United States District Court
Southern District of Texas
ENTERED
November 12, 2021
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
VS.	§	CRIMINAL NO. 4:17-CR-0514-7
	§	
DAISY T. RAFOI-BLEULER,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Court is the defendant's, Daisy T. Rafoi-Bleuler ("the defendant"), motion to dismiss Counts One, Two, and Three of the pending Superseding Indictment ("SSI") (DE 177) as the SSI relates to her. Also pending are the United States' ("the government") memorandum, responses, and supplemental authority (DEs 183, 186 and 189), and the defendant's replies (DEs 184, 194). After a careful review of the factual and legal arguments presented, the applicable law, and the proffered exhibits, including the SSI, the Court determines that the defendant's motion to dismiss should be **GRANTED** for lack of jurisdiction.

II. FACTUAL BACKGROUND

A. The Warrant and Request for Extradition

The defendant, a citizen and resident of Zurich, Switzerland, while on vacation in Lake Como, Italy on April 26, 2019, was arrested by Italian authorities based on an INTERPOL Red Notice.[1] The warrant was issued based on the SSI returned by a federal grand jury in the United States, on or about April 24, 2019. Following her arrest, the defendant appeared in the Court of Appeals of Milan, pursuant to the government's request for extradition. The Court of Appeals granted the government's request for extradition, but released the defendant from custody on the condition that she not leave Italy. However, she did not remain in Italy but, instead, returned to her home in Switzerland and appealed the Order of Extradition to the Italian Supreme Court of Cassation. On June 18, 2020, the Supreme Court of Cassation entered its judgment dismissing the extradition order and declaring the extradition order null and void.[2] Because the defendant left Italy and returned to her residence in Switzerland, the government charges that the

[1] An Interpol Red Notice is the closest instrument to an international arrest warrant. When a person, whose name is listed, comes to the attention of the police abroad, the country that sought the listing is notified through Interpol and can request either his provisional arrest (if there is an urgency) or can file a formal request for extradition. *Crim. Res. Manual No. 611 Interpol Red Notices*, U.S. DEP'T OF JUSTICE ARCHIVES (Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-611-interpol-red-notices.

[2] The judgment decided in the Italian Supreme Court of Cassation on June 18, 2020, was filed by the Clerk of Court on September 16, 2020.

defendant is a fugitive, which status is relevant to its argument that the Court should not entertain the defendant's motion to dismiss the SSI.

B. The SSI Factual Allegations

According to the SSI, Petroleos de Venezuela, S.A. ("PDVSA") is a Venezuelan state-owned/state-controlled oil company responsible for the exportation, production, refining, transportation, and trade of energy resources throughout the world. PDVSA Services, Inc. ("PDVSA-S"), is a United States-based and wholly-owned affiliate of PDVSA, and is located in Houston, Texas. PDVSA-S and Bariven, another wholly-owned subsidiary of PDVSA, are alleged to be "instrumentalities"[3] of PDVSA, responsible for purchasing equipment, soliciting vendors, and providing various services abroad associated with Venezuela's petroleum industry.

To award contracts for energy services, a PDVSA bidding panel issued requests for quotations to companies that provide formal bids, from which a winner would be selected. All contracts awarded were ultimately approved by a senior PDVSA employee. The SSI and other related indictments charge that individuals, Nervis Gerardo Villalobos Cardenas, Alejandro Isturiz Chiesa, Raphael Ernesto

[3] The term "instrumentality" is not specifically defined in the relevant statutes, and the Fifth Circuit has not supplied a definition. The Eleventh Circuit has defined an instrumentality as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014), *cert. denied*, 574 U.S. 876, 135 S.Ct. 293, 190 L.Ed.2d 141 (2014). It does not appear that a natural person can be an instrumentality because the FCPA's definition of "foreign official" includes an "officer or employee of a[n] . . . instrumentality [of a foreign government]." 15 U.S.C. § 78dd-1(f)(1)(A).

