UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. SACR 09-00077-JVS Date September 20, 2011

Present: The Honorable James V. Selna

Interpreter Not Present

Karla J. Tunis	Not Present	Not Present
Deputy Clerk	*Court Reporter.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
1. Stuart Carson	**NOT**		**X**	**1. Nicola T. Hanna**	**NOT**		**X**
2. Hong Carson	**NOT**		**X**	**2. Kimberly A. Dunne**	**NOT**		**X**
3. Paul Cosgrove	**NOT**		**X**	**3. Kenneth Miller**	**NOT**		**X**
4. David Edmonds	**NOT**		**X**	**4. David W. Weichert**	**NOT**		**X**

Proceedings: (In Chambers) **Order Denying Defendants' Motion to Dismiss Counts 1, 11, 12, and 14 of the Indictment** v(Fld 6-13-11, #376)

I. Introduction

Defendants Stuart Carson, Hong "Rose" Carson, Paul Cosgrove, and David Edmonds (collectively, "Defendants") move to dismiss Counts 1, 11, 12 and 14 of the Indictment on the grounds that they fail to state an offense ("Motion"). Count 1 charges Defendants with a conspiracy to violate the Travel Act, 18 U.S.C. § 1952(a)(3), from 1998 through 2007, and Counts 11, 12, and 14 charge them with substantive violations of the Travel Act.[1] Defendants contend that dismissal is required because these counts allege foreign commercial bribery, but the Travel Act does not apply extraterritorially. Morever, dismissal is warranted because the conduct alleged does not implicate the California commercial bribery statute, California Penal Code § 641.3, which is an essential element of a Travel Act violation. However, even if the Travel Act and the California commercial bribery statute do apply, Defendants submit that these statutes are unconstitutionally vague as applied to them. Finally, Defendants argue that the substantive Travel Act counts fail to allege an essential element of the Act, and Counts 12 and 14 fail to allege a jurisdictional element. The Government opposes Defendants' Motion.

[1] Count 1 also charges Defendants with conspiring to violate the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2.

II. Factual Background

A federal grand jury returned a sixteen-count indictment on April 9, 2009 (the "Indictment").[2] The counts at issue here target certain alleged bribes by Defendants —or, a conspiracy to pay bribes—to officers and employees of foreign companies for the purpose of obtaining or retaining business for their employer, Controlled Components Inc. ("CCI").[3] (Indictment ¶ 14.) CCI is a Delaware corporation with its headquarters in Rancho Santa Margarita, California, and is in the business of manufacturing "control valves for use in the nuclear, oil and gas, and power generation industries worldwide." (Indictment ¶ 3.) Defendants are U.S. citizens who served as executives at CCI's headquarters in Rancho Santa Margarita, California. (Indictment ¶¶ 4-7.)

The Indictment alleges that $1.95 million in bribes or "corrupt payments" were made to officers and employees of CCI's foreign owned customers between 2003 and 2007. (Indictment ¶¶ 14, 31, 35.) Defendants are alleged to have arranged holidays for overseas customers to places such as Disneyland and Las Vegas "under the guise of training and inspection trips," when the "actual purposes of the trips were to reward the customers' officers and employees for causing their employers to purchase [CCI's] products, retain business for [CCI], and obtain new business for [CCI]." (Indictment ¶ 19.) Defendants Stuart and Rose Carson are alleged to have purchased "numerous extravagant vacations . . . [for] private customers for the purpose of securing business," which included "first-class airfare to destinations such as Hawaii, five-star hotel accommodations, charter boat trips, and similar luxuries." (Indictment ¶ 20.) Defendants also allegedly hosted "lavish sales events" that included "hotel costs, meals, greens fees for golf, and travel expenses," and gave "expensive gifts to . . . private customers for the purpose of assisting in securing business."[4] (Indictment ¶¶ 22-23.)

Counts 1, 11, 12, and 14 are summarized as follows:

Count 1: Conspiracy to violate the FCPA and the Travel Act from 1998 through 2007. (Indictment ¶¶ 15-31.)

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[2] Count 16 of the Indictment was dismissed on February 28, 2011.

[3] Company A, referred to in paragraph 14 of the Indictment, is now known as CCI.

[4] The Government also alleges that Defendants "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," and "often provided approvals for corrupt payments by email." (Opp'n at 3.) While the Indictment generally alleges that Defendants used "the mail and any facility in interstate and foreign commerce" (Indictment ¶¶ 16(B), 35), it does not allege precisely how approvals for corrupt payments were transmitted.

