("R. Carson"), Paul Cosgrove, David Edmonds, Flavio Ricotti, and Han Yong Kim (collectively, "the defendants") with conspiring to pay bribes to officials of foreign and domestic private companies, for the purpose of assisting their employer, Control Components, Inc. ("CCI"), to obtain and retain

business.[1]

Count One of the Indictment charges defendants with conspiring to violate the Foreign Corrupt Practices Act ("FCPA") and the Travel Act from 1998 through 2007. Counts Two through Ten of the Indictment allege substantive FCPA violations involving corrupt payments to foreign officials. Counts Eleven through Fifteen allege substantive violations of the Travel Act involving corrupt payments to officers and employees of private companies.

Defendants S. Carson, R. Carson, Cosgrove, and Edmonds were all U.S. citizens and served as executives at CCI's headquarters in Rancho Santa Margarita, California. (Indictment ¶¶ 3-7). A significant portion of the four defendants' acts in furtherance of the conspiracy occurred either in the United States or through communications with individuals in the United States. Indictment (¶¶ 3-7, 18-37). The four defendants, located primarily in the United States, communicated by e-mail with CCI salespeople and representatives based in the United States and foreign countries in deciding how to bid on and obtain contracts. The four defendants often provided approvals for corrupt payments by e-mail.

Aside from arranging and approving corrupt payments while in the United States, some or all of the four defendants took the following actions, among others, while in the United States: participated in and arranged for holidays to places such as

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[1] On April 28, 2011, Mr. Ricotti pleaded guilty to one count of conspiracy to violate the FCPA and the Travel Act. Mr. Kim remains a fugitive in Korea.

Disneyland and Las Vegas for officers and employees of state-owned and private customers (Indictment ¶ 19); hosted and attended lavish sales events to entertain current and potential state-owned entities and private customers (¶ 22); provided false information to internal auditors (¶ 25); provided false and misleading information to CCI's attorneys in connection with an August 2007 internal investigation (¶ 29); and destroyed documents at CCI (¶ 30).

With regard to Counts 11, 12, and 14, the Indictment alleges that defendants Edmonds (Counts 11 and 12) and Cosgrove (Count 14) "committed various overt acts in the Central District of California, and elsewhere, including, but not limited to, the following":

Count 11 (Overt Acts 46 & 47) - defendant Edmonds approved a corrupt payment to an employee of Company 1, and caused CCI to wire a payment of approximately $10,000 from California to China for the purpose of making the corrupt payment.

Count 12 (Overt Acts 48 & 49) - defendant Edmonds approved a corrupt payment to an employee of Company 1, and caused CCI to wire a payment of approximately $5,000 from Sweden to China for the purpose of making the corrupt payment.

Count 14 (Overt Acts 53-55) - defendant Edmonds approved a corrupt payment to an employee of Company 3, and caused CCI to wire a payment of approximately $136,584 from Sweden to Latvia for the purpose of making the corrupt payment.[2]

[2] Defendants are correct that the chart in paragraph 35 of the Indictment incorrectly lists the payment in Count Fourteen as going from Sweden to New York instead of from Sweden to Latvia.

II. LEGAL ARGUMENT

A. Summary of Argument

Defendants' claims should be rejected. First, the case law has established that the Travel Act can be used to prosecute foreign commercial bribery. Second, this case does not involve an extraterritorial application of law. Third, although it is not necessary for the Court to address the issue, it is clear that the Travel Act does apply extraterritorially. Fourth, the alleged conduct violates California's commercial bribery statute. Fifth, the Travel Act and the California commercial bribery statute are not void for vagueness. Finally, the Travel Act counts allege all essential elements.

B. Legal Standard for a Motion to Dismiss

Under Rule 12(b) of the Federal Rules of Criminal Procedure, a party may file a motion to dismiss based on "any defense, objection, or request that the court can determine without a trial of the general issue." Fed. R. Crim. P. 12(b); United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986). In considering a motion to dismiss, the court "must presume the truth of the allegations in the charging instrument" and should not generally consider "evidence not appearing on the face of the indictment." United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996). A court must decide such a motion before trial "unless it finds good cause to defer a ruling." Fed. R. Crim. P. 12(d); Shortt Accountancy, 785 F.2d at 1452.

C. The Travel Act Can be Used to Prosecute Foreign Commercial Bribery

As demonstrated in United States v. Welch, 327 F.3d 1081 (10th Cir. 2003), the Travel Act can be used to prosecute foreign commercial bribery. In Welch, the only federal appeals court decision addressing a criminal prosecution of foreign commercial bribery under the Travel Act, the court held that the Travel Act reached a scheme involving corrupt payments made to members of the International Olympic Committee ("IOC") to influence the members to award the 2002 Winter Olympic Games to Salt Lake City.