Retter Munoz, Cesar David Rincon Godby, Luis Carlos De Leon Perez and Javier Alvarado Ochoa, among others, all current or former employees of PDVSA or its affiliates and citizens[4] of Venezuela, corruptly solicited and participated in selecting vendors for PDVSA in exchange for illegal kickbacks, and for preferred treatment in the order that invoices of those selected were preferentially paid. At the time, the Venezuelan government was experiencing a liquidity crisis that had begun in 2010, causing PDVSA's revenue, which represented a significant portion of Venezuela's budget, to sharply fall.

The government charges that in order to conceal the proceeds derived from the kickback/bribery scheme, Rincon, Shiera, De Leon, Isturiz, Villalobos, and others engaged the defendant and her wealth management company to set up various bank accounts in Switzerland, Curacao, Dubai, and other foreign locations, to hide the ill-gotten proceeds. Therefore, the government charges that the defendant, by providing financial services through her firm, violated various federal statutes, specifically, Title 18 U.S.C. § 1956(h), conspiracy to violate the Money Laundering Control Act of 1986, as amended (MLCA), concerning funds derived in violation of Title 15 U.S.C. §§ 78dd-1, -2 and -3, the Federal Corrupt Practices Act (FCPA); Title 18 U.S.C. § 371 conspiracy to violate the FCPA; and

[4] Luis Carlos De Leon Perez is the exception. He holds dual citizenship in the United States and Venezuela.

Title 18 U.S.C § 1956(a)(1)(B)(i) (MLCA) and Title 18 U.S.C. § 2, aiding and abetting.

To assert authority to prosecute the defendant, the government charges that the defendant is "a person"[5] who acted as an "agent"[6] for a "domestic concern,"[7] all as defined by the FCPA. The government claims that the defendant "knowingly" engaged in and assisted PDVSA-S, Bariven, and her codefendants to conduct financial transactions in "interstate commerce" [8], the proceeds of which were derived from the Venezuelan kickback/bribery scheme. These allegations also form the bases for the government's assertion that the defendant conspired with her codefendants to commit money laundering. The government contends that the defendant, as an "agent" of "domestic concerns," conspired to created false justifications for the deposit of kickback/bribery proceeds and used email and other instruments of interstate commerce to communicate with the domestic concerns,

[5] Title 15 U.S.C. § 78dd-3 defines the term "person" as any natural person, other than a national of the United States (as defined in section 1101 of Title 8) or any corporation.

[6] The term "agent" does not appear to be defined in either of the three sub-sections of Title 15, section 78dd. Courts have held that the term's common law meaning is intended by Congress. *United States v. Hoskins*, 73 F.Supp.3d 154, 165 (2d Cir. 2014) ("*Hoskins I*") (citations omitted). However, when the term is used to establish jurisdiction it becomes a question of law for the court.

[7] The term "domestic concern" means (a) any individual who is a citizen, national, or resident of the United States, and (b) any corporation, partnership, or other business entity which has its principal place of business in the United States, or which is organized under the laws of a state of the United States or its territory. 15 U.S.C. § 78dd-2(h).

[8] The term "interstate commerce" includes, in relevant part, "trade, commerce, transportation, or communication . . . between any foreign country and any State . . . and . . . includes the intrastate use of—(A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality." *Id*. § 78dd-3(f)(5).

several of which are codefendants, in order to carry out the money laundering offense.

III. CONTENTIONS OF THE PARTIES

A. The Defendant's Allegations and Contentions

The defendant seeks dismissal of Counts One, Two, and Three of the SSI, as they relate to her, generally, on three bases. She asserts that the SSI: (1) fails to allege or establish that the government has jurisdiction to prosecute her; (2) is unconstitutionally vague concerning her status as an "agent"; and (3) fails to state a prosecutable offense. The defendant's arguments rest, in part, on the uniqueness of her circumstances as a foreign national who, as she argues, is unconstrained by the laws of the United States.

The defendant explains that she is a principal and owner of a Swiss wealth management firm that has no prior association or affiliation with the United States or the codefendants. She notes that she has not been accused of violating Swiss law and, in fact, asserts that she has conducted herself, with regard to the codefendants, "in strict accordance with Swiss anti-money laundering and other financial laws and regulations." Hence, all services provided by her firm on behalf of the codefendants were provided as professional services and not pursuant to an agency relationship.