Count 11 (Overt Acts 46-47): Violation of the Travel Act by Mr. Edmonds on March 9, 2004 , as reflected by a wire transfer of approximately $10,000 from California to China, for the purpose of making a corrupt payment to an employee of Company 1. (Indictment ¶¶ 31, 34-35.)

Count 12 (Overt Acts 48-49): Violation of the Travel Act by Mr. Edmonds on April 25, 2005, as reflected by a wire transfer of approximately $5,000 from Sweden to China, for the purpose of making a corrupt payment to an employee of Company 1. (Indictment ¶¶ 31, 34-35.)

Count 14 (Overt Acts 53-55): Violation of the Travel Act by Mr. Cosgrove on October 24, 2006, as reflected by a wire transfer of approximately $136,584.98 from Sweden to Latvia, for the purpose of making a corrupt payment to an employee of Company 3.[5] (Indictment ¶¶ 31, 34-35.)

III. Legal Standard

Under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." "A pretrial motion is generally 'capable of determination' before trial if it involves questions of law rather than fact." United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986). When issues raised in a pretrial motion are "entirely segregable" from the evidence that will be presented a trial, they must be decided before trial. Id. (quoting United States v. Barletta, 644 F.2d 50, 57-58 (1st Cir. 1981)). However, when issues are "'substantially founded upon and intertwined with' evidence concerning the alleged offense," the issues "fall[] within the province of the ultimate finder of fact and must be deferred." Id. (quoting United States v. Williams, 644 F.2d 950, 952-53 (2d Cir. 1981)). "Finally, if an issue raised in a pretrial motion is not entirely segregable from the evidence to be presented at trial, but also does not require review of a substantial portion of that evidence, the district court has discretion to defer decision on the motion." Id.

IV. Discussion

The Travel Act prohibits traveling in interstate or foreign commerce, or using the mail or any facility in interstate or foreign commerce, in furtherance of certain unlawful criminal

[5] Count 14 alleges a payment from Sweden to New York, but all parties agree that this alleged payment concerned one from Sweden to Latvia. Count 14 also originally charged Flavio Ricotti, but Mr. Ricotti pled guilty to one count of conspiracy to violate the FCPA and the Travel Act on April 28, 2011. The Government's brief indicates that Mr. Edmonds approved payment under Count 14 (Opp'n at 4), but the Indictment indicates that it was Mr. Cosgrove.

activity. See Rewis v. United States, 401 U.S. 808, 809 (1971). As relevant here, the elements of a Travel Act violation include: (1) travel in interstate or foreign commerce or use of the mail or any facility in interstate or foreign commerce, (2) with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, followed by (3) performance of or an attempt to perform an act of promotion, management, establishment, carrying on, or facilitation of the enumerated unlawful activity. 18 U.S.C. § 1952(a)(3); see also United States v. Welch, 327 F.3d 1081, 1090 (10th Cir. 2003). "Unlawful activity" is defined 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). The "unlawful activity" identified in the Indictment is "commercial bribery" in violation of California Penal Code § 641.3. (Indictment ¶ 35.)

A. The Travel Act Applies to the Conduct Charged

Defendants argue that dismissal is required because the Travel Act does not apply extraterritorially. (Mot. at 5-18.) Defendants rely on the Supreme Court's decision in Morrison v. National Australia Bank Ltd., __ U.S. __, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010), which held that § 10(b) of the Securities Exchange Act of 1934 did not provide a "cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." 130 S. Ct. at 2875. In reaching its decision, the Court made clear that courts must presume that a statute does not apply extraterritorially unless Congress clearly expressed its affirmative intention to give the statute extraterritorial effect: "When a statute gives no clear indication of an extraterritorial application, it has none." Id. at 2877-78. Since there was "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially," the Court concluded that it did not. Id. at 2883.