In Welch, the two U.S.-based defendants caused corrupt payments to be made to IOC members from some fifteen countries. 327 F.3d at 1085, n.4. Counts Two through Five of the Welch indictment each alleged one specific instance of defendants' use of "a facility in interstate or foreign commerce" with the intent to carry on an "unlawful activity" in violation of 18 U.S.C. § 1952(a)(3). Id. at 1086. The unlawful activity was "bribery of government officials" in violation of the Utah Commercial Bribery Statute, Utah Code Ann. § 76-6-508(a)(a). Count Two and Three of the Welch indictment alleged wire transfers between Salt Lake City and London, England to IOC members. Count Four alleged a wire transfer between Salt Lake City and Paris, France to an OIC member. Count Five alleged a faxed letter between Colorado Springs, Colorado and Salt Lake City. Id. at 1086 n.5.

The district court in Welch dismissed the indictment on grounds that the Utah Commercial Bribery Statute was an invalid predicate for a violation of the Travel Act. The district court stated that "federal prosecutors have co-opted an obscure Utah

misdemeanor bribery statute of uncertain and improbable application as the only basis for charging defendants with four federal Travel Act felonies" and refused to "speculate that the Utah legislature intended Utah's commercial bribery statute to apply to defendants' alleged conduct." 327 F.3d at 1088.

In reversing the district court and reinstating the indictment, the Tenth Circuit stated that the Travel Act's legislative history indicated that the Act was designed to "impose criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain 'unlawful activities.'" 327 F.3d at 1090 (quoting letter from Attorney General Robert F. Kennedy, supra). Relying on Perrin, supra, which held that "Congress intended 'bribery . . . in violation of the laws of the State in which committed' to encompass conduct in violation of state commercial bribery statutes," the court of appeals found it "unremarkable" that Utah's commercial bribery statute may serve as a predicate for a Travel Act violation. 327 F.3d at 1090-91.

Contrary to the Carson defendants' assertion that Congress did not intend for the Act to cover foreign commercial bribery, (Defts' Mot. at 6339), the Welch court, in reinstating an indictment involving foreign commercial bribery, made clear that "[w]hile we recognize that the legislative history of the Travel Act indicates it was aimed at combating organized crime, it has been clearly established that its reach is not limited to that end." 327 F.3d at 1091 (citing Erlenbaugh, 409 U.S. at 247 n.21); see also United States v. Dailey, 24 F.3d 1323, 1329 (11th Cir. 1994) (noting the "widespread use of the Travel Act in

federal prosecutions and judicial approval of its applications to offenses not associated with organized crime").

The Welch court also made clear that the Travel Act "proscribes not the unlawful activity per se, but the use of interstate facilities with the requisite intent to promote such unlawful activity." 327 F.3d at 1092. The Travel Act only requires that the defendants intended "to promote" or "facilitate the promotion" of the predicate state offense. Id. "[A]n individual may violate the Travel Act simply by attempting to perform a specified 'unlawful act' so long as that individual has the requisite intent required by the 'unlawful act.'" Id.

Defendants relegate their discussion of Welch to a single footnote in their motion, asserting that the ruling "did not actually address the extraterritorial application of the Travel Act." (Defts' Mot. at 6339, n.4). Although the Tenth Circuit did not squarely address whether the Travel Act applies extraterritorially, it reinstated an indictment that in clear terms charged a U.S.-hatched scheme to make corrupt payments via wires from the United States to foreign countries.[3] The court, in examining the largely U.S.-based conduct, apparently assumed that jurisdiction was proper because some of the events underlying the fraudulent scheme occurred within the United States.

[3] As further detailed below, the only court that has addressed this issue directly concluded that the Travel Act does apply extraterritorially. See United States v. Noriega, 746 F. Supp. 1506, 1516 (S.D. Fla. 1990).

D. This Case Does Not Involve an Extraterritorial Application of Law

Defendants assume that the government's use of the Travel Act requires an extraterritorial application of the statute. It does not. The Travel Act counts charge a U.S.-based corruption scheme in which many of the underlying events occurred within the United States, and the statute therefore reaches that scheme without any resort to extraterritorial application. The mere fact that some conduct occurred abroad does not render the Travel Act's application extraterritorial. Indeed, the Travel Act specifies that foreign or interstate commerce activity is necessary to confer jurisdiction.

In Pasquantino v. United States, 544 U.S. 349 (2005), the Supreme Court made clear that even where certain acts occur overseas as part of a fraudulent scheme, such conduct can be reached where acts were taken in the United States in furtherance of the scheme. In Pasquantino, the defendants were indicted for and convicted of federal wire fraud for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States. The defendants, while in New York, ordered liquor over the telephone from package stores in Maryland and then drove, or employed others to drive, the liquor over the Canadian border without paying the required Canadian excise taxes. 544 U.S. at 352.

