No. 16-1010

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

FREDERIC PIERUCCI (HOSKINS),
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, D.C. NO. 3:12CR238 (JBA) (ARTERTON, D.J.)

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STATEMENT OF JURISDICTION

The United States appeals from the district court's order dismissing a part of Count 1 of the third superseding indictment against defendant-appellee Lawrence Hoskins and effectively precluding the government from proceeding on a part of the aiding and abetting allegations for Counts 2-7, as well as the district court's order denying reconsideration. The district court (Hon. Janet Bond Arterton) had subject matter jurisdiction under 18 U.S.C. § 3231.

The district court's initial order was entered on August 13, 2015. App. 118-38 (Dkt. 270).[1] The government filed a motion for reconsideration on August 27, 2015. Dkt. 273. The district court denied reconsideration on March 16, 2016. App. 139-50 (Dkt. 342). The government filed a timely notice of interlocutory appeal on April 1, 2016. App. 151 (Dkt. 344); *see* Fed. R. App. 4(b)(1)(B); *United States v. Healy*, 376 U.S. 75, 77-78 (1964) ("a timely petition for rehearing by the Government filed within the permissible time for appeal renders the judgment not final for purposes of appeal until the court disposes of the petition").

This Court has jurisdiction under 18 U.S.C. § 3731 (authorizing interlocutory government appeal from a district court's order "dismissing an

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[1] "App." refers to the appendix; "Dkt." refers to district court docket entries.

indictment . . . , as to any one or more counts, or any part thereof"). *See United States v. Margiotta*, 662 F.2d 131, 139 (2d Cir. 1981) (Section 3731 permits appeal where district court's actions have "practical effect of eliminating an independent basis upon which a conviction could be secured"); *see also United States v. Serafini*, 167 F.3d 812, 816 (3d Cir. 1999). The Solicitor General has authorized this government appeal.

STATEMENT OF THE ISSUE

Whether a foreign person (who does not reside in the United States) can be liable for conspiring or aiding and abetting a U.S. company to violate the Foreign Corrupt Practices Act if that individual is not in the categories of principal persons covered in the statute.

STATEMENT OF THE CASE

Hoskins and others were charged by a grand jury for the District of Connecticut with various counts relating to a conspiracy to bribe foreign officials in return for favorable treatment on a business deal in Indonesia. In the third superseding indictment ("Indictment"), Hoskins was charged with conspiring to violate provisions of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-2 and 78dd-3, in violation of 18 U.S.C. § 371 (Count 1); substantive violations of the FCPA and aiding and abetting the same, in violation of 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2 (Counts 2-7); and money laundering, as well

as conspiring and aiding and abetting the same, pursuant to 18 U.S.C. §§ 2, 1956(a)(2)(A), and 1956(h) (Counts 8-12). App. 85-117 (Indictment). The district court (Hon. Janet Bond Arterton) dismissed a portion of the conspiracy charge and effectively precluded the government from relying on the aiding and abetting allegations in Counts 2-7, App. 118-38; *United States v. Hoskins*, 123 F.Supp.3d 316 (D. Conn. 2015), and it denied the government's motion for reconsideration, App. 139-50.

A. Statement of Facts

1. Background on the FCPA

The FCPA criminalizes schemes to bribe foreign officials in return for favorable treatment in obtaining or retaining business, where there are threshold ties to the United States. More specifically, the FCPA prohibits covered actors from, *inter alia*, committing an act "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or . . . the giving of anything of value" to "any foreign official" for the purpose of influencing the "foreign official" in aiding an actor "in obtaining or retaining business for or with, or directing business to, any person." *See, e.g.*, 15 U.S.C. § 78dd-2(a)(1).

The FCPA anti-bribery provisions contain three sections, each regulating different categories of actors, both individuals and entities. *See* 15 U.S.C.

§§ 78dd-1, 78dd-2, & 78dd-3. Individuals who "willfully violate" the FCPA are subject to criminal penalties. *E.g.*, 15 U.S.C. § 78dd-2(g).

Section 78dd-1 prohibits an "issuer" of U.S. securities (*i.e.*, foreign and domestic companies that are publicly listed on U.S. stock exchanges or that are required to register with the SEC) or "any officer, director, employee, or agent of such issuer" from making "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" a bribe to a foreign official to obtain business. 15 U.S.C. § 78dd-1(a)(1).

Section 78dd-2 applies to a "domestic concern" (other than an "issuer" subject to Section 78dd-1) or "any officer, director, employee, or agent of such domestic concern." 15 U.S.C. § 78dd-2(a). A "domestic concern" encompasses "any individual who is a citizen, national, or resident of the United States," as well as a business that "has its principal place of business in the United States," or which is organized under state law. 15 U.S.C. § 78dd-2(h)(1)(A) & (B). In short, a domestic concern is a U.S. person or business. Section 78dd-2's main proscription is substantially equivalent to Section 78dd-1, prohibiting "use of the mails or any means or instrumentality of interstate commerce" in furtherance of a bribe to a foreign official to obtain business. 15 U.S.C. § 78dd-2(a).

Sections 78dd-1 and 78dd-2 both contain "alternative jurisdiction" provisions that proscribe U.S. businesses and U.S. persons from engaging in acts

outside the United States in furtherance of a corrupt payment to a foreign official to obtain business, "irrespective" of the use of the mails or instrumentalities of interstate commerce. *See* 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

The final section, § 78dd-3, regulates the conduct of "persons other than issuers or domestic concerns," to wit, foreign citizens, residents, and corporations, "while in the territory of the United States." 15 U.S.C. § 78dd-3(a) & (f)(1). Section 78dd-3 makes it unlawful for a foreign "person" (including a foreign business), or any "officer, director, employee, or agent of such person,"[2] "while in the territory of the United States" to use the mails or instrumentalities of interstate commerce "or to do any other act" in furtherance of a corrupt payment to a foreign official for obtaining business. *Ibid.*

2. Offense conduct

As alleged and relevant here, Hoskins participated in a bribery scheme for Alstom S.A. ("Alstom"), its Connecticut-based subsidiary Alstom Power, Inc. ("Alstom US"), and other conspirators, including both U.S. persons as well as foreign entities and their agents acting within U.S. territory, to win a $118 million contract to build power stations for the government of Indonesia (the "Indonesia Project"). The conspiracy ran from 2002 to 2009. App. 85-86, 88-

[2] All three FCPA sections also apply to "any stockholder acting on behalf" of the covered entity. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

89, 93-95 (Indictment ¶¶ 2, 11, 12, 26, 27). Hoskins, with his coconspirators, arranged for millions of dollars of bribes to be paid to a Member of the Indonesian Parliament and officials at the state-run electricity company in Indonesia in exchange for assistance in awarding the contract to Alstom Power US and its partners, including the Japanese-based trading company Marubeni. App. 86-87, 89, 93-95, 108, 110-12 (Indictment ¶¶ 4, 12, 26, 27, 83-85, 93-102).

Alstom is a French multinational conglomerate in the business of building power, grid, and transportation projects, among other things; Alstom US is its U.S. subsidiary headquartered in Windsor, Connecticut. App. 85-86 (Indictment ¶ 2). Hoskins, a citizen of the United Kingdom and a Senior Vice President of Alstom, supported Alstom subsidiaries' efforts to secure contracts around the world.[3] App. 86, 89 (Indictment ¶ 3, 13); Dkt. 190 at 2.

In this capacity, Hoskins was responsible for retaining two consultants for the Indonesia Project through whom Alstom US and its partners concealed bribe payments to Indonesian government officials. App. 87-89 (Indictment ¶¶ 8, 13). One of the consultants was based in Maryland ("Consultant A"); the second, in Indonesia ("Consultant B"). Dkt. 161, Exs. 1 and 2; App. 92 (Indictment ¶¶ 20,

[3] Hoskins was employed by Alstom's British subsidiary, Alstom UK Ltd., and assigned to the parent company's French subsidiary, Alstom Resources Management S.A. App. 86 (Indictment ¶¶ 2-3).

21). Even after the retention of the consultants, Hoskins took additional steps to ensure that the key officials were bribed in an effective and timely manner. *See, e.g.*, App. 104-07 (Indictment ¶¶ 65-67, 70-78).

The bribe payments made to the Member of the Indonesian Parliament were initiated from the New York bank account of Alstom US, as well as the New York bank account of Marubeni (Alstom's Japanese consortium partner). The funds were paid to Consultant A's bank account in Maryland and then used to bribe the Member of Parliament in Indonesia. App. 96, 108, 110-11 (Indictment ¶¶ 34, 83-85, 93, 98-100). Alstom US similarly initiated payments to Consultant B from its New York bank account, which Consultant B then used to bribe the Indonesian officials. App. 110 (Indictment ¶¶ 94-97).