Defendants acknowledge that the Travel Act expressly "proscribes travel in interstate or foreign commerce, or use of the facilities of such commerce," but argue that the Act's "reference to foreign commerce does not render its application extraterritorial." (Mot. at 6 (emphasis added).) Under Morrison, " statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." 130 S. Ct. at 2882 (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 251 (1991)) (emphasis in original). Defendants point to the Second Circuit's decision in Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29 (2d Cir. 2010), in which the court held that RICO does not apply extraterritorially even though the statute applies to "any enterprise which is engaged in, or that activities of which affect, interstate or foreign commerce." (Mot. at 6-7 (citing Norex, 631 F.3d at 33).) Defendants submit that the "Travel Act's text plainly demonstrates its domestic focus," that the "legislative history of the 1961 Travel Act demonstrates that Congress did not intend it to have extraterritorial reach," and that the subsequent enactment of the FCPA provides a clear

inference that the Travel Act was not intended to apply extraterritorially. (Mot. at 7-9.)

The Court's analysis begins with whether Morrison controls. As discussed more fully below, the Court holds that Morrison does not control for two reasons: (1) an extraterritorial analysis is unnecessary because the criminal offense was completed domestically, and (2) even if an extraterritorial analysis is implicated, the Travel Act counts are proper under United States v. Bowman, 260 U.S. 94 (1922).

1. An Extraterritorial Analysis Is Unnecessary

The Government argues that Morrison does not control because this case does not involve an extraterritorial application of the law. (Opp'n at 9-12.) According to the Government, 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." (Opp'n at 9.) This is exemplified in Pasquantino v. United States, 544 U.S. 349 (2005). (Opp'n at 9-10.) The Court agrees.

In Pasquantino, the defendants were "convicted of federal wire fraud for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States." 544 U.S. at 353. While in New York, defendants ordered liquor by telephone from stores in Maryland, and then drove (or employed others to drive) the liquor over the Canadian border without paying the required Canadian excise taxes. Id. Defendants were charged with wire fraud under 18 U.S.C. § 1343, which "prohibits the use of interstate wires to effect 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" Id. Defendants argued that their convictions were improper, among other reasons, because the wire fraud statute was applied extraterritorially. Id. at 371. The Supreme Court rejected defendants' contentions, stating that defendants' "offense was complete the moment they executed the scheme inside the United States." Id.

According to the Court, the "domestic element of [defendants'] 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. The fact that the victim of the fraud was the Canadian government did not alter the Court's analysis because "the wire fraud statute punishes frauds executed 'in interstate or foreign commerce,'" and thus it was "not a statute in which Congress had only domestic concerns in mind." Id. at 371-72. Although the Court recognized that "[i]t may seem an odd use of the Federal Government's resources to prosecute a U.S. citizen for smuggling cheap liquor into Canada," the Court concluded that "the broad language of the wire fraud statute authorizes it to do so, and no canon of statutory construction permits us to read the statute more

narrowly." Id. at 372.

Here, the "broad language" of the Travel Act compels a similar result. The Government seeks to enforce the domestic elements of a Travel Act violation, which include: (1) use of the mail or any facility in interstate or foreign commerce, (2) with the intent to facilitate commercial bribery, followed by (3) an act in furtherance of the commercial bribery. See 18 U.S.C. § 1952(a)(3). Defendants allegedly acted in California and directed commercial bribery payments to foreign individuals. All the elements under the Travel Act were allegedly satisfied in California even if the target of Defendants' commercial bribery scheme was overseas. The fact that some of the wired payments were made from Sweden to China or Sweden to Latvia is of no consequence because Defendants, acting in California, presumably used some instrumentality in interstate or foreign commerce to set those payments in motion.

Defendants argue that Pasquantino is distinguishable because a Travel Act violation does not criminalize "fraud simpliciter," but rather "fraud on a corporate employer." (Mot. at 14-15; Reply at 8.) For this reason, Defendants contend that a Travel Act violation is akin to the Securities Exchange Act violation addressed in Morrison because both "charge a crime 'in connection with [a] particular transaction or event.'" (Mot. at 14-15.) "Simple wire fraud is completed within the U.S. and culpability is not dependent upon the object, victim, or harm caused," but the "Travel Act only applies to accessing channels of commerce to promote the violation of a specific state's bribery laws." (Reply at 8.)