In finding that the wire fraud statute reached this conduct, the Pasquantino Court held that it was not relying on an extraterritorial application of the wire fraud statute. The Court stated that the "domestic element of petitioners' conduct

is what the Government is punishing in this prosecution, no less than when it prosecutes a scheme to defraud a foreign individual or corporation, or a foreign government acting as a market participant." Id. at 371. "[T]he wire fraud statute punishes frauds executed 'in interstate or foreign commerce,' so this is surely not a statute in which Congress had only domestic concerns in mind." Id. at 371-72 (citations omitted); see also Ford v. United States, 273 U.S. 593, 622-24 (1927) (if a criminal enterprise is carried out in part within the United States, all of the participants, including foreigners whose activities were entirely outside the United States, may be penalized).

Courts in the Ninth Circuit have fully adopted this principle. See United States v. Lampert, 2008 WL 1868000, at *1, 275 Fed. Appx. 703, 704-05 (9th Cir. Feb. 4, 2008) (unpublished) (telemarketing fraud conviction upheld where some of the events underlying the scheme occurred in the United States); United States v. Moncini, 882 F.2d 401, 402 (9th Cir. 1989) (mailing of child pornography conviction upheld where part of offense committed in United States).

In United States v. Daniels, No. 09-00862, 2010 WL 2557506 (N.D. Cal. June 21, 2010) (slip copy), the court examined whether 18 U.S.C. § 894, the federal statute prohibiting the collection of extensions of credit by extortionate means, could reach the extortionate collection of a debt where some of the preparation for the crime occurred in the United States, but where the threat itself was made in a foreign country. The court, relying on the theory of territorial jurisdiction, held that the statute could reach such conduct. 2010 WL 2557506, at *5-*6.

The Daniels court's inquiry centered on the question of whether the offense, or part of the offense, occurred within the United States. 2010 WL 2557506 at *3. Among other facts, the court found that the defendants had wired money overseas and had sent emails from the United States to Finland in furtherance of the scheme. Id. at *4. "Based upon this conduct, standing alone, this court can exercise jurisdiction over [the counts]." Id. The court also found that although a threat to repay money was conveyed in a foreign country, "the intended effects of the threat - to speed up the repayments of [the] loan - were intended to be felt in the United States." Id. at *5. The court concluded that "the alleged crime committed by defendants took place, at least in part in United States territory, thereby justifying this court's exercise of jurisdiction over the charges." Id.; see also United States v. Mandell, No. 09CR0662, 2011 WL 924891, at *4 (S.D.N.Y. Mar. 16, 2011) (slip copy) (where "substantial and material amounts of overt activity" occurred in New York, extraterritorial application of United States laws is not required).

In the Carson case, as further detailed above, the indictment alleges that defendants' commission of the offense of foreign commercial bribery occurred, at least in part, in the United States. The indictment alleges that the four defendants, all of whom were based at CCI's headquarters in California, "made and caused CCI employees and agents to make corrupt payments to officers and employees of numerous state-owned and privately-owned customers around the world for the purpose of assisting in obtaining or retaining business for CCI." Indictment ¶ 14.

The Indictment further alleges that defendants "committed various overt acts in the Central District of California, and elsewhere, including but not limited to" overt acts 46-58 related to foreign commercial bribery. Such acts included, but were not limited to, the approval of corrupt payments and the performance of acts causing CCI to make wire payments in furtherance of the bribery scheme. Furthermore, as in Daniels, the intended effects of the Carson bribery scheme - increased profits (and executive bonuses) for a U.S.-based company - were intended to be felt in the United States.

Thus, the Court should deny defendants' motion because the indictment properly alleges conduct within the United States in violation of the Travel Act.

E. The Travel Act Does Apply Extraterritorially

Because territorial application has been alleged as to the Travel Act counts, this Court need not consider the question of whether the Travel Act applies extraterritorially. Nonetheless, for the reasons set forth below, it is clear that the Travel Act does apply extraterritorially.

1. The Only Court to Address Directly the Travel Act's Extraterritoriality Held that the Travel Act Does Apply Extraterritorially

In United States v. Noriega, 746 F. Supp. 1506, 1516-19 (S.D. Fla. 1990), the court examined whether the Travel Act reached conduct abroad. The defendant, Manuel Noriega, was charged with participating in an international cocaine conspiracy. Noriega was a foreign leader whose alleged illegal activities all occurred outside the territorial bounds of the United States. The indictment alleged that on two separate

occasions, co-conspirators of Noriega used an airplane to transport drug proceeds from Miami to Panama.

As an initial matter, the Noriega court indicated that a statute's extraterritorial reach "may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved." 746 F. Supp. at 1515 (citations omitted). The Noriega court examined the legislative history of the Travel Act, observing that "[t]he Act was . . . an attempt to reach criminal activities uniquely broad and transitory in scope, i.e., those whose influence extend beyond state and national borders and therefore require federal assistance. S. Rep. No. 644, 87th Cong., 1st Sess., 4 (1961)." Id. at 1518 (emphasis supplied).