Hoskins' coconspirators included a number of U.S. persons, including Frederic Pierucci (Alstom's Vice President of Global Boiler Sales, stationed in Connecticut); David Rothschild and William Pomponi (two Vice Presidents of Regional Sales for Alstom US); and Alstom US. App. 88, 90-91 (Indictment ¶¶ 11, 14-16). In furtherance of the scheme, Hoskins repeatedly e-mailed and called these and other U.S.-based coconspirators, including Consultant A, while they were in the United States, but he did not travel here. App. 95-96 (Indictment ¶¶ 29-32). His coconspirators also included Marubeni and its employees and agents, who attended meetings with Alstom employees in Windsor,

Connecticut, in connection with the Indonesia Project. App. 89, 98, 107 (Indictment ¶¶ 12, 38, 79).

The conspirators succeeded in securing the Indonesia Project. App. 88 (Indictment ¶ 10). The contract was between the Indonesian government, Alstom US, Alstom's Indonesia subsidiary, and Marubeni. Dkt. 161, Ex. 3.

B. Course of Proceedings

In July 2013, a grand jury charged Hoskins in a second superseding indictment with conspiring to violate provisions of the FCPA, in violation of 18 U.S.C. § 371 (Count 1); substantive violations of the FCPA and aiding and abetting the same, in violation of 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2 (Counts 2-7); and money laundering, as well as conspiring and aiding and abetting the same, pursuant to 18 U.S.C. §§ 2, 1956(a)(2)(A), and 1956(h) (Counts 8-12). App. 28-62 (Dkt. 50). The FCPA conspiracy charge (Count 1) had two objects: to commit a violation of 15 U.S.C. § 78dd-2 (prohibiting domestic concerns from using interstate commerce corruptly to give anything of value to a foreign official), and 15 U.S.C. § 78dd-3 (prohibiting any foreign person or business from taking acts in furtherance of the corrupt scheme while in the United States). App. 37-39 (Dkt. 50 ¶ 26).[4]

[4] Hoskins was arrested in April 2014 when he traveled to the United States Virgin Islands. Dkt. 161 at 7.

Hoskins moved to dismiss the second superseding indictment (Dkt. 149), arguing, *inter alia*, that (1) he was too high level within the Alstom organization to be an "agent" of a U.S. subsidiary; (2) the FCPA did not apply extraterritorially beyond its express terms and therefore was inapplicable to him (a non-agent foreign national operating abroad); and (3) he was exempt from conspiracy and accomplice liability under the reasoning of *Gebardi v. United States*, 287 U.S. 112 (1932), which in limited circumstances bars prosecution of an individual for conspiracy or accomplice liability when the underlying substantive statute does not directly cover the individual.

The district court denied Hoskins' motion. App. 63-84 (Dkt. 190). The district court ruled that the indictment was sufficient on its face and that Hoskins' argument that he was not an agent of Alstom US amounted to a premature challenge to the sufficiency of the evidence. The court also rejected Hoskins' extraterritoriality challenge, concluding that he is charged with "domestic conduct." App. 80 (Dkt. 190 at 18). The court explained that, although Hoskins "may have never entered the United States in connection with his Alstom employment," that factor was "not dispositive because his physical presence within the United States is not required where the Indictment alleges that he used domestic wire transfers to promote the conspiracy." App. 81. The court did not address the *Gebardi* claim.

In April 2015, the grand jury returned a third superseding indictment – the current, operative Indictment. The Indictment made clear that Hoskins is being charged under Counts 1-7 not only as an agent of a domestic concern (*i.e.*, a principal falling within the FCPA's direct prohibitions), but also as a conspirator and aider and abettor of domestic concerns and foreign persons acting within U.S. territory, without regard to his qualification as an agent of a domestic concern. App. 84, 93-95 (Indictment ¶¶ 13, 26); *see* App. 120 n.1 (describing alterations in the Indictment).

The government moved in limine to preclude Hoskins from arguing that he could be convicted of Counts 2-7 only if the government proved that he was acting as an "agent" of a domestic concern. Dkt. 232.

Hoskins, in turn, filed a second motion to dismiss and responded to the government's motion in limine, again arguing that, as a non-agent of a domestic concern and a foreign national who did not act within the territory of the United States, he was part of an excepted class of persons under *Gebardi* and therefore could not be convicted of conspiring to commit, or aiding and abetting, FCPA violations. Dkt. 253 and 255. The government opposed the motion to dismiss. Dkt. 262.

The district court granted, in part, Hoskins' motion to dismiss and denied the government's motion in limine. App. 118-38. The court framed the issue

raised by the two motions as "whether a non-resident foreign national could be subject to criminal liability under the FCPA, even when he is not an agent of a domestic concern and does not commit acts while physically present in the territory of the United States, under a theory of conspiracy or aiding and abetting a violation of the FCPA by a person who is within the statute's reach." App. 121-22. Although acknowledging that conspirator and accomplice liability generally apply across the criminal code, the court ruled that the *Gebardi* principle limited their application in this case. App. 123-27.

In *Gebardi*, the Supreme Court considered whether a woman could be convicted of conspiracy to violate the Mann Act, which prohibited the transportation across state lines of "any woman or girl for the purpose of prostitution or debauchery." 287 U.S. at 118 (quoting former 18 U.S.C. § 398). Even though a violation of the Mann Act would "frequently" be expected to involve the "consent and agreement on the part of the woman to the forbidden transportation, . . . this acquiescence was not made a crime under the Mann Act itself." App. 125 (quoting 287 U.S. at 119, 121) (brackets and ellipses omitted). In light of Congress's deliberate decision not to impose substantive liability on the participating woman, *Gebardi* held that she also may not be prosecuted for conspiracy, the district court explained. *Ibid.* Thus, according to the district court, "the *Gebardi* principle is that where Congress chooses to exclude a class

of individuals from liability under the statute, the Executive may not override the Congressional intent not to prosecute that party by charging it with conspiring to violate a statute that it could not directly violate." *Ibid.* (punctuation and internal quotation marks omitted). Moreover, the court reasoned, the *Gebardi* principle applies equally to aiding and abetting liability. *Ibid.*

The district court held that the *Gebardi* principle precluded conspiracy and aiding and abetting liability here because Congress's choice to "assign[] guilt [under the FCPA] to only one type of participant" shows its "intent[] to leave the others unpunished for the offense." App. 127 (internal quotation marks omitted; citing *United States v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987)). The court looked first at the statute's text and structure, observing that it "carefully delineates the classes of people subject to liability and excludes non-resident foreign nationals where they are not agents of a domestic concern or did not take actions in furtherance of a corrupt payment within the territory of the United States." App. 128. The court also considered the FCPA's legislative history. The court stated that it was "sparse," but concluded that it "is consistent with what the plain text and structure of the final enactment implies regarding the limits of liability for non-resident foreign nationals." App. 130. The court therefore concluded that "Congress did not intend to impose accomplice liability

on non-resident foreign nationals who were not subject to direct liability." App. 137.

Because the government could still proceed on the theory that Hoskins was liable as an agent of a domestic concern, the court did not dismiss the conspiracy count in its entirety. The court ruled, however, that the government could not proceed on the theory that Hoskins could be liable for conspiring to violate the FCPA "even if he is not proved to be an agent of a domestic concern." *Ibid.*

Moreover, the court appeared to dismiss altogether the second object of the conspiracy – that Hoskins conspired with others, including foreign persons, to violate the FCPA under 15 U.S.C. § 78dd-3 "while in the territory of the United States." *See* App. 137 n.14. The court noted that "it is undisputed that Mr. Hoskins never entered the territory of the United States and thus could not be prosecuted directly under this section." *Ibid.* The court concluded, "[T]he Government cannot circumvent this intention by resort to the conspiracy statute." *Ibid.* Thus, although the court allowed the government to proceed in part on the first object of the FCPA conspiracy on the theory that Hoskins was an agent of a domestic concern, the court appeared to dismiss the second object of the conspiracy without regard to Hoskins' agency status.

The government moved for reconsideration, arguing that the district court failed to consider key pieces of legislative history and relevant circuit case law. Dkt. 273. After a hearing (App. 153-260; Dkt. 354), the district court denied the government's motion for reconsideration. App. 139-50.

SUMMARY OF ARGUMENT

The FCPA criminalizes bribes paid to foreign officials for obtaining or retaining business. It casts a wide net, directly prohibiting a variety of individuals and entities with connections to the United States from making corrupt payments to foreign officials. The net ensnared Hoskins in two ways. First, the grand jury alleged that he was an agent of a "domestic concern" (encompassing a U.S. person or U.S. business), an expressly enumerated FCPA category. 15 U.S.C. § 78dd-2. Second, he was charged with conspiring to commit and aiding and abetting substantive FCPA violations even if he was not an agent of a domestic concern, based on the well-established rule, reaffirmed just last term by the Supreme Court, that conspirator and accomplice liability are not limited to those individuals expressly enumerated in the underlying substantive statute. *Ocasio v. United States*, 136 S. Ct. 1423 (2016).[5]

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[5] Although the government intends to prove at trial that Hoskins in his role assisting and supporting Alstom US in the bribe scheme was not too "high-level" to be considered an agent, *see CutCo Industries v. Naughton*, 806 F.2d 361, 366 (2d Cir. 1986) ("joint participation in a partnership or joint venture establishes

While agents of a domestic concern come within the direct prohibitions of the FCPA, non-agents (unless they are covered under some other direct prohibition) do not. Non-agents may include individuals who occupy a sufficiently high-level position vis-a-vis the covered individuals such that they are not considered agents of the covered person. They may be, for example, the mastermind or the one pulling the strings, *i.e.*, causing the covered individual to engage in the prohibited conduct. When this ringleader-type figure is a foreign national who is physically outside the United States, he does not fall within the FCPA's direct prohibitions, but is appropriately charged under well-entrenched conspirator and accomplice theories of liability. The reason: the non-agent foreign national who orchestrates individuals directly covered by the statute in the payment of bribes to a foreign official is validly held accountable for his involvement in the very acts and harm that the statute is designed to address and for which his coconspirators and accomplices are subject to prosecution.