On its face, the Court agrees with Defendants' statement that the Travel Act applies when "channels of commerce" are accessed in violation of a state's bribery laws, which is precisely what the Indictment alleges here. The Court does not draw the same implication from this statement as do Defendants, however, because commercial bribery under California Penal Code § 641.3 is not limited to "fraud on a corporate employer" or bribery within the territorial confines of California. As discussed more fully below, California's commercial bribery statute targets corrupt payments that injure competitors of the bribery recipient. The focus of California's commercial bribery statute is not only on "fraud on the corporate employer," but also on these corrupt payments that injure such competitors. Moreover, as discussed infra, California's commercial bribery statute applies even if the bribery transaction is consummated outside of California. This is why the Travel Act violation alleged here is analogous to the wire fraud violation in Pasquantino: the offense was complete the moment Defendants used a channel of foreign commerce to allegedly offer a "corrupt payment" to an employee and thereafter effectuated a payment to that employee. This is precisely how Morrison characterized Pasquantino. 130 S. Ct. at 2887.

Morrison distinguished Pasquantino on the grounds that the wire-fraud statute punished

"fraud *simpliciter*," whereas the Securities Exchange Act does not punish "all acts of deception, but only such acts 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" 130 S. Ct. at 2887. The Court used this same logic to argue that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." Id. at 2884. The focus of the Travel Act, however, is broader than the Exchange Act because it criminalizes a range of activities unconfined to one state. As recognized by the Supreme Court, the Travel Act "was aimed primarily at . . . persons who reside in one State while operating or managing illegal activities located in another." Rewis, 401 U.S. at 811. The Act "was needed to aid state and local governments which were no longer able to cope with the increasingly complex and interstate nature of large-scale, multiparty crime." Perrin v. United States, 444 U.S. 37, 41 (1979). This broader focus is evident in the language of the statute. Much like the wire-fraud statute at issue in Pasquantino, "no canon of statutory construction permits us to read the statute more narrowly." 544 U.S. at 372. Moreover, had the Court concluded that application of the wire fraud statute to the fact pattern in Pasquantino was fundamentally flawed, it undoubtedly would have said so.

Accordingly, an extraterritorial analysis is unnecessary under Morrison because the criminal offense was completed domestically.

2. The Travel Act Counts Are Proper under *Bowman*

Even if an extraterritorial analysis is implicated here, the Travel Act counts are proper under Bowman, 260 U.S. 94.

Bowman concerned a criminal indictment charging "conspiracy to defraud a corporation in which the United States was and is a stockholder" after defendants submitted a false claim for fuel oil for one of its steamships. Id. at 95. Because the plot was hatched at sea and carried out in Rio de Janeiro, Brazil, the district court concluded that the absence of any statutory reference to conduct at sea required it to construe the statute "not to extend to acts committed on the high seas." Id. at 96-97. The Supreme Court reversed.

In reversing, the Court recognized that a territorial presumption generally applies to statutes: "If punishment [for acts] . . . is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." Id. at 98. However, the Court held 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 added). According to the Court:

> Some . . . offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

Id. (emphasis added). The Court concluded that statute at issue was designed to prevent fraud by military contractors during World War I and its aftermath, and therefore the statute must reach frauds carried out on the high seas and in foreign ports because military operations take place throughout the world. See id. at 101.

Thus, consistent with Bowman, criminal statutes may apply extraterritorially even without an explicit Congressional statement. In deciding whether criminal statutes apply extraterritorially, courts "must consider the language and function of the prohibition." United States v. Leija-Sanchez, 602 F.3d 797, 799 (7th Cir. 2010). For example, in Leija-Sanchez, the Government charged defendant with a violent crime in aid of racketeering activity under 18 U.S.C. § 1959 for "arranging and paying for the murder of Guillermo Jimenez Flores (known as Montes), a former employee who had gone into competition with [defendant's] organization." Id. at 798. Assassins employed by defendant (all of whom were Mexican citizens) found Montes in Mexico (who was also a Mexico citizen) and killed him there. Id. The district court dismissed the count under § 1959 because it agreed with defendant that the statute did not apply extraterritorially, but the Seventh Circuit reversed. In doing so, the court held that Bowman controlled the analysis of whether § 1959 applied extraterritorially. Id. at 798-99. The Court concluded that § 1959 applied extraterritorially because the statute "applies to enterprises that engage in or affect 'foreign commerce,'" and the "rule cannot be implemented if the existence of activities abroad prevents application of § 1959 to those acts and effects that occur in the United States."[6] Id. at 800.

Similarly, the Travel Act cannot be implemented "if the existence of activities abroad prevents application of [the statute] to those acts and effects that occur in the United States."

[6] Assuming that the "last act" here is receipt of the payment rather than initiation of the payment, Leija-Sanchez would support application of the Travel Act here. Leija-Sanchez, 602 F.3d at 800.