The Noriega court pointed out that Section 1952(a)(3)'s text confirms its extraterritorial application: that language "suggests no restriction based upon the locus of conduct other than that it result in activity crossing state lines." 746 F. Supp. at 1518. The Noriega court concluded by stating that where "the defendant causes interstate travel or activity to promote an unlawful purpose, § 1952(a)(3) applies, whether or not the defendant is physically present in the United States." Id. Thus, the only court to have addressed the issue explicitly determined that the Travel Act does apply extraterritorially.

2. *Bowman* Permits Extraterritorial Application of the Travel Act

An analysis of the Supreme Court's conclusions in United States v. Bowman, 269 U.S. 94 (1922), further confirms that extraterritorial application of the Travel Act is proper. In

Bowman, the Supreme Court held that a criminal statute can be applied to acts outside the United States if the character of the offense supports the "natural inference" that an extraterritorial location "would be a probable place for its commission."[4] 269 U.S. at 99. The Bowman Court recognized that Congress's failure to affirmatively state that a statute is to be applied extraterritorially typically indicates a contrary intent. Id. at 98. The Court cautioned, however, that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents." Id. (emphasis supplied). Crimes fit this description if limiting their "locus" to the United States would greatly curtail the scope and usefulness of the statute.

Here, the plain language of the Travel Act demonstrates Congress's desire to reach conduct overseas. The title of the Travel Act is "[i]nterstate and foreign travel or transportation in aid of racketeering enterprises." (emphasis supplied). The first line of the statute provides: "Whoever travels in interstate or foreign commerce or uses the mail of any facility in interstate or foreign commerce ...." (emphases supplied).

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[4] Contrary to defendants' assertion that "it is unclear whether Bowman survives Morrison," at least one court has specifically held that "Morrison neither explicitly nor implicitly overrules Bowman." United States v. Finch, No. 10-00333, 2010 WL 3938176, at *4 (D. Haw. Sept. 30, 2010).

These references to "foreign commerce" and "foreign travel" clearly indicate that Congress intended to reach conduct overseas. See, e.g., Pasquantino, 544 U.S. at 371-72 (wire fraud statute's prohibition of frauds executed "in interstate or foreign commerce" indicates that "this is surely not a statute in which Congress had only domestic concerns in mind"); United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006) (relying on reference to "travel[] in foreign commerce" to find text of statute "explicit as to its application outside the United States").

Contrary to defendants' assertion, foreign commercial bribery committed by U.S. companies and nationals does victimize the United States. Foreign commercial bribery hurts U.S. competitors, affects the integrity of the American marketplace and U.S. companies, and creates unfair competition. As such, the crime must be viewed as stemming from "the right of the government to defend itself against obstruction, or fraud wherever perpetrated." Bowman, 269 U.S. at 99.

Pursuant to Bowman, courts have found that criminal statutes reach criminal conduct committed in whole or in part overseas. See United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994) (18 U.S.C. § 1959 applies extraterritorially under Bowman analysis); United States v. Cotten, 471 F.2d 744, 749-50 (9th Cir. 1973) (theft of government property statute applies extraterritorially under Bowman); Finch, 2010 WL 3938176, at *4 (domestic bribery statute applies extraterritorially under Bowman). Thus, Bowman supports extraterritorial application of the Travel Act.

3. Defendants' FCPA Enactment Argument is Unavailing

Defendants next assert that the Travel Act cannot apply to foreign bribery because Congress intended the FCPA to "occupy the field," as demonstrated by the FCPA's legislative history and conflicts between the FCPA's coverage and that of the Travel Act. Defendants insist that Congress never intended the Travel Act to have extraterritorial application. As explained below, they are mistaken.

Congress's inclusion of "foreign commerce" in the Travel Act expresses legislative intent that the Travel Act be applied where acts occur overseas. None of the FCPA legislative history that defendants cite actually supports their theory that the FCPA was intended to occupy the field of foreign bribery. While Congress was aware that the FCPA would not reach all payments overseas, that does not mean Congress intended to limit the reach of the Travel Act, and nowhere in the legislative history did Congress express an intent to do so.

Commercial bribery has long been treated differently than official bribery. Most states have separate statutes prohibiting official and commercial bribery. Aside from the Travel Act, there is no federal law prohibiting commercial bribery. International anti-corruption treaties treat official and commercial bribery as completely separate issues.[5] The Travel Act did not address foreign policy concerns in the legislative

[5] For example, both the U.N. Convention Against Corruption, Dec. 9, 2003, 43 I.L.M. 37, and the Criminal Law Convention on Corruption, Oct. 10, 2000, 35 I.L.M. 724, address official bribery and commercial bribery in separate Articles.

history because accusing a representative of a foreign sovereign of corruption has a wholly different impact on foreign policy than one involving commercial bribery. There is no reason to believe, absent any statement to the contrary, that Congress intended the FCPA to suddenly "occupy" a completely separate field that it was not intended to address.