The district court, however, erred by applying the narrow exception set forth in *Gebardi v. United States*, 287 U.S. 112 (1932), to exclude from conspirator and accomplice liability those individuals who are not specifically enumerated within a specific FCPA provision. The district court failed to recognize that, at

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'control' sufficient to make each partner or joint venturer an agent of the others"), we assume for purposes of this brief that he is a non-agent.

the threshold, *Gebardi* does not apply absent the statutory text demonstrating that a type of participant necessarily or at least frequently involved in the transaction was exempt from liability, which the district court did not and could not find in this case. The district court compounded its error by then finding in the FCPA's text and structure an affirmative legislative policy to preclude conspirator and accomplice liability. Contrary to the district court's conclusion, the statutory text and context do not evince a legislative intent to depart from normal principles of conspirator and accomplice liability. In the absence of a strong indication otherwise, the inquiry should have ended there. Furthermore, even if there was a need for recourse to legislative history, the district court similarly misconstrued the legislative history as supporting the exclusion of conspirator and accomplice liability. The FCPA's legislative history reveals not only the absence of such a strong affirmative policy, which again should end the inquiry, but to the contrary, demonstrates that Congress intended the FCPA to apply broadly to encompass conspirator and accomplice liability for foreign nationals like Hoskins.

The district court separately erred in dismissing the Count 1 allegations that Hoskins, as an agent of a domestic concern, conspired with foreign nationals acting within United States territory in furtherance of bribing a foreign official (15 U.S.C. § 78dd-3). Because agents of domestic concerns are covered

under the FCPA's direct prohibitions, there was no basis under *Gebardi* or any other principle to dismiss that portion of Count 1.

ARGUMENT

I. Hoskins Is Properly Charged as a Non-Agent Foreign National with Conspiring to Violate the FCPA and Aiding and Abetting FCPA Violations.

The district court's ruling creates a special class of persons immune from FCPA prosecution: foreign nationals at the highest reaches of business organizations who can induce U.S. persons to bribe foreign officials in violation of the statute. Contrary to the district court, federal law contains no such loophole. Under standard and well-entrenched principles of conspirator and accomplice liability, a non-agent foreign national like Hoskins who operates from abroad to assist his U.S.-based coconspirators and accomplices may be held culpable for conspiring to violate the FCPA and aiding and abetting FCPA violations. The exception established in *Gebardi v. United States*, 287 U.S. 112 (1932), does not preclude such liability here, nor does the FCPA's text, structure, or legislative history demonstrate an affirmative policy to immunize defendants like Hoskins.

A. Standard of review

This Court reviews the district court's interpretation of a federal statute de novo. *United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012).

B. Hoskins, a foreign national operating abroad, is liable as a conspirator and accomplice for FCPA offenses that he is incapable of directly committing.

1. Conspirator and aiding and abetting liability generally apply to all individuals, including those not specified in the underlying substantive statute as well as foreign nationals operating abroad who assist their U.S.-based partners in crime.

In Count 1, Hoskins was charged with a violation of the general conspiracy statute, 18 U.S.C. § 371. That statute makes it an offense when "two or more persons conspire . . . to commit any offense against the United States" and one of the conspirators commits an overt act in furtherance of the offense. *Ibid.* "Although conspirators must pursue the same criminal objective, a conspirator need not agree to commit or facilitate each and every part of the substantive offense." *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016) (internal quotation marks and brackets omitted). A defendant must merely reach an agreement with his conspirators "that the underlying crime *be committed* by a member of the conspiracy who was capable of committing it." *Id.* at 1432 (emphasis in original).

In Counts 2-7, as relevant here, Hoskins was charged with aiding and abetting a violation of the domestic concern provision of the FCPA, in violation of 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2. The aiding-and-abetting statute makes culpable those who aid and abet an offense, as well as those who willfully cause

"an act to be done which if directly performed by him or another would be an offense against the United States." 18 U.S.C. §§ 2(a) & (b).

As the district court recognized, "[t]heories of accomplice liability under the general conspiracy statute, 18 U.S.C. § 371, and aiding and abetting statute, 18 U.S.C. § 2, generally apply across the United States Code to impose liability upon those who conspire with or aid and abet in the commission of any federal crime." App. 123-24. "Traditionally there is no need for the statute setting forth the substantive offense to make any reference to liability for conspiracy. That job is performed by 18 U.S.C. § 371." *United States v. Lake*, 472 F.3d 1247, 1266 (10th Cir. 2007). Likewise, "[i]t is axiomatic in federal criminal law that when certain conduct is criminally proscribed by a statute, the proscription extends to the aider and abettor under 18 U.S.C. § 2(b)." *United States v. Terry*, 17 F.3d 575, 580 (2d Cir. 1994).

Conspiracy liability is not confined to those individuals identified as perpetrators in the substantive statute. Rather, "[a] person . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas v. United States*, 522 U.S. 52, 64 (1998); *see Ocasio*, 136 S. Ct. at 1431 (affirming this "longstanding principle"); *United States v. Applins*, 637 F.3d 59, 76 (2d Cir. 2011). For example, one can be convicted of "a conspiracy with an officer or employee of the government or any other for an offence that only

he could commit." *United States v. Holte*, 236 U.S. 140, 145 (1915). Likewise, a criminal prohibition against a bankrupt person concealing assets from a trustee does not preclude "one not a bankrupt" from unlawfully "conspiring" with the bankrupt person to commit the prohibited conduct. *See Gebardi,* 287 U.S. at 120 n.5.

This same principle applies to accomplice liability. As this Court has recognized on numerous occasions, "[o]ne purpose of 18 U.S.C. § 2 is to enlarge the scope of criminal liability under existing substantive criminal laws so that a person who operates from behind the scenes may be convicted even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal by Congress." *United States v. Ruffin*, 613 F.2d 408, 413 (2d Cir. 1979); *see United States v. Tannenbaum*, 934 F.2d 8, 14 (2d Cir. 1991).

Furthermore, the application of conspirator and accomplice liability to foreign nationals acting abroad, who would not otherwise be covered under the direct prohibitions of a statute, for their culpability in assisting domestic conduct, is also well-established. *See, e.g.*, *Ford v. United States*, 273 U.S. 593, 620 (1927) (holding culpable all the members of a conspiracy that takes place in the United States "whether [the members] are in or out of the country"). Thus, "[i]t is well settled that the government has the power to prosecute every member of a conspiracy that takes place in United States territory, even those

conspirators who never entered the United States." *United States v. Inco Bank & Trust Corp.*, 845 F.2d 919, 920 (11th Cir. 1998); *United States v. Winter*, 509 F.2d 975, 982 (5th Cir. 1975). An equivalent principle makes aiders and abettors who do not set foot in the United States liable for the domestic conduct of their accomplices. *See Rivard v. United States*, 375 F.2d 882, 887 & n.13 (5th Cir. 1967) ("when a substantive offense is committed within the territorial limits of the United States," an "alien" whose "participation was all without those territorial limits" is culpable for aiding and abetting the violation); *see United States v. Lawson*, 507 F.2d 433, 445 (7th Cir. 1974).

Thus, a normal and regular feature of U.S. criminal law extends conspirator and accomplice liability to foreign nationals acting abroad, who would not otherwise be covered under a statute's direct proscriptions, in order to capture their culpability in assisting domestic conduct. Under these general and widely applied rules of liability, Hoskins may be charged under theories of conspirator and accomplice liability, even if he is not subject to the direct prohibitions of the FCPA.

2. The allegations against Hoskins do not fall within the *Gebardi* exception to conspirator and accomplice liability.

The district court erroneously dismissed these theories of liability based on the reasoning of *Gebardi*. In *Gebardi*, the Supreme Court reversed a

conviction for conspiracy to violate the Mann Act, which made it unlawful to "'transport . . . any women or girl for the purpose of prostitution . . . or for any other immoral purpose.'" 287 U.S. at 118 (quoting former 18 U.S.C. § 398). The Court concluded that a woman who merely consented or acquiesced to being transported across state lines in violation of the statute could not be guilty of conspiring with those who transported her. *Id.* at 123.