Id. The Court agrees with the Government that the "plain language of the Travel Act demonstrates Congress's desire to reach conduct overseas." (Opp'n at 14.) The title of the Travel Act is "Interstate and foreign travel or transportation in aid of racketeering enterprises." (Emphasis added). 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 added). As the Government argues, "[t]hese references to 'foreign commerce' and 'foreign travel' clearly indicate that Congress intended to reach conduct overseas." (Opp'n at 15); see also 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").

Defendants contend that "[i]t is unclear whether Bowman survives Morrison." (Mot. at 18.) This is because Morrison stated that "'presumption [against extraterritoriality applies] in all cases, preserving a stable background against which Congress can legislate with predictable effects," and because Morrison did not distinguish Pasquantino on the grounds that one concerned the application of a civil statute and the other a criminal statute, but rather on the type of fraud alleged. (See Reply at 3.) Be that as it may, Morrison does not mention Bowman, nor does it explicitly overrule it. United States v. Campbell, __ F. Supp. 2d __, No. 10-224 (RMC), 2011 WL 3157598, at *1, 7 (D.D.C. July 27, 2011) (stating that "[d]espite the emphasis of Morrison that the presumption against extraterritoriality applies 'in all cases,' recent Supreme Court jurisprudence has developed with nary a mention of Bowman and has predominately involved civil statutes.") Bowman must be followed until the Supreme Court overrules it. Leija-Sanchez, 602 F.3d at 799 ("Whether or not Aramco and other post-1922 decisions are in tension with Bowman, we must apply Bowman until the Justices themselves overrule it."); United States v. Weingarten, 632 F.3d 60, 66-67 (2d Cir. 2011) (acknowledging Morrison, but noting that under Bowman "Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to United States territory would severely diminish the statute's effectiveness.") (internal quotation marks omitted); Campbell, 2011 WL 3157598, at *1 (holding that the court must follow Bowman because it "cannot ignore what neither the Supreme Court nor the D.C. Circuit has declared outmoded.").[7]

Alternatively, Defendants argue that Bowman is inapplicable because the Travel Act "was not intended to protect the federal government, but to aid state law enforcement." (Mot. at 18.) Defendant's focus on "protect[ing] the federal government" is

[7] For this reason, the Court finds it significant that the Second Circuit did not comment on the extraterritorial application of RICO's criminal provisions in Norex: "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.3d at 33.

too narrow. Instead, the Ninth Circuit has interpreted Bowman to mean that courts "may infer that extraterritorial application is appropriate from 'the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved.'"[8] United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994) (quoting United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991). Here, as discussed supra, the "nature of the offense" expressly contemplates foreign conduct. Congress's other legislative efforts to eliminate similar crimes, including eliminating bribery of foreign officials by passing the FCPA, supports an extraterritorial application of the Travel Act.[9]

Accordingly, even if an extraterritorial analysis is implicated here, the Travel Act counts are proper under Bowman.

B. California Penal Code § 641.3 Reaches the Conduct Charged

Defendants next argue that California's commercial bribery statute, California Penal Code § 641.3, does not reach the alleged conduct, and therefore the Indictment fails to state an offense under the Travel Act. Section 641.3 proscribes the following conduct:

> Any employee who solicits, accepts, or agrees to accept money or any thing of value from a person other than his or her employer, other than in trust for the employer, corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who offers or gives an employee money or any thing of value under those circumstances, is guilty of commercial bribery.

Cal. Penal Code § 641.3(a) (emphasis added). As used in the statute, "corruptly" means "that

[8] In determining whether a statute applies extraterritorially, the Ninth Circuit also evaluates whether such application would violate the principles of international law. Vasquez-Velasco, 15 F.3d at 839. Defendants do not challenge whether the extraterritorial application of the Travel Act violates international law because "international law is irrelevant": "Defendants' challenge to the extraterritorial application of the Travel Act does not present a question of Congressional power or this Court's jurisdiction," but rather "[i]t presents a merits question focused on whether Congress clearly expressed its intent that the Travel Act apply extraterritorially and, if not, whether the government is nonetheless seeking the extraterritorial application of the statute." (Reply at 7.)