Regarding defendants' argument that there are defenses and exceptions in the FCPA that do not appear in the Travel Act, there is no need - and it would be nearly impossible - to review the large number of statutes that overlap but require different elements of proof.[6] That is precisely why they are different crimes. The entire body of case law on multiplicity and duplicity are dedicated to the subject. See, e.g., United States v. Stafford, 831 F.2d 1479, 1485 (9th Cir. 1987) (in comparing the Travel Act with an obstruction statute (18 U.S.C. § 1510), the court noted "[b]ecause no clear evidence of contrary congressional intent exists, Congress is presumed to have intended to permit separate punishment for each offense.").

4. International Law Permits Exercise of the Court's Jurisdiction

The Court's jurisdiction comports with principles of international law.[7] International law recognizes five general

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[6] For example, the misconduct at issue could potentially also have been charged as wire fraud (18 U.S.C. § 1343), money laundering (18 U.S.C. § 1956(a)(1)), or RICO (18 U.S.C. § 1961 et seq.).

[7] Congress may override international law in choosing to apply a statute extraterritorially but, absent an explicit congressional directive, courts generally presume Congress does not intend to violate principles of international law. United States v. Vasquez-Velasco, 15 F.3d 833, 840-41 (9th Cir. 1994).

bases under which a sovereign may exercise jurisdiction: (1) territorial - place of offense; (2) nationality - offender nationality; (3) protective - injury to national interest; (4) universal - physical custody of the offender; and (5) passive personal - victim nationality. Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984).

As described above, first and foremost, the United States may exercise jurisdiction over the defendants based on the territoriality principle (the one principle that, by definition, is not extraterritorial) because the defendants took action in the territory of the United States. The United States may also exercise jurisdiction based on the nationality principle. The nationality principle "permits a country to apply its statutes to extraterritorial acts of its own nationals." United States v. Hill, 279 F.3d 731, 740 (9th Cir. 2002). All of the defendants in this case are U.S. citizens and thus the Court may exercise jurisdiction. See, e.g., United States v. Clark, 435 F.3d 1100, 1106-07 (9th Cir. 2006); Hill, 279 F.3d at 740. The Court may also exercise jurisdiction under the protective and universal principles in that there was harm to the United States from the corrupt conduct and the defendants were located in the United States.

F. The *Morrison* Holding Does Not Impact the Above Analysis

Defendants rely on Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010), which addresses private enforcement of a civil statutory provision – § 30(b). In addressing whether § 30(b) "provides a cause of action to foreign Plaintiffs suing foreign and American defendants for misconduct in connection with

securities traded on foreign exchanges," Morrison, 130 S. Ct. at 2875, the Court reasserted the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States," id. at 2877. Morrison does not bear on the present analysis for two key reasons: (1) unlike the Travel Act, § 30(b) lacks any reference to its application abroad; and (2) Morrison addresses the interpretation of a civil statute, not criminal statutes like the one at issue here.

First, unlike the Travel Act – which expressly references and addresses as one of its "foci" conduct affecting foreign commerce and crossing national boundaries – the text of § 30(b) "contains nothing to suggest it applies abroad," id. at 2881. Indeed, Section 30(b) expressly states that its provisions shall not apply to any person transacting a business in securities outside the United States, unless it is to evade regulations promulgated under Section 30(b). As the Court in Morrison pointed out, no regulations had been promulgated under Section 30(b), and, therefore, the transactions in Morrison were not designed to evade any regulations. 130 S. Ct. at 2882.[8]

Defendants make much of the Morrison Court's reference to stock "foreign commerce" language. Yet the Court in Morrison was referencing the definition of "interstate commerce" in an ancillary statute, 15 U.S.C. § 78c(a)(17), id. at 2882, and held

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[8] Morrison also pointed out that another provision in the Act – § 30(a) – does contain language expressly providing for its extraterritorial application, which suggests that if Congress had intended for § 30(b) to apply abroad, it would have included similar language in that section. 130 S. Ct. at 2882.

that this definition, alone, would not confer extraterritorial status. In the present case, the Travel Act itself, and not some ancillary provision defining "interstate commerce," expressly applies to foreign conduct.

Second, Morrison does not purport to comment on the reach of U.S. criminal statutes, which were the sole focus of the Court's inquiry in Bowman. "Morrison neither explicitly nor implicitly overrules Bowman, which counsels courts to examine statutes with an eye toward whether Congress intended to protect the Government from crimes wherever perpetrated." Finch, 2010 WL 3938176, at *4. As the Seventh Circuit recently held, "[w]hether or not Aramco [which, like Morrison, trumpeted the presumption against extraterritoriality in a civil case] and other post-1922 decisions are in tension with Bowman, we must apply Bowman until the Justices themselves overrule it." United States v. Leija-Sanchez, 602 F.3d 797, 798 (7th Cir. 2010); see Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the federal courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.").