In doing so, the Court explained that Congress "set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation," and therefore the statute "necessarily contemplate[d] her acquiescence," yet did not make her acquiescence "a crime under the Mann Act itself." *Id.* at 121. Thus, the Mann Act's failure "to condemn the woman's participation in those transportations which are effected with her mere consent, [was] evidence of an affirmative legislative policy to leave her acquiescence unpunished." *Id.* at 123. The Court reasoned, "a necessary implication of that policy [is] that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter." *Ibid.*

The exception created by *Gebardi* is extremely narrow. The Court limited conspiracy liability for a person who could not be liable as a principal only when that person's participation in the crime was, at a minimum, "frequently, if not normally" a feature of the criminal conduct, but Congress chose not to criminalize that person's role in the substantive offense. *Gebardi*, 287 U.S. at 119, 121. The *Gebardi* Court itself recognized the narrow reach of this exception when it reaffirmed its prior holding in *Holte*, 236 U.S. at 145, and acknowledged that a woman being transported may be prosecuted under the Mann Act where she actively aided and assisted in the commission of the offense. 287 U.S. at 119.

In *Ocasio*, decided just last Term, the Supreme Court reaffirmed the narrowness of the *Gebardi* exception. 136 S. Ct. at 1432. In that case, the Court considered *Gebardi*'s application to a Hobbs Act extortion scheme in which the bribe recipient (a Baltimore police officer) was convicted of conspiring with the bribe payors (owners of an auto repair shop). In upholding the conspiracy conviction, the Court reaffirmed the normal rule that, even when a person lacks capacity to personally commit an offense, he may be liable for conspiring to commit it. *Ibid.* The *Gebardi* principle, the Court explained, limits that liability "when that person's consent or acquiescence is inherent in the underlying substantive offense" – in which case, conspiracy liability is not wholly barred,

but "something more than bare consent or acquiescence may be needed to prove that the person was a conspirator." *Ibid.*

Under Supreme Court precedent, then, the *Gebardi* exception applies only when the defendant's "consent or acquiescence is inherent" in the object offense *(ibid.*), or, at least where the defendant's participation in the crime is "frequently, if not normally" a feature of the criminal conduct, yet the statute chooses not to make the defendant's behavior "a crime under the [statute] itself." *Gebardi*, 387 U.S. at 121. More simply, if someone is expected to acquiesce or participate in most instances of the offense, yet Congress chose not to criminalize that participation, a court can reasonably infer that Congress did not mean for that individual to face liability for his role, at least under typical circumstances. Such an inference, if strong enough based on all relevant factors, can overcome the normal rule that secondary liability applies generally throughout the criminal code. But that special inference only makes sense where, at a minimum, the participation at issue is contemplated in the typical case.

Lower courts applying *Gebardi* have found the immunity inference applicable where the unpunished participant is the putative "victim" of the crime, such as the woman being transported in violation of the Mann Act. *See United States v. Annunziato*, 293 F.2d 373 (2d Cir. 1961); *see also United States v. Harris*, 959 F.2d 246, 263 (D.C. Cir. 1992), *abrogated on other grounds by United*

States v. Stewart, 246 F.3d 728 (D.C. Cir. 2001); *United States v. Spitler*, 800 F.2d 1267, 1276-77 (4th Cir. 1986).

The lower courts have also found that inference in bilateral transactions where the offense "necessarily" involves participation by another, yet Congress chose to punish only one side of the transaction. *See* 2 W. LaFave, *Substantive Criminal Law* § 13.3(e) at p. 370 (2003) (*Gebardi* applies to crimes in which the participation by another is "inevitably" incident to the commission of the offense); *United States v. Shear*, 962 F.2d 488, 493-94 (5th Cir. 1992) (where statute prohibited an "employer" from violating safety regulations, an "employee" could not be convicted as an aider and abettor because every employer "*necessarily* has employees" for whom Congress must have contemplated principal liability) (emphasis in original).

Even in such cases, however, there is only a "weak presumption" that conspirator and accomplice liability do not apply, which can be overcome by other factors. *See United States v. Falletta*, 523 F.2d 1198, 1200 (5th Cir. 1975). In *Falletta*, for instance, the Fifth Circuit held that the *Gebardi* exception did not exempt an individual who aided and abetted a convicted felon in receiving a firearm. The court pointed out that other portions of the firearm statute (*e.g.*, imposing liability for possession of a firearm) did not involve bilateral transactions, and it discerned no reason that Congress, in drafting the

prohibition on a felon's receipt of a firearm, would have focused on aiding and abetting liability sufficient to warrant an inference that it meant to exclude from all liability those who assisted the felon in receiving the firearm. *Ibid.*

With respect to the FCPA, the one court of appeals to consider the issue has limited *Gebardi* to its traditional application: where the defendant is a "necessary party" to the transaction but Congress did not criminalize that party's conduct. In *United States v. Castle*, 925 F.2d 831, 833 (5th Cir. 1991), the Fifth Circuit relied on the necessary party analysis to apply *Gebardi* to exclude the foreign official bribe recipient from conspiracy liability. In that scenario, the court likened the FCPA to the Mann Act, observing that "Congress intended in both the FCPA and the Mann Act to deter and punish certain activities which *necessarily* involved the agreement of at least two people, but Congress chose in both statutes to punish only one party to the agreement." *Id.* at 833 (emphasis added; footnote omitted). As the court explained, in the FCPA, "the very individuals whose participation was required in every case – the foreign officials accepting the bribe – were excluded from prosecution for the substantive offense." *Id.* at 835. "Given that Congress included virtually every possible person connected to the payments except foreign officials, it is only logical to conclude that Congress affirmatively chose to exempt this small class of persons from prosecution." *Id.* at 835; *see id.* at 836 (court found "affirmative legislative

policy to leave unpunished a well-defined group of persons who were *necessary parties* to the acts constituting a violation of the substantive law) (emphasis supplied).[6]

Under these principles and case law, *Gebardi* does not apply to exclude defendants like Hoskins – foreign national bribe payors who are too high-level to qualify as agents – from the scope of conspirator and accomplice liability

[6] In *United States v. Bodmer*, 342 F.Supp.2d 176 (S.D.N.Y. 2004), a district court interpreted the pre-1998 version of the FCPA to dismiss a conspiracy count against a Swiss lawyer acting as an agent of U.S. companies. That version of the FCPA made it "unlawful" for any "agent" of a domestic concern to bribe a foreign official, 15 U.S.C. § 78dd-2(a) (1988), but the penalty provision, in relevant part, provided only that "[a]ny employee or agent of a domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States" was subject to criminal penalties. 15 U.S.C. § 78dd-2(g)(2)(B) (1988). Even though the court believed that "Congress likely intended that the FCPA's criminal sanctions applied to non-resident foreign nationals who properly appeared in United States courts," it found that there was ambiguity in the pre-1998 FCPA's penalty provision sufficient to trigger the rule of lenity. *Bodmer*, 342 F.Supp.2d at 189. The *Bodmer* court then applied the *Gebardi* principle to exclude the defendant from conspiracy liability, given its ruling that the statute expressly exempted an enumerated party from criminal penalties for a substantive violation. *Id.* at 181, 189. The government agreed that, *if* the court construed the pre-1998 FCPA to exclude non-resident foreign national agents from direct liability, such agents were also exempt from conspiracy liability under the *Gebardi* principle. *Ibid.*

The district court in this case noted that the government in *Bodmer* conceded the applicability of *Gebardi* to the defendant in that case, but failed to appreciate the significantly different statutory text in the pre-1998 version of the FCPA that informed the government's position in *Bodmer*. *See* App. 129 n.7.

under the FCPA. Hoskins was one of the primary bribe payors committing the offense. He was not a victim or within any expressly protected class of persons under the statute, but rather was the type of participant at whom the statute is aimed – a bribe payor who actively participated in the bribery scheme. Furthermore, a defendant like Hoskins – *i.e.*, a non-agent foreign national on the bribe-paying side – is not a necessary party to an FCPA transaction. Unlike the foreign official bribe recipient at issue in *Castle*, who falls at the very heart of FCPA conduct but was omitted from the FCPA's direct proscriptions, the typical FCPA bribery case does not "frequently" or "normally" (*Gebardi*, 287 U.S. at 121) involve the assistance of persons like Hoskins – that is, "non-resident foreign nationals [who] are not agents of a domestic concern or [who] did not take actions in furtherance of a corrupt payment within the territory of the United States." App. 128. The district court did not rule to the contrary, nor could it. That is sufficient to exclude Hoskins from *Gebardi*'s scope.

C. The district court erred in applying the *Gebardi* exception to immunize non-agent foreign nationals.

The district court believed that the government's interpretation of *Gebardi* was "too narrow." App. 127. According to the district court's reasoning, *Gebardi* applies whenever a statute "exclude[s] a class of individuals from liability" (App. 125), thereby inviting a far-ranging examination into legislative

intent to determine whether Congress, in any manner, evinced an affirmative legislative policy "to exclude a certain class of individuals from liability under a criminal statute." App. 126. Colored by its mistaken conclusion that the *Gebardi* principle applied, the court examined the FCPA's text and legislative history and concluded that it reflected an affirmative legislative policy to exclude non-agent foreign nationals operating outside U.S. territory. The court's analysis was flawed at each step.

1. The district court erred in its interpretation of the scope of the *Gebardi* exception.

The district court stated that *Gebardi*'s exclusion of conspirator and accomplice liability applies whenever "Congress chooses to exclude a class of individuals from liability under a statute." App. 125. This is wrong.