[9] Defendants argue that "the subsequent enactment of the FCPA provides a clear inference that the Travel Act was not intended to apply extraterritorially." (Mot. at 9-12.) The Court disagrees. First, multiple criminal statutes can often be applied to the same criminal conduct. See United States v. Stafford, 831 F.2d 1479, 1485 (9th Cir. 1987) ("The Travel Act and 18 U.S.C. § 1510 each require proof of an element that the other does not. Because no clear evidence of contrary congressional intent exists, Congress is presumed to have intended to permit separate punishment for each offense.") Second, as to the facts alleged in this Indictment, the Court does not discern any conflict between the Travel Act and the FCPA.

the person specifically intends to injure or defraud . . . a competitor of any such employer."[10] Cal. Penal Code § 641.3(d)(3).

According to Defendants, § 641.3 "has never been used to criminally prosecute foreign commercial bribery," and "[n]othing in the legislative history of [§] 641.3 suggests application to commercial bribery of an employee of a foreign company in exchange for a foreign sale." (Mot. at 18-19.) However, as the Government points out, California Penal Code § 778a(a) expressly addresses offenses commenced within California and consummated outside of the state. Section 778a states in relevant part:

> 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 manner as if the crime had been committed entirely within this state.

Cal. Penal Code § 778a(a) (emphasis added). Thus, under § 778a(a), "California has territorial jurisdiction over an offense if the defendant, with the requisite intent, does a preparatory act in California that is more than a de minimis act toward the eventual completion of the offense." People v. Betts, 34 Cal. 4th 1039, 1047 (2005); cf. People v. Brown, 91 Cal. App. 4th 256, 266-67 (2001) (holding that jurisdiction was proper for second degree murder because preparations were made in California, even though the amputation of the victim's leg—which led to the victim's death—occurred in Mexico); Bryant v. Mattel, Inc., No. CV 04-9049 DOC (RNBx), 2010 WL 3705668, at *8-9 (C.D. Cal. Aug. 2, 2010) (holding that application of California Penal Code § 641.3 was proper for bribes in Mexico and Canada because the statute "proscribes bribery conducted 'in whole or in part' in California."). Here, while acting in California from CCI's headquarters, Defendants are alleged to have offered "corrupt payments" by wiring money to employees of private companies outside of California in order to secure business. (Indictment ¶¶ 18, 35.) The corrupt payments were intended to benefit Defendants' employer, CCI. Because more than *de minimis* preparatory acts were carried out in California in furtherance of the commercial bribes, § 778a allows for prosecution under § 641.3.

Defendants next argue that California has not been harmed by "offering of bribes to foreign employees of foreign companies in exchange for sales abroad," and courts have dismissed charges predicated on state law violations under the Travel Act when "the state itself

[10] "Corruptly" is defined to mean that "the person specifically intends to injure or defraud (A) his or her employer, (B) the employer of the person to whom he or she offers, gives, or agrees to give the money or a thing of value, (C) the employer of the person from whom he or she requests, receives, or agrees to receive the money or a thing of value, or (D) a competitor of any such employer." Cal. Penal Code § 641.3(d)(3).

does not intend its criminal laws to reach the charged conduct." (Mot. at 19-20 (citing United States v. Ferber, 966 F. Supp. 90 (D. Mass. 1997) and United States v. Tonry, 837 F.2d 1281 (5th Cir. 1988).) Defendants therefore contend that a Travel Act violation cannot be stated if "there is no indication that California could or would prosecute the foreign commercial bribery alleged." (Mot. at 20.) The question here, however, is not whether California "would prosecute" foreign commercial bribery or ever has, or even whether California "intended" § 641.3 to be applied to foreign commercial bribery (whatever "intended" means), but rather whether the alleged conduct does, in fact, fall under the scope of § 641.3.[11] There is no question that the Indictment charges that Defendants offered "corrupt payments" to employees of several private companies,[12] and that Defendants set in motion their commercial bribery scheme from CCI's headquarters in California. For the reasons stated previously, the plain language of California Penal Code § 641.3 reaches the alleged conduct.