Surprisingly, defendants cite to the Second Circuit's opinion in Norex Petroleum Ltd. v. Access Industries, 631 F.3d 29, 31 (2d Cir. 2010) for the proposition that courts are interpreting Morrison expansively, but fail to include the Norex court's key holding that is most relevant to this case. The court in Norex made clear that its holding has no impact on

criminal RICO cases: "Because Norex brought a private lawsuit pursuant to 18 U.S.C. § 1964(c), we have no occasion to address - and express no opinion on - the extraterritorial application of RICO when enforced by the government pursuant to Sections 1962, 1963 or 1964(a) and (b)." 631 F.2d at 33.[9]

Moreover, this Court recently expressed its view that the holding in Morrison does not necessarily preclude civil plaintiffs from bringing claims under RICO where part of the conduct occurs overseas. "[W]ere foreign Plaintiffs to bring a RICO claim against an alleged enterprise operating in the United States, consisting largely of domestic 'persons,' engaging in a pattern of racketeering activity in the United States, and damaging Plaintiffs abroad, these foreign Plaintiffs might well state a claim consistent with Morrison's holding." In re Toyota Motor Corp. Unintended Acceleration Litigation, No. 8:10ML02151, 2011 WL 1485479, at *18 (C.D. Cal. Apr. 8, 2011).[10]

In sum, defendants cannot sweep the Travel Act within the scope of the general presumption against extraterritoriality reiterated in Morrison. Recent court decisions confirm that, even in the face of post-Morrison challenges, criminal statutes, including those involving fraud and bribery, still apply

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[9] Defendants' reliance on Giffen (Defts' Mot. at 6345) is also misplaced. Giffen concerned the narrow issue of whether principles of international comity precluded the government's pre-McNally honest services theory from applying to deprivation of honest services by foreign officials to foreign nationals.

[10] Defendants' reliance on Lopez-Vanegas (Defts' Mot. at 6346) is misplaced because none of the acts in furtherance of the conspiracy to possess/distribute narcotics in the United States took place in the United States. See United States v. Daniels, 2010 WL 2557506, at *4-*5 (distinguishing Lopez-Vanegas).

extraterritorially where (as here) their text "contemplates coverage of acts occurring overseas." See Finch, 2010 WL 3938176, at *4 (upholding extraterritorial application of the domestic bribery statute because language of the statute is broader in scope than Securities Exchange Act); United States v. Mandell, 2011 WL 924891, at *4-*5 (mail and wire fraud); United States v. Weingarten, 632 F.3d 60, 65-66 (2d Cir. 2011) (travel with intent to engage in illicit sexual conduct); United States v. Coffman, No. 09-181, 2011 WL 665604, at *3-*4 (E.D. Ky. Feb. 14, 2011) (mail and wire fraud); see also Morrison, 130 S. Ct. at 2888 (Breyer, J., concurring) (noting that while § 30(b) did not cover the fraudulent activity alleged, "state law or other federal fraud statutes [such as mail fraud and wire fraud] may apply . . . .").

G. The Alleged Conduct Violates California's Commercial Bribery Statute

Defendants next argue that, because California Penal Code Section 641.3 ("PC 641.3") has never been used to criminally prosecute foreign commercial bribery, it cannot be used to do so.[11] (Defts' Mot. at 6348-50). Defendants correctly note that the Travel Act is properly used to prosecute crimes predicated on a state statute where there are consequences within that State. United States v. Perrin, 444 U.S. at 40. Defendants then assert, with no legal basis, first that this crime did not have consequences within California, and second, that the Travel Act cannot be used when the state has not prosecuted foreign

[11] California has prosecuted instances of domestic commercial bribery pursuant to PC 641.3. See, e.g., Hambarian v. Superior Court, 44 P.3d 102, 106 (Cal. 2002).

commercial bribery.

Defendants assert that PC 641.3 "has never been used to criminally prosecute foreign commercial bribery." (Defts. Mot. at 6348). In addition, defense counsel states in her Declaration that she has "researched whether, in a criminal case, any court has held that the California commercial bribery statute criminalizes bribes given to employees of a private foreign company in a foreign country" and has "found no case holding that a defendant may be found guilty of commercial bribery under Penal Code 641.3 for offering or giving a bribe to a foreign employee working abroad for a foreign private company." See Hawbecker Dec. ¶ 7.

Defendants fail to mention that this Court has permitted PC 641.3 to be used as the basis for a Travel Act violation involving foreign commercial bribery. See Bryant v. Mattel, Inc., No. 04-9049, 2010 WL 3705668, at *8-*9 (C.D. Cal. Aug. 2, 2010). In Bryant, the defendant, as part of its civil RICO counterclaims, alleged as a predicate act of racketeering activity that the plaintiff violated the Travel Act based upon a violation of PC 641.3 by making corrupt payments to individuals in Mexico and Canada. The plaintiff argued that PC 641.3 does not apply to extraterritorial conduct. Id. at *8. The Bryant court held that the defendant had adequately pleaded a violation of the Travel Act because the alleged foreign commercial bribery had been conducted "in whole or in part" in California and thus plaintiff's arguments failed. Id. at *8-*9.[12]

[12] Defendant's counterclaim was later dismissed for unrelated reasons in that it was unable to factually establish

The Carson defendants also ignore California's own expression of what activity the state would consider to fall within its reach - including that taking place outside California. Section 778a(a) of the California Penal Code ("PC 778a(a)") states:

> Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same matter as if the crime had been committed entirely within this state.