The district court did not have the benefit of *Ocasio*, which was issued after its ruling, when considering the scope of *Gebardi*. As explained, *Ocasio* reaffirms the narrow scope of the *Gebardi* exception, stating that it applies where participation in the crime by someone like the defendant "is inherent in the underlying substantive offense," 136 S. Ct. at 1432, such as in the case of a bribe payor under the Hobbs Act but not a non-agent foreign national as here.

Contrary to the district court's ruling, the mere fact that a statute is written so as to directly cover a limited category of persons does not alone support

application of the *Gebardi* exception, even where those categories are "carefully delineate[d]," App. 128. *See, e.g.*, *Ruffin*, 613 F.3d at 413 (finding defendant liable under causing theory even though "he obviously could not have been found guilty of violating 42 U.S.C. § 2703, since he was never an 'officer, director, agent or employee of, or connected in any capacity with, any agency receiving financial assistance,' the only category of persons to whom the criminal sanction of § 2703 directly applies"). Thus, in *Castle*, the Fifth Circuit applied *Gebardi* to exempt a foreign national bribe recipient from liability not because the FCPA contains enumerated categories of participants in its direct prohibitions, but because the foreign national bribe recipient is a necessary party to the transaction, yet omitted from substantive liability. 925 F.2d at 833. In contrast, the district court's overly broad construction of *Gebardi* cuts too deeply into the general principle that conspirator and accomplice liability apply across the criminal code, even when the defendant does not have the capacity to commit the underlying offense. *See Ocasio*, 136 S. Ct. at 1432 ("*Holte* and *Gebardi* make perfectly clear that a person may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit.").

In support of its broad construction of the *Gebardi* exception, the district court also relied on *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987). But the district court gave *Amen* an overly broad reading as well.

In *Amen*, this Court reversed a conviction for aiding and abetting a violation of the Continuing Criminal Enterprise ("CCE") statute, 21 U.S.C. § 848, holding that the "drug kingpin" sentencing enhancement could not be applied under an aiding-and-abetting theory to those who merely assisted the kingpin. *Id.* at 381-82. The Court reasoned that, "[w]hile the legislative history makes no mention of aiders and abettors, it makes it clear that the purpose of making CCE a new offense rather than leaving it as sentence enhancement was not to catch in the CCE net those who aided and abetted the supervisors' activities, but to correct its possible constitutional defects by making the elements of the CCE triable before a jury." *Id.* at 382. Prior to analyzing the legislative history of the statute, the Court cited to *Gebardi*, stating, "When Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense." *Id.* at 381.

The district court relied on that broad characterization of the *Gebardi* principle to rule that it was applicable here. App. 127 (quoting *Amen*, 831 F.2d at 381). *Amen*, however, should not be so broadly construed.

A violation of the kingpin statute, like the Mann Act or the FCPA, necessarily involves the participation of two classes of persons – those who lead a criminal enterprise, on the one hand, and those who are led, on the other – but Congress chose only to provide for an enhanced punishment of one of those

necessary parties. Indeed, the *Amen* Court made that very point, stating that "Congress defined the offense as leadership of the enterprise, *necessarily* excluding those who do not lead." 831 F.2d at 381 (emphasis added); *cf. United States v. Pino-Perez*, 870 F.2d 1230, 1231 (7th Cir. 1989) (en banc) ("The persons supervised by the kingpin cannot be punished as aiders and abettors. When a crime is so defined that participation by another is necessary to its commission, that other participant is not an aider and abettor.") (citation and internal quotation marks omitted).[7] Because the drug kingpin statute could be so categorized, it raised the *Gebardi* inference that Congress might have intended to exempt non-kingpins from accomplice liability, hence this Court turned to legislative history to determine congressional intent.

The district court rejected the government's limiting characterization of *Amen*, stating that the *Amen* Court's reliance on legislative history belied the government's argument. App. 127. But that misses the point. The *Amen* Court

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[7] The government in *Amen* attempted to distinguish between employees or subordinates of the CCE, who would be exempted from accomplice liability under the traditional *Gebardi* analysis as a necessary party to the CCE, and others who provided assistance to the leader but were not led by him or her. *See Pino-Perez*, 870 F.2d at 1232 (adopting that view). This Court, however, found such a distinction "totally unworkable," asking rhetorically, "How does one determine whether a person is an employee or a third party," *Amen*, 831 F.2d at 382, and therefore applied the *Gebardi* exception to immunize all individuals who assisted a drug kingpin.

looked to legislative history only after specifically characterizing the statute as involving two necessary parties, only one of whom was subjected to direct criminal penalties – which rendered the statute, in the *Amen* Court's view, a candidate for application of the *Gebardi* exception. That same analysis does not apply here, as non-agent foreign nationals are not necessary parties to an FCPA transaction on the bribe-paying side, and therefore their exclusion from the FCPA's direct prohibitions does not permit application of the *Gebardi* exception.

2. The district court erred in ruling that the FCPA's text and legislative history require immunity from conspirator and accomplice liability for non-agent foreign nationals.

a. <u>The FCPA's text and structure do not indicate an exclusion for non-agent foreign nationals.</u>

The FCPA's text and structure support holding defendants like Hoskins, non-agent foreign nationals who actively participated in the bribe-paying side of the transaction, culpable for conspiracy and aiding and abetting. The district court erred in reaching a contrary conclusion.

i. The FCPA broadly criminalizes schemes to bribe foreign officials in return for favorable treatment in obtaining business, as long as there are threshold ties to the United States. As currently enacted, the FCPA tethers the bribe-paying conduct to the United States in a variety of ways. In Section 78dd-1, it links the U.S. interest to an issuer of U.S. securities (even if a foreign

business entity) or an agent or employee thereof (even if a foreign national) who uses the instrumentalities of interstate commerce in furtherance of bribing a foreign official. 15 U.S.C. § 78dd-1(a). In Section 78dd-2, the "domestic concern" provision, the U.S. connection is based on the bribe-payor being a U.S. person or business, or an agent or employee thereof (even if a foreign national), using interstate commerce in furtherance of the bribe scheme. 15 U.S.C. § 78dd-2(a). In Section 78dd-3, there is a territorial connection, as it covers foreign nationals and entities, and their agents, engaging in bribe-paying within the territory of the United States. 15 U.S.C. § 78dd-3(a). The "alternative jurisdiction" provisions rely on the nationality principle, criminalizing bribe-paying by U.S. persons and businesses acting abroad, regardless of whether they use interstate commerce. 15 U.S.C. §§ 78dd-1(g), 78dd-(2)(i).

Taken together, the text and structure reveal that the FCPA expansively applies on the bribe-paying side of the offense and encompasses a wide array of individuals who act on behalf of a domestic concern or other entity connected to the United States, without regard to their nationality. Far from excluding foreign nationals on the bribe-paying side from its reach (including those who never step foot in the United States), the FCPA includes them in various capacities as principals, as long as they have some relationship to the United States. *See Castle*, 925 F.2d at 835 (other than the foreign official bribe recipient,

Congress intended in the FCPA to "reach as far as possible" and "include[d] virtually every person or entity involved, including foreign nationals who participated in the payment of the bribe when the U.S. courts had jurisdiction over them") (citing H.R. Conf. Rep. No. 95-831, at 14 (1977)). Thus, foreign national bribe-payors low-level enough to be agents of a domestic concern or issuer, even if operating exclusively abroad, are covered as principals, as are all foreign national bribe-payors who take action within the territory of the United States.

By enacting these provisions with specific linkages to the United States, Congress established primary sources of liability for bribe-paying under the FCPA. With the anchor to the United States firmly in place through principal liability, normal principles of conspirator and accomplice liability then come into play, "so that a person who operates from behind the scenes may be convicted even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal by Congress," *Ruffin*, 613 F.2d at 413 – a scenario that describes Hoskins perfectly. Interpreting a statute to accommodate conspirator and accomplice liability in this manner is not counter-textual, it instead fulfills the statutory purpose. *Cf. United States v. Hill*, 55 F.3d 1197, 1205 (6th Cir. 1995) (even though Congress "sought to exempt small businesses from the reach of [18 U.S.C.] § 1955 [] because they did not implicate

national concerns," "Congress' intent is not thwarted by holding the operators of small business liable as aiders and abettors" of a large-scale gambling business because "[i]n this instance" "the small business becomes part of the national problem that Congress sought to eliminate").