Accordingly, California Penal Code § 641.3 reaches the alleged conduct in the Indictment.[13]

C. The Travel Act and California Penal Code § 641.3 Are Not Unconstitutionally Vague

Defendants contend that application of the Travel Act and California Penal Code § 641.3 to Defendants' conduct is unconstitutionally vague and violates Due Process. According to

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[11] For this reason, the Court disagrees with Feber, 966 F. Supp at 105-06. In Feber, the court recognized that "the plain language of [the relevant Massachusetts statute] would appear to extend to the conduct in this case," but that state "prosecutors have never pursued criminal charges for gratuity violations against anyone similarly situated to [defendant]." Id. at 105. According to the court, "[i]f conduct such as [defendant's] is to be pursued criminally under [the Massachusetts statute], it is the state, not the federal government, that must make that initial prosecutorial policy decision." Id. The Court disagrees. If the plain language of a state criminal statute reaches the conduct alleged, the inquiry ends. Decisions by state prosecutors about whether to bring cases (absent unusual Due Process concerns) have no bearing on the statutory construction of a statute. However, the Court notes that Feber recognized that a violation of the Massachusetts bribery statute—as opposed to the gratuity statute—would have stated a valid predicate offense under the Travel Act. Id. at 103 ("There is no doubt that a violation of the Massachusetts bribery statute is a valid predicate offense under the Travel Act.") Thus, it may be that the court resorted to this unconventional means of statutory construction given the peculiar underlying facts in Feber.

[12] It is clear from the Indictment that there is no ambiguity about whether California Penal Code § 641.3 applies to the parties involved in the alleged commercial bribery in this case, thus distinguishing it from Tonry, 837 F.2d at 1281. Tonry concerned a Travel Act violation for the bribery of the "Chairman of the Chitimacha Tribe" based on a predicate offense under Louisiana law. 837 F.2d at 1281. Louisiana had two bribery statutes: a public bribery statute criminalizing bribery of Louisiana public officials and employees, and a commercial bribery statute criminalizing bribery of private agents, employees, and fiduciaries. Id. at 1282. By dividing bribery into "public" and "private" statutes, and limiting the reach of the public bribery statute to Louisiana officials, the court held that Louisiana's private, commercial bribery statute did not reach the conduct of non-Louisiana public officials. Id. at 1281, 1283-84. No such argument can be made here.

[13] There is a federal interest in using state bribery statutes as a predicate for a Travel Act prosecution. Welch, 327 F.3d at 1093.

Defendants, nothing in the text, legislative history, or case law of the Travel Act and California Penal Code § 641.3 "suggests that the statutes reach the conduct alleged here." (Mot. at 21.) Moreover, the "government's ability to pick up, dust off and apply old statutes to new and unforeseen situations demonstrates arbitrary enforcement." (Id.)

The Government responds that "the Travel Act's repeated reference to use of 'foreign commerce' provides ample notice that foreign conduct falls within the Travel Act's purview," and that California Penal Code § 778a "likewise puts defendants on clear notice that activities outside the state can be violations of [§] 641.3." (Opp'n at 25-26.) Contrary to Defendants' assertion, "[t]he Travel Act has consistently been used in prosecuting such bribery for years." (Opp'n at 26 (citing, inter alia, Welch, 327 F.3d 1081.) Because "defendants again fail to make any reference to the facts of this case in arguing that the statute is vague as applied," as well as the fact that "a scienter requirement may serve to defeat a claim that a defendant is being punished for conduct he did not know was wrong," the Government submits that the statutes are not unconstitutionally vague as applied to Defendants. (Opp'n at 26-27.)

To satisfy due process, a statute must "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, __ U.S. __, 130 S. Ct. 2896, 2927-28 (2010) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). "The void-for-vagueness doctrine embraces these requirements." Id. at 2928. When considering a void-for-vagueness challenge, a strong presumptive validity attaches to an Act of Congress. Id. (stating that court must "construe, not condemn, Congress' enactments.") "[V]agueness 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. Valenzuela, 596 F.2d 1361, 1367 (9th Cir. 1979) (quoting United States v. Mazurie, 419 U.S. 544, 550 (1975)). Scienter requirements in criminal statutes may alleviate vagueness concerns. Gonzales v. Carhart, 550 U.S. 124, 149 (2007); Colautti v. Franklin, 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.").

Defendants' void-for-vagueness challenge fails. The Court agrees with the Government that the Travel Act's repeated use of the term "foreign commerce" provides ample notice, and California Penal Code § 778a makes it clear that violations under § 641.3 can be tried even if the commercial bribe is consummated outside of California. Second, cases such as Welch, 327 F.3d at 1081, demonstrate that the Travel Act is not being "dusted off" and employed arbitrarily.