PC 778a(a) (emphasis added). PC778a(a) gives California courts the ability to reach "crimes committed outside the state if the defendant formed the intent and committed 'any act' within this state in whole or partial execution of that intent." People v. Morante, 975 P.2d 1071, 1092 (Cal. 1999). Such jurisdiction can be exercised even when a significant part of the crime is committed in a foreign country. See People v. Brown, 109 Cal. Rptr. 2d 879, 886-87 (2001) (jurisdiction of offense proper where murder occurred in Mexico but preparations were made in California). Any allegation in the Indictment of conduct falling within Section 778a(a) thus brings the conduct at issue within the purview of the California commercial bribery statute.

Defendants misconstrue United States v. Ferber, 966 F. Supp. 90 (D. Mass. 1997), by citing it for the proposition that, because Massachusetts had never criminally prosecuted a gratuity offense, it could not serve as a predicate for the Travel Act.

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injury to business or property. See Mattel, Inc. v. MGA Entertainment, Inc., No. 04-9049, 2011 WL 1114250, at *105 (C.D. Cal. Jan. 5, 2011).

That is not the point of Ferber. The Ferber court specifically noted that, had the underlying violation been of the Massachusetts bribery statute, as opposed to gratuity statute, it would have been clear that the Travel Act claims would be sufficient. Id. at 104.[13] In fact, the Tenth Circuit in Welch expressly distinguished Ferber in a case involving foreign commercial bribery, finding a strong federal interest in the prosecution. Welch, 327 F.3d at 1093.[14]

H. The Travel Act and PC 641.3 are Not Void for Vagueness

The Court should also reject defendants' vagueness and due process challenges. (Defts' Mot. at 6350-51). A statute is void for vagueness only if it fails to "define the criminal offense with (1) sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement." Skilling v. United States, 130 S. Ct. 2896, 2927-28 (2010) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

Courts have repeatedly found the Travel Act is not void for vagueness. See, e.g., United States v. O'Hara, 301 F.3d 563, 570 (7th Cir. 2002); United States v. Seregos, 655 F.2d 33, 35-36 (2d Cir. 1981). In fact, the Travel Act's repeated reference to use

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[13] The problem in Ferber was that a gratuity is not necessarily a bribe for Travel Act purposes, and in construing the scope of the gratuity statute, the court had to go beyond the plain text of the statute and look at Massachusetts' practice. The text of PC 641.3 is clear and no such analysis is needed.

[14] The other cases cited by defendants are inapposite here, as the state bribery and jurisdictional statutes in those cases were unclear as to whether or not they included the charged conduct. That is not the case here - the statutes are clear.

of "foreign commerce" provides ample notice that foreign conduct falls within the Travel Act's purview. PC 778a, discussed above, likewise puts defendants on clear notice that activities outside the state can be violations of PC 641.3. Contrary to defendants' assertion (Defts' Mot. at 6351), the government did not "recently . . . pick up, dust off and apply old statutes to new and unforseen situations," nor are there "grave doubts" as to the Travel Act's applicability to bribery that occurs overseas. The Travel Act has consistently been used in prosecuting such bribery for years.[15]

Despite the fact that "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand," United States v. Mazurie, 419 U.S. 544, 550 (1975), and despite this same issue was raised with respect to the motions regarding the definition of a "foreign official," defendants again fail to make any reference to the facts of this case in arguing that the statute is vague as applied and fail to meet the heavy burden of demonstrating that the Travel Act's prohibition of using foreign commerce to promote bribery did not provide clear warning that the charged conduct was proscribed.

Finally, a scienter requirement may serve to defeat a claim that a defendant is being punished for conduct he did not know was wrong. See Colautti v. Franklin, 439 U.S. 379, 395 (1979)

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[15] See, e.g., United States v. Mead, Dkt. No. 98-CR-240 (D.N.J. 1998); United States v. King, Dkt. No. 01-CR-190 (W.D. Mo. 2001); United States v. Welch, 327 F.3d 1081 (10th Cir. 2003); United States v. Amoako, Dkt. No. 06-CR-702 (D.N.J. 2007); United States v. Nguyen, Dkt. No. 08-CR-522 (E.D. Pa. 2008).

Section 1952(a)(3) contains a scienter requirement sufficient to overcome defendants' challenge, requiring intent to promote an unlawful activity, and, like the FCPA, PC 641.3 requires that the payment be made corruptly. Because the statutes require intentional and corrupt conduct, the statute is not unconstitutionally vague as applied to defendants. See, e.g., United States v. Guo, 634 F.3d 1119, 1123 (9th Cir. 2011).