Indeed, to interpret the FCPA otherwise "would create a gaping loophole in the law that would hinder, rather than promote," the enforcement of the statute, punishing low-level foreign nationals facilitating the bribe scheme on behalf of a domestic concern, but not the foreign national ringleaders of the very same offense. *United States v. Henson*, 848 F.2d 1374, 1384 (6th Cir. 1988). Nothing in the statutory text or structure supports treating the high-level foreign national disparately from his lower-level counterpart.

ii. Although the district court stated that it considered the "text and structure of the FCPA," in fact, it said little about those elements. App. 128. The court stated that the FCPA "carefully delineates the classes of people subject to liability and excludes non-resident foreign nationals where they are not agents of a domestic concern" or did not act "within the territory of the United States." *Ibid.* That is an insufficient basis to predicate immunity, as it would apply to countless statutes that enumerate similar categories of persons. While the statutory text of the FCPA identifies those who may be directly liable as principals for their bribe-paying conduct, like most statutes, it is silent as to the

liability of accomplices and conspirators. In the face of such silence, courts routinely apply the default presumption that conspirator and accomplice liability encompass individuals not expressly enumerated in the statute – even where the statute, as here, "carefully delineates" classes of persons to be covered. *See Shear*, 962 F.2d at 493 n.5 (noting that the presumption "extends to underlying statutes that criminalize acts by a particular class of individuals" and citing cases); *see, e.g.*, *Ruffin*, 613 F.2d at 413.

Although the district court relied on *Castle*, that case is inapposite. As explained, *Castle* applied the *Gebardi* exception to the FCPA to exclude a necessary party in a bilateral transaction – the foreign official bribe-recipient – from conspiracy and accomplice liability, where Congress did not make that necessary party liable as a principal. 925 F.3d at 835-36. But that ruling does not support interpreting the FCPA's text to exclude Hoskins, a non-agent foreign national who actively assisted the bribe-paying side of the transaction. Consistent with *Castle*, the FCPA's express enumeration of some foreign nationals for primary liability simply reinforces the expansive reach of the statute to foreign-based conduct; it does not signal a congressional intent to depart from the usual rules of secondary liability that extend coverage to foreign nationals operating outside the United States based on ties to domestic conduct.

b. The FCPA's legislative history does not support excluding non-agent foreign nationals from conspiracy and accomplice liability.

Because the statutory text does not clearly indicate an intent to exclude non-agent foreign nationals from conspirator and accomplice liability, there is no need to resort to legislative history. Nonetheless, the FCPA's legislative history reinforces the absence of such intent. Congress's intent is particularly evident from an examination of the background on the 1998 amendments, which reflect the FCPA in its current form. It is bolstered by the legislative history surrounding the FCPA's 1977 enactment.

i. After enacting the FCPA in 1977, Congress broadened the statute.

"Congress enacted the FCPA in 1977, in response to recently discovered but widespread bribery of foreign officials by United States business interests. Congress resolved to interdict such bribery, not just because it is morally and economically suspect, but also because it was causing foreign policy problems for the United States." *United States v. Kay*, 359 F.3d 738, 746 (5th Cir. 2004). The FCPA as originally enacted contained two anti-bribery provisions. Section 78dd-2(a) made it "unlawful" for "any domestic concern," or "any officer, director, employee, or agent of such domestic concern" or "stockholder acting on behalf of such domestic concern" to use interstate commerce to participate

in the bribery of a foreign official to further business interests. 15 U.S.C. § 78dd-2(a) (1977). Section 78dd-1 in substantially equivalent terms applied to an "issuer" of U.S. securities and its officers, directors, employees, agents, and stockholders. *Id.* at § 78dd-1(a).

The 1977 FCPA imposed criminal penalties on individual defendants who were officers, directors, or stockholders acting on behalf of domestic concerns or issuers if they acted "willfully." *E.g.*, *id.* at § 78dd-2(b)(2). Before an agent or employee could be subjected to a criminal penalty, however, the 1977 FCPA required a threshold finding that a domestic concern or issuer had "violated" the FCPA. *Id.* at § 78dd-2(b)(3). That requirement was driven by a concern that low-level individuals might be made scapegoats. *See* H.R. Conf. Rep. 95-831, at 13. In addition, the criminal penalty provisions for employees and agents applied only to an individual who was "a United States citizen, national, or resident or [wa]s otherwise subject to the jurisdiction of the United States." 15 U.S.C. § 78dd-2(b)(3) (1977).

Congress thereafter acted to expand the FCPA. In 1988, Congress removed the requirement predicating criminal liability of an employee or agent on a threshold finding that the company had violated the FCPA. *E.g.*, 15 U.S.C. § 78dd-2(g)(2)(B) (1988).

In 1998, Congress broadened the FCPA in a number of ways to come into compliance with its treaty obligations under the Organisation for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) ("OECD Convention"). *See United States v. Esquenazi*, 752 F.3d 912, 923 (11th Cir. 2014). In order to meet its treaty obligation "to establish that it is a criminal offense under [United States] law for any person intentionally to bribe a foreign official to obtain or retain business," Congress: (1) enacted Section 78dd-3, to encompass within the FCPA's direct prohibitions "all foreign persons who commit an act in furtherance of a foreign bribe while in the United States," S. Rep. 105-277, at 3 (1998); (2) enacted "alternative jurisdiction" provisions "to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States," *ibid.*; *see* 15 U.S.C. §§ 78dd-1(g), 78dd-(2)(i); and (3) amended the criminal penalty provisions to make clear that all employees and agents of U.S. businesses are subject to both criminal and civil penalties, whether U.S. nationals or foreign nationals, *e.g.*, 15 U.S.C. §§ 78dd-2(g)(2).

ii. The 1998 legislative history demonstrates non-agent foreign nationals are liable as conspirators and aiders and abettors.

Because the 1998 FCPA is the version currently in effect, the legislative background on the 1998 amendments is the most pertinent. That legislative history reveals no affirmative legislative policy to exclude conspirator and accomplice liability for non-agent foreign nationals. To the contrary, it demonstrates that Congress intended such principles to apply broadly to foreign nationals who assist domestic actors, pursuant to normal principles of federal law.

The principles to which the United States agreed as a signatory nation to the OECD Convention should inform the interpretation of the current version of the FCPA. *See Esquenazi*, 752 F.3d at 924 (it is of "paramount importance" that federal statutes be construed "in such a way to ensure the United States is in compliance with the international obligations it voluntarily has undertaken") (citing *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995)); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). Indeed, Congress so intended, and therefore interpreting the FCPA in accordance with the OECD Convention fulfills statutory purpose. *See* S. Rep. No. 105-277, at 2 (the 1998 amendments

were intended "to conform [the FCPA] to the requirements of and to implement the OECD Convention"); H.R. Rep. No. 105-802, at 11 (1998).

At the threshold, the United States' agreement in Article 1 to "take such measures as may be necessary to establish that it is a criminal offence under its law for *any person*" to engage in bribery of foreign officials to further business interests, OECD Convention, art. 1.1 (emphasis added), signals that the 1998 FCPA should be construed broadly. *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2009) ("'any' has expansive meaning").

Significantly, Article 1 also explicitly addresses conspiracy and aiding and abetting liability. It states:

> Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

OECD Convention, art. 1.2. Taken together with the directive to cover "any person" who pays a bribe to a foreign official, this language defeats any argument that Congress intended to exempt non-agent foreign nationals like Hoskins from conspiracy and accomplice liability. Under long-standing principles, *see supra* pp. 20-21, a foreign national operating abroad who conspires with or aids and abets actors in the United States to bribe a U.S. official, for example under 18 U.S.C. § 201 (bribery of a public official) or 18 U.S.C. § 1343

(wire fraud), is guilty of conspiring to commit or aiding and abetting those violations. His status as a foreign national who never set foot in the United States does not absolve him of such liability. In the OECD Convention, the United States agreed to criminalize "to the same extent" a foreign national operating abroad, but who acts in complicity with individuals acting within the United States, as Hoskins did here, for his culpability in bribing a foreign public official. The FCPA and related principles of conspirator and accomplice liability should be so interpreted.

Other provisions of the OECD Convention bolster that conclusion. In Article 4, the United States agreed "to take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory." OECD Convention, art. 4.1. The accompanying interpretive commentaries specify that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required." Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, at ¶ 25 (1997); *see* S. Rep. No. 105-277, at 6 (Congress so intends); H.R. Rep. No. 105-802, at 22 (same). Applying standard federal principles of conspirator and accomplice liability to the FCPA so as to encompass non-agent foreign nationals who never set foot in the United States,

but who conspire or aid and abet U.S.-based actors, is consistent with the directive that the United States act broadly to prohibit criminal conduct that occurs only "in part" in the United States. OECD Convention, art. 4.1.

The United States also agreed to "take remedial steps" to ensure "its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials." OECD Convention, art. 4.4. Construing the FCPA to allow conspiracy and accomplice liability for non-agent foreign nationals operating abroad fulfills that purpose of ensuring that U.S. law is "effective" (*ibid.*), as to do otherwise allows the foreign national ringleader of a bribery scheme based in the United States to go free, while punishing his U.S.-based underlings and despite his strong ties to the United States.

In the district court's view, "there is no indication that the OECD Convention requires the United States to prosecute foreign bribery committed abroad by non-resident foreign nationals who conspire with United States citizens." App. 136-37. The district court, however, did not expressly consider all of the relevant articles of the OECD Convention discussed above, in particular the United States' agreement to punish "aiding and abetting" and "authorisation," as well as "conspiracy to bribe a foreign official" "to the same extent" as bribery of a U.S. public official, or the directive that U.S. law be

"effective" in combating bribery of foreign officials. OECD Convention, art. 1.2, art. 4.4.