For these reasons, Defendants' void-for-vagueness challenge fails.

D. The Travel Act Counts Allege All Essential Elements

Defendants contend that the Travel Act counts fail to allege all essential elements.

1. Act in Furtherance after Alleged Bribery

Defendants argue that the Indictment fails to allege an act in furtherance of bribery after the alleged use of interstate or foreign commerce. (Mot. at 21-23.) "The Travel Act is not violated where the only alleged conduct is travel or use of the facility in interstate commerce." (Mot. at 22 (citing United States v. Zemater, 501 F.2d 540, 544-45 (7th Cir. 1974).) Because the "wire transfers identified in the Travel Act Counts are the alleged bases for both the first and third elements of the charged Travel Act offenses," Defendants submit that the Travel Act Counts fail. The Government responds by stating that "the Travel Act charging language in paragraph 35 of the Indictment tracks the language of the statute," and there is "no legal support for [Defendants'] assertion that the Travel Act counts fail because the Indictment does not describe the specific subsequent unlawful act." (Opp'n at 27.)

Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." "'[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the 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.'" United States v. Davis, 336 F.3d 920, 922 (9th Cir. 2003) (quoting United States v. Bailey, 444 U.S. 394, 414 (1980)). "In cases where the indictment 'tracks the words of the statute charging the offense,' the indictment will be held sufficient 'so long as the words unambiguously set forth all elements necessary to constitute the offense.'" Id. (quoting United States v. Fitzgerald, 882 F.2d 397, 399 (9th Cir. 1989)).

Here, the Indictment tracks the language of the Travel Act and "unambiguously sets forth all elements necessary to constitute the offense." Id. Defendants are sufficiently informed of the charges, and whether the Government can satisfy all elements of a Travel Act violation depends on the evidence to be presented at trial.

2. "Foreign Commerce" in Count 12 and Count 14

Defendants argue that the indictment fails to allege the jurisdictional element of "travel or use of a facility in interstate or foreign commerce" for Counts 12 and 14 because they involve wire transfers between two foreign countries—Sweden and China and Sweden and Latvia,

respectively. (Mot. at 23-24.) Because "foreign commerce" requires an act between the United States and a foreign country, these counts fail. (Reply at 11 (citing United States v. Weingarten, 632 F.3d 60, 70 (2d. Cir. 2011); United States v. Montford, 27 F.3d 137, 138 (5th Cir. 1994).) The Government responds that the Travel Act is satisfied because Defendants acted domestically to cause the wire transfers. (Opp'n at 28-29 (citing United States v. Goldberg, 830 F.2d 459 (3rd Cir. 1987).)

The Court agrees with the Government that the alleged transactions fall within the scope of "foreign commerce" in the Travel Act, and that the cases cited by Defendants are distinguishable.

In Montford, the court addressed whether "gambling boat excursions a few miles offshore to avoid the reach of state law are in 'foreign commerce' for purposes of certain federal criminal statutes." 27 F.3d at 138. The court ruled "that foreign commerce requires some form of contact with a foreign state." Id. at 140. 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 62-63, 71. In doing so, the court emphasized that it did "not suggest . . . that the mere presence of an intermediate stop outside the United States on a multi-legged journey undertaken for unlawful purposes will immunize a defendant from prosecution . . . ." Id. at 71.

Here, there is no issue about whether Defendants' actions had some contact with a foreign state, so Montford is distinguishable. Moreover, unlike the facts alleged in Weingarten, there is a "territorial nexus" to the United States because Defendants allegedly set in motion the corrupt payments from California. Holding otherwise would mean that Defendants could avoid prosecution simply by making sure any "corrupt payments" were made from overseas bank accounts. Instead, this situation is analogous to the one hypothesized in Weingarten, in which the court warned that criminal defendants could not immunize themselves from prosecution simply by interposing intermediate stops "on a multi-legged journey undertaken for unlawful purposes." Id. Defendants allegedly set out to bribe individuals in China and Latvia, but stopped briefly in their bank account in Sweden to accomplish their unlawful purposes. The allegations are sufficient.

E. Count 1 Stands

Because the Court denies Defendants' Motion to dismiss the Travel Act counts, the Court also denies Defendants' Motion to dismiss the conspiracy allegations in Count 1.

V. Conclusion

Accordingly, for the foregoing reasons, Defendants' Motion is denied.

IT IS SO ORDERED.

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