I. The Travel Act Counts Allege All Essential Elements

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974). "An indictment which tracks the offense in the words of the statute is sufficient if those words fully, directly, and expressly set forth all the elements necessary to constitute the offense intended to be proved." United States v. Tavelman, 650 F.2d 1133, 1137 (9th Cir. 1981).

Here, the Travel Act charging language in paragraph 35 of the Indictment tracks the language of the statute. Defendants cite no legal support for their assertion that the Travel Act counts fail because the Indictment does not describe the specific subsequent unlawful act. The language used in the Indictment, by itself, has been held sufficient in a series of Travel Act prosecutions. See Tavelman, 650 F.2d at 1138;[16] United States v.

[16] The Indictment goes further than those in several of the cited cases (including Tavelman) in that, aside from setting forth the statutory language, it also provides details regarding

Muskovsky, 863 F.2d 1319, 1326-27 (7th Cir. 1988); United States v. Cerone, 830 F.2d 938, 951 (8th Cir. 1987); United States v. Stanley, 765 F.2d 1224, 1239-40 (5th Cir. 1985); United States v. Palfrey, 499 F. Supp. 2d 34, 43 (D.D.C. 2007). As the Fifth Circuit explained in Stanley, an indictment that tracks the language of the Travel Act is sufficient because the Act itself clearly sets out the essential elements of the offense. 765 F.2d at 1239-40.

Defendants' argument that Counts Twelve and Fourteen should be dismissed because they allege wires between two foreign countries is similarly without merit.[17] The Third Circuit addressed this very issue in United States v. Goldberg, 830 F.2d 459 (3rd Cir. 1987). The defendant in Goldberg, while in Pennsylvania, caused a wire transfer of funds from Canada to the Bahamas as part of a wire fraud scheme. The court found that the wire fraud statute reached such conduct because, as with the Carson defendants, the defendant caused the wire transfer and thus was the "cause of the harm." Goldberg, 830 F.2d at 463-64.

The Goldberg court found that because the defendant was a citizen of this country and was located in this country when he caused the offense to be committed, there were "two additional reasons for the United States to exercise jurisdiction over the offender: the need for a nation to protect against the injurious

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several overt acts related to the Travel Act counts.

[17] Although Count Fourteen alleges a wire transfer of approximately $136,584 from Sweden to Latvia (see n.2, supra), Overt Act 54 alleges that Cosgrove caused a wire payment from Sweden to New York of the first portion ($26,865) of the total promised corrupt payment ($163,449) alleged in Count Fourteen.

effect upon its citizens and upon commerce, when this effect is intentionally caused by the misdeeds of its own citizens and/or by the conduct of those persons found within its border." Id. at 464; see also United States v. Liersch, No. 04CR02521, 2005 WL 6414047, at *7 (S.D. Cal. May 2, 2005) (slip copy) (upholding money laundering charges involving a wire transfer between two foreign banks).

The two cases cited by defendants are both inapposite. In Weingarten, the court reversed the defendant's conviction for travel for the purpose of engaging in a sexual act with a minor because the travel was between two foreign nations "without any territorial nexus to the United States." 632 F.3d at 67. In the case at bar, as in Goldberg, defendants engaged in activity in the United States which caused the foreign wires. In United States v. Montford, 27 F.3d 137, 139 (5th Cir. 1994), the court ruled that where a vessel has no contact whatsoever with a foreign country, its journey does not involve foreign commerce, a holding that has little, if any, relevance to defendants' claims.

J. The Conspiracy Count Should Stand

Even if defendants' motion had merit, which it does not, the conspiracy charge would survive in any event. Defendants claim that, if the Travel Act counts are invalid, the entire conspiracy is "infected." (Defts' Mot. at 6355). Defendants offer no law or logic to support this statement. With one exception, all the cases cited by defendants are situations where the proof at trial varied so significantly from what was charged in the indictment

that the rights of the defendant were prejudiced.[18] That is not the case here and no allegations of variance have been made, so there is no "infection." When conspiracy is charged with multiple objects, if one object survives, a conviction survives. Ingram v. United States, 360 U.S. 672, 679-80 (1959). Likewise, where one object of the conspiracy is properly pleaded, the conspiracy survives. United States v. Borland, 309 F. Supp. 280, 291 (D. Del. 1970) (dismissal by court of two of the three objects of the charged conspiracy did not require dismissal of the entire conspiracy).

III. CONCLUSION

For the reasons set forth above, this Court should deny defendants' Motion to Dismiss Counts One, Eleven, Twelve, and Fourteen of the Indictment.

[18] The one exception, D'Alessio, (Defts' Mot. at 6355), also is inapposite. D'Alessio did not charge a multi-object conspiracy. Rather, the scheme to defraud was found defective because it was based entirely on substantive counts that alleged that the defendant violated a rule that was inapplicable to him.