In rejecting any reliance on the requirement that each signatory country make it a criminal offense "for any person" to pay a foreign bribe, the district court noted that the directive was "cabined" by Article 4's directives that each signatory take steps to establish jurisdiction over offenses "[1] committed in whole or in part in its territory or [2] by its own nationals while abroad." App. 136 (internal quotation marks omitted). The district court, however, failed to recognize that interpreting the FCPA to cover a foreign national who never steps foot in the United States but conspires with or aids and abets U.S.-based persons engaged in domestic conduct to violate a federal law is, in fact, grounded in the directive that jurisdiction extend to offenses "committed in whole or *in part* in [United States] territory." OECD Convention, art. 4.1 (emphasis added).

Moreover, in enacting Section 78dd-3, which exerts territorial jurisdiction over foreign nationals who act within the United States in furtherance of bribing a foreign official, Congress powerfully confirmed its intent to also broadly cover foreign nationals who act outside U.S. territory. Congress stated:

> Although this section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the territory of the United States, Congress does not thereby intend to place a similar limit on the exercise of U.S. criminal jurisdiction

> over foreign nationals and companies under any other statute or regulation.

S. Rep. No. 105-277, at 6; *see* H.R. Rep. No. 105-802, at 22. Congress thus made clear in its enactment of the 1998 FCPA that it did not intend to deviate from federal statutes such as 18 U.S.C. § 371 and 18 U.S.C. § 2 and their associated long-standing legal principles criminalizing the conduct of foreign nationals operating abroad who are assisting their U.S.-based accomplices.

The district court instead interpreted the reference in the committee reports to "any other statute or regulation" as clarifying Congress's intent that, in enacting Section 78dd-3 to "provide[] for liability for foreign nationals for their acts within the territory of the United States, Congress did not intend to impose such a territorial limitation under 15 U.S.C. § 78dd-2 for foreign nationals who were agents, officers, directors, employees or stockholders of domestic concerns." App. 135 n.18. The district court's narrow interpretation, however, is not supported by the language Congress used. Throughout their reports, including in the passage at issue, the Senate and House referred to Sections 78dd-1, 78dd-2, and 78dd-3 as "sections" or "provisions," not as "any other statute or regulation." *See, e.g.*, S. Rep. No. 105-277, at 3 ("[t]his section"), 4 ("new provisions"), 5 ("existing FCPA provisions"), 6 ("this section"); *see also* H.R. Rep. No. 105-802, at 19, 20, 21, 22. The more reasonable interpretation is that Congress was not limiting its statement to FCPA provisions, but instead

making clear that the FCPA was not intended to limit any other source of United States law, which necessarily includes "statute[s]" such as Sections 371 and 2.

Although the district court rejected that interpretation because "Congress was [] capable of referring explicitly to the statutes governing secondary liability," App. 148, there was no need for Congress to do so because of the expansive language it did use, covering "any other statute or regulation." The district court's statement that it did not find "the Senate Committee report to amount to an unambiguous statement that Congress intended the statutes governing secondary liability to apply to foreign nationals who are not otherwise covered by the FCPA as principals" (App. 149) turns the analysis on its head. Congress need not provide an express intent to employ the normal principles of conspirator and accomplice liability. Those principles are instead presumed to apply in the absence of an express intent to the contrary.

The district court rejected that argument on the basis that it was not holding that secondary liability is inapplicable to the FCPA, but only that secondary liability cannot be "applied to categories of persons excluded by the express language of the underlying substantive offense in light [of] the *Gebardi* principle." App. 148-49. But, as explained, the 1998 FCPA does not expressly exclude non-agent foreign nationals, it merely does not include them for

principal liability in order to ensure that the criminalized bribery scheme as a whole has sufficient connection to United States interests.

iii. The 1977 legislative history does not establish an affirmative policy to deviate from normal principles of conspirator and accomplice liability.

The district court primarily relied on the legislative history of the 1977 enactment of the FCPA, rather than the current FCPA's background, in support of its ruling. After reviewing some of the revisions to the bills that eventually became the FCPA, the court determined that "the carefully-crafted final enactment evinces a legislative intent to cabin" conspirator and accomplice liability. App. 133. But the legislative history shows no more than that Congress carefully delineated categories of defendants to come within the direct prohibitions of the statute in order to ensure sufficient ties to U.S. interests, as the statutory text itself demonstrates. It does not show an affirmative legislative policy to exclude the conspirators and accomplices of those principal defendants, which is what a court must find to depart from the normal application of principles of secondary liability. In fact, even though no showing of an intent to *include* conspirator and accomplice liability is necessary because that is the default presumption, there are in fact numerous indications that the 1977 Congress contemplated broader liability.

Many hearings and draft bills preceded the FCPA's 1977 enactment. The district court focused on the drafting history starting with the Senate version of the bill introduced on June 2, 1976, making it unlawful for any U.S. "issuer" or "domestic concern" to use an instrumentality of interstate commerce in furtherance of a bribe to a foreign official. In that bill, a "domestic concern" was defined to include (1) U.S. citizens and nationals and (2) entities owned or controlled by U.S. persons that were either incorporated or had a principal place of business in the United States. S. 3664, 94th Cong. (1976). After the House failed to act that session, a substantially identical version of that bill was reintroduced in January 1977 as S. 305, 95th Cong. (Jan. 1977). *See* S. Rep. 95-114, at 2 (1977).

According to the Senate report accompanying the predecessor to S. 305, the Senate understood that its proposal "would not permit prosecution of a foreign national who paid a bribe overseas acting *entirely on his own initiative*." S. Rep. 94-1031, at 7 (1976) (emphasis added). The Senate's narrow language demonstrates a focus on excluding foreign nationals with no ties to the United States as principals; it gives no indication of an intent to exclude foreign nationals who under long-established principles of conspirator and accomplice liability would be held responsible for the domestic conduct of U.S. persons.

The Senate report went on to state that the bill applied to employees of the U.S. parent company who approved the bribery because "the concepts of aiding and abetting and joint participation in, would apply to a violation under this bill in the same manner in which they have applied in both SEC actions and in private actions brought under the securities laws generally." S. Rep. 94-1031, at 7.[8] Thus, the Senate specifically contemplated the application of normal and well-entrenched rules of secondary liability – the very rules that make Hoskins culpable in this case.

"A competing House bill introduced on February 22, 1997 provided for broader liability for non-resident foreign nationals than the Senate bill . . . ." App. 131. The House bill contained provisions explicitly applying in various ways to officers, directors, employees, and agents of issuers and domestic concerns who used an instrumentality of interstate commerce in furtherance of the specified bribe scheme, with no distinction between U.S. persons or foreign nationals falling within those categories. H.R. 3815, 95th Cong., § 2(a) at Sec. 30A(c) (Feb. 1977); *id.* at § 2(b) at Sec. 3(c) & (f)(2). Furthermore, the House

[8] In context, this portion of the legislative history was not limited to civil proceedings, but expressed Congress's understanding regarding criminal liability as well. *See Castle*, 925 F.2d at 832 n.1.

bill extended the definition of domestic concern to include foreign-based affiliates of U.S. companies. *Id.* at § 3(f)(2)(A).

The Senate thereafter amended its bill in response to a request from the administration of President Carter "to clearly cover under the bill individuals making payments." Markup Session on S. 305, Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., at 8 (Apr. 6, 1977) ("Markup Session"). In amended S. 305, the Senate added provisions covering "officers, directors, employees, or stockholders making overseas bribes on behalf of the corporation." S. Rep. 95-114, at 11; *see* S. 305, 95th Cong., § 104(a) (amended May 2, 1997). The Senate declined a Carter Administration request to extend the direct prohibitions of the bill to foreign subsidiaries of U.S. companies (which would have covered bribery by foreign subsidiaries regardless of involvement by the U.S. parent company). *See* Markup Session at 9; S. Rep. No. 95-114, at 11.

The Senate report on the amended bill after the markup session again used restrictive language in explaining when foreign nationals would not be culpable. It stated:

> The committee has recognized that the bill would not reach all corrupt overseas payments. For example, the bill would not cover payments by foreign nationals *acting solely on behalf of* foreign subsidiaries *where there is no nexus* with U.S. interstate commerce or

> the use of U.S. mails and where the issuer, reporting company, or domestic concern had *no knowledge* of the payment.

S. Rep. 95-114, at 11 (emphasis added). The Senate thereby again indicated the narrowness of any exclusion of foreign nationals from the reach of the law, with such exclusion predicated on "no nexus" to U.S. conduct – unlike the circumstances here, where Hoskins affiliated himself with U.S. businesses and persons conducting a bribery scheme from the United States.