More particularly, the defendant contends, the FCPA and the MLCA do not apply to her because any acts on her part were extraterritorial and are in no wise connected to the United States. Therefore, she argues, her conduct falls outside the reach of the FCPA and the MLCA, which are not extraterritorial statutes. Along that same argument line, the defendant contends that the SSI's allegations concerning her acts, in particular, do not support a finding that she was an agent of a domestic concern. Notably, the SSI does not charge that she knowingly or intentionally involved herself in the underlying Venezuelan Scheme at any time. Hence, the SSI fails, as against her, because the United States' courts lack jurisdiction over her.

Lastly, the defendant alleges that Counts One and Three are defective because the SSI fails to establish that she was involved in the alleged substantive money laundering offense, or conducted transactions in the United States. For these reasons, and those more expansively recorded in her memorandum, the defendant also seeks dismissal of Counts One and Three of the SSI.

B. The Government's Allegations and Contentions

The government argues that the defendant engaged in "a bribery and money laundering scheme" when she assisted a group of United States businessmen and current or former residents to launder and conceal "the proceeds of their bribery scheme through the international financial system, including banks in

Switzerland." According to the SSI, the scheme arose out of energy contracts "corruptly" secured by vendors, through the codefendants, with the assistance of PDVSA officials and employees.

As its primary argument against the defendant, however, the government contends that she is an "agent" of a "domestic concern" and is currently a "fugitive."[9] Therefore, the Court should refuse to address the defendant's motion to dismiss based on the teachings of the "Fugitive Disentitlement Doctrine."[10] In this regard, the government asserts that, after having been served with extradition document, provided a hearing, and ordered to not leave Italy, the defendant left and has earned the status of fugitive. Therefore, as a fugitive, the defendant should not be afforded the benefits of the courts of the United States.

The government also asserts that, assuming the defendant's conduct does not amount to actual flight, it, nevertheless, constitutes "constructive flight." In this regard, the government argues that the fact that the defendant fled Italy, and not the United States, is of no consequence because she was forbidden by the Court of

[9] The term "fugitive" refers to a person who flees the jurisdiction of the court to avoid prosecution or refuses to return to the jurisdiction of the court after learning of a pending charge. "A person who learns of charges against him while he is outside the jurisdiction 'constructively flees' by deciding not to return."' *See In re Grand Jury Subpoenas Dated March 9, 2001,* 179 F. Supp. 2d 270, 287 (2001) (citations omitted).

[10] "In general, the Fugitive Disentitlement Doctrine limits a criminal defendant's access to the judicial system whose authority he evades . . . . This power stems not from any statute, but rather from a court's inherent power to 'protect [its] proceedings and judgments in the course of discharging [its] traditional responsibilities.'" *Bagwell v. Dretke*, 376 F.3d 408, 410 (5th Cir. 2004) (citing to *Degen v. United States*, 517 U.S. 820, 823 (1996).

Appeals of Milan from leaving its jurisdiction. As such, the government argues that her conduct constitutes constructive flight. Therefore, the Court should refuse to address the defendant's motion to dismiss based on the strictures of the Doctrine, and if addressed be denied.

In light of the defendant's claim that the Court lacks jurisdiction over her because the term "agent" renders the FCPA unconstitutionally vague, and because the FCPA's and the MLCA's extraterritorial reach do not necessarily extend to the defendant, the Court will address the applicability of the Fugitive Disentitlement Doctrine.

IV. ANALYSIS AND DISCUSSION

A. The Fugitive Disentitlement Doctrine

The Fugitive Disentitlement Doctrine does not apply as a matter of statutory law but falls within a court's discretion. *Bagwell v. Dretke*, 376 F.3d 408, 410 (5th Cir. 2004). In light of this determination, the Court is of the view that fundamental to whether the Doctrine should apply in this case is whether the government can charge an individual with a criminal offense, or issue a warrant for an arrest, where the individual is a foreign national. The Court's jurisdiction is challenged. Hence, the Court is duty-bound to examine the jurisdictional basis for the government's charges and dismiss the Indictment if it lacks jurisdiction. *See* Fed. R. Crim. P. 12(b)(1), (2).

As noted above, the government argues that the Court should not expend its time and resources addressing the defendant's concerns because of her alleged unwillingness and failure to submit to the jurisdiction of this Court. *See United States v. Oliveri*, 190 F. Supp. 933, 935 (S.D. Tex. 2001). The Fifth Circuit has applied the Doctrine, limiting a criminal defendant's access to the court system where the facts established that the defendant sought to evade the jurisdiction of the court. *Momani v. Mukasey,* 257 F. App'x 746, 747 (5th Cir. 2007) (quoting *Bagwell*, 376 F.3d at 410).[11] This case law presumes, and the facts of the cases support the conclusion, that the defendants targeted in those cases were under the jurisdiction of the courts. Nevertheless, *Mukasey* recognized that the application of the Doctrine falls within the inherent powers and discretion of the courts, thereby leaving the circumstances of its application, by and large, to the deciding tribunal. *Bagwell,* 376 F.3d at 413.

Both *Bagwell* and *Mukasey* followed Supreme Court precedent that cautions that, if a defendant is a fugitive when a court considers his case, the court must determine whether it will be able to enforce any judgment that it renders. *Id.* at 411 (citing *Degen v. United States*, 517 U.S. 820, 824 (1996)). That factor alone

[11] In *Mukasey*, the defendant was in the United States and had been ordered to depart voluntarily. He failed to do so, avoided Immigration authorities, and was listed as a "fugitive." Jurisdiction over the defendant was not an issue because he was already subject to the jurisdiction of the court.

may be determinative of whether the Doctrine should be applied. *Id.* Courts may also consider the absence of a defendant as a waiver or abandonment of his case and, thereby, a forfeiture of any right to relief. *Id.* A court may also refuse to address a fugitive's claim in order to discourage escape and, simultaneously, encourage a fugitive to voluntarily surrender in order that the court may proceed to adjudicate her claim. *Id.* Finally, a criminal defendant's escape may be seen as an affront to the dignity and authority of the court, dictating that the Doctrine apply. *Id. See also Empire Blue Cross & Blue Shield v. Finkelstein,* 111 F.3d 278, 280 (2d Cir. 1997).

The defendant argues that the fundamental basis for applying the Doctrine does not apply to her as a foreign national because the SSI fails to establish that she is the intended subject of the criminal laws relied upon in the SSI.[12] Hence, her alleged acts of defiance, propagated by the government, are fundamental to the issue of whether the government has the statutory authority to reach beyond the boundaries of the United States and prosecute a foreign national under the FCPA or the MLCA and issue an arrest warrant. *See United States v. Hoskins*, 73 F.Supp.3d 154, 165 (2d Cir. 2014) ("*Hoskins I"*). Logic dictates that if the government cannot prosecute a foreign national under either of the statutes, it

[12] A general principle of criminal law teaches that "no [woman] shall be held criminally responsible for conduct which [she] could not reasonably understand to be prescribed." *United States v. Lanier*, 520 U.S. 259, 265 (1997) (citing to *Boule v. City of Columbia*, 378 U.S. 347, 351 (1964) (other citations omitted). The government, in this circumstance, may need to prove that the defendant's conduct was a crime in her own country, irrespective of the laws of the United States.

cannot lawfully issue a warrant for an arrest under the FCPA or the MLCA.[13] These poignant arguments dictate that the Court exercise its inherent powers and address the defendant's lack of jurisdiction claim. *Hotze v. Burwell,* 784 F.3d 984, 991 (5th Cir. 2015).

B. Federal Rules Criminal Procedure -- Dismissal Standard

A court may properly grant a Rule 12 motion to dismiss if the issue raised is one of law and does not require an adjudication of the facts. Fed. R. Crim. P.12(b)(1); *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005), *abrogated on other grounds*, *United States v. Garcia*, 707 F. App'x. 231, 234–35 (5th Cir. 2017). "A motion that the court lacks jurisdiction may be made at any time while the case is pending." Fed. R. Crim. P. 12(b)(2). Jurisdiction, under Rule 12(b)(2), however, refers to subject matter jurisdiction. *United States v. Kahl*, 583 F.2d 1531, 1536 (5th Cir. 1978). Objections to subject matter jurisdiction cannot be waived, and a district court may raise the issue *sua sponte*. *Id.; see also Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697 (5th Cir. 1997). Such objections may include whether, and to what degree, a