On September 28, 1977, the House reported an amended version of its bill. The amended House bill still applied to officers, directors, and agents of issuers and domestic concerns (which were still defined to include foreign subsidiaries of any U.S. corporation), but agents were "distinguished from an officer, director or other person in a policymaking position" at the company by a requirement that they could not be subject to a criminal penalty unless the issuer or domestic concern was itself found liable. H.R. Rep. No. 95-640, at 11, 12 (1977); H.R. 3815, 95th Cong., § 2(b) at Sec. 3(c) (as amended Sept. 28, 1977).[9]

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[9] The House report explained that this provision was designed to avoid a "low level employee or agent of the corporation" from being made "the scapegoat for the corporation," particularly when such low-level agent might "not have the resources, legal or financial, to provide witnesses necessary to his defense." H.R. Rep. No. 95-640, at 11. Hoskins is not the type of low-level party for whom this provision was designed. In any event, that threshold requirement was removed in the 1988 FCPA amendments. *E.g.*, 15 U.S.C. § 78dd-2(g)(2)(B) (1988).

The House report on its amended bill contained the identical statements from the first Senate report that emphasized that a foreign national "who paid a bribe overseas acting *entirely on his own initiative*" would not be covered under the bill, but that traditional concepts of "aiding and abetting" liability and "joint participation" applied. H.R. Rep. No. 95-640, at 8 (emphasis supplied). Thus, the House echoed the Senate in using restrictive language when discussing the circumstances under which a foreign national would be exempt from culpability, and, like the Senate, it emphasized its intent that normal concepts of secondary liability would apply.

"The FCPA as enacted included elements from both the Senate and House bills . . . ." App. 131; *see supra* pp. 38-39. The final bill excluded the foreign subsidiaries of U.S. companies as principals, as the Senate had proposed. The House conference report describing the compromises between the Senate and House bills explained:

> [T]he conferees recognized the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the *direct prohibitions* of the bill.

H.R. Conf. Rep. No. 95-831, at 14 (emphasis supplied). The conferees further recognized that such difficulties "may not be present in the case of individuals who are U.S. citizens, nationals or residents." *Ibid.* The conference report continued:

> Therefore, individuals other than those specifically covered by the bill (*e.g.*, officers, directors, employees, agents, or stockholders acting on behalf of an issuer or domestic concern) will be liable when they act in relation to the affairs of any foreign subsidiary of an issuer or domestic concern if they are citizens, nationals, or residents of the United States. In addition, the conferees determined that foreign nationals or residents otherwise under the jurisdiction of the United States would be covered by the bill in circumstances where an issuer or domestic concern engaged in conduct proscribed by the bill.

Ibid.

The conference report, like the rest of the 1977 legislative history, does not establish an affirmative legislative policy to exclude non-agent foreign nationals from conspirator and accomplice liability. In the report, legislators again used deliberately narrow language in explaining the scope of an exclusion from the FCPA. The report specified no more than that foreign subsidiaries would not be covered under "the direct prohibitions of the bill"—*i.e.*, as a principal — because of the "inherent jurisdictional, enforcement, and diplomatic difficulties." *Ibid.* Otherwise, the FCPA would have swept within its scope, as principal participants, foreign subsidiaries and all their foreign officers, directors, employees, and agents, despite potentially minimal ties to the United States. Congress demonstrated no intent to exclude foreign nationals who conspired with or aided and abetted U.S. actors engaged in domestic conduct to violate the law, instead contemplating that, where an issuer or domestic concern

violated the FCPA as a principal, "foreign nationals or residents otherwise under the jurisdiction of the United States would be covered." *Ibid.*

In finding an affirmative legislative policy to exclude conspirator and accomplice liability for those not directly covered under the FCPA, the district court relied on the Senate's markup session amending the early version of the Senate bill, which had applied expressly only to an "issuer" or a "domestic concern." S. 305, 95th Cong. (Jan. 1977). In the markup session, a participant explained that the initial bill "intended to cover individuals" as "aiders, abettors and conspirators," but that an amendment "makes clear that they are covered directly and also it makes clear that they are covered in their capacity in acting on behalf of the company." Markup Session at 12. According to the district court, this language "shows that Congress considered imposing individual liability based on concepts of accomplice liability but instead chose to do so directly and carefully delineated the class of persons covered to address concerns of overreaching." App. 133.

The district court's analysis is flawed. The Senate specified that employees of the company were covered under the statute just to be "crystal clear." Markup Session at 8. Otherwise, given that employees would be involved in every case, the statute's intent to cover individuals rather than the company alone would be open to question. *See Shear*, 962 F.2d at 493-94. The

amendment was also designed to make clear that "just [] an ordinary employee" was covered, not merely "an officer or director," as long as the employee was "acting on behalf of the company." Markup Session at 12-13. The need to make these types of distinctions required more specific language regarding the liability of individuals. *See, e.g.*, 15 U.S.C. § 78dd-2(b)(3) (1977) (predicating criminal liability of employee and agent on threshold finding that domestic concern had violated the FCPA). Thus, the Senate's decision to join the House in specifying categories of individual liability did not signal an affirmative legislative policy to jettison well-entrenched principles of conspirator and accomplice liability, particularly considering that both the Senate and the House specifically stated that normal principles "of aiding and abetting and joint participation" should apply to the FCPA. S. Rep. 94-1031, at 7; H.R. Rep. No. 95-640, at 8. Indeed, the penultimate House report contained that statement even though the House bill already specifically covered categories of individuals, reinforcing the conclusion that, while Congress did indeed "carefully delineate[]" categories of principal FCPA violators, it had no intent to thereby exclude their conspirators and aiders and abettors.

c. No other indicators of congressional intent warrant excluding non-agent foreign nationals from conspirator and accomplice liability.

A foreign national agent who never steps foot in the United States, but who receives an email from his U.S. employer ordering him to pay a bribe and takes some act in furtherance of that bribe, may be criminally liable under the FCPA. Nothing in the FCPA suggests that if the roles were reversed – and the foreign national abroad sends emails to the United States and causes the U.S. agent to carry out the bribe scheme, the foreign national should be treated disparately from his lower-level counterpart.

Although the district court relied on *Amen* (App. 133), *Amen* is inapplicable for reasons beyond its *Gebardi* analysis, *see supra* pp. 31-33. In *Amen*, this Court addressed a statute that called for the imposition of substantially enhanced sentences for individuals who played leadership roles in drug-distribution enterprises that included a minimum number of participants; other criminal statutes already prohibited participation in such enterprises and were fully applicable to conspirators, principals, and accomplices operating at every level of the enterprise. 831 F.2d at 382. In that context, in addition to relying on statutory text that "defined the offense as leadership of the enterprise, necessarily excluding those who do not lead," this Court relied on the entire statutory scheme as well as statutory purpose and legislative history to conclude

that Congress did not intend to subject non-kingpins to aider and abettor liability. *Id.* at 381-82.

The text, context, purpose, and legislative history of the FCPA contain entirely different indicators. Congress did not provide any basis to subject only lower-level foreign nationals controlled by domestic concerns to criminal liability while immunizing higher-level foreign nationals who cause a U.S.-based employee or agent to violate the FCPA. Indeed, the "'inherent jurisdictional, enforcement, and diplomatic difficulties'" (App. 129) would be the same regardless of whether the foreign national acts as a principal to violate the FCPA or whether the foreign national acts as a conspirator or accomplice to do so. Otherwise, a foreign national CEO of a foreign company that has a U.S. subsidiary could originate, plan, and cause the carrying out of a massive bribery scheme through the U.S. subsidiary so that the CEO's company would reap all the profits. The CEO could send dozens of emails to the United States in furtherance of the corrupt scheme and could arrange a meeting in the United States between his employees and the foreign official to make the bribe payment. The CEO could wire the bribe money to the United States with an accompanying instruction to "pay this money to the official or I will fire you." But the CEO would escape liability while all of his employees and agents could be prosecuted. Congress did not depart so far from well-established principles

of criminal law, under which courts have consistently recognized the liability of conspirators and accomplices, in order to exclude this class of high-level foreign nationals who cause U.S. persons to violate the law. Such a reading of the FCPA would create an unwarranted anomaly in the law that would reward foreign national ring-leaders of the U.S. bribery scheme but punish the foreign national underlings. This Court should reject such "absurd" interpretation. *United States v. Venturella*, 391 F.3d 120, 126 (2d Cir. 2004).

II. The District Court Erred in Dismissing the Second Object of the FCPA Conspiracy Charge.

Even if individuals not expressly enumerated within the FCPA's direct prohibitions are immune from conspirator and accomplice liability, the district court nonetheless erred in dismissing in its entirety the second object of the Count 1 conspiracy (App. 137 n.14), alleging that Hoskins conspired with foreign nationals acting within United States territory in furtherance of bribing a foreign official (15 U.S.C. § 78dd-3). At a minimum, the second object of the conspiracy is validly charged to the extent that Hoskins is an agent of a domestic concern, one of the expressly enumerated categories encompassed by the FCPA. For all the reasons discussed above, nothing about the FCPA or *Gebardi* evinces an affirmative legislative policy to exclude Hoskins from conspiracy liability in that circumstance.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel of record certifies that the foregoing Brief for Appellant United States of America complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), inasmuch as the brief is proportionately spaced, has a typeface of 14 points or more, and contains no more than **13,770** words. This certification is based on the word count of the word-processing system used in preparing the government's brief: Microsoft Word 2007.

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I certify that on September 9, 2016, I caused the foregoing brief to be served upon the Filing Users identified below through the Court's Case Management/Electronic Case Files ("cm/ecf") system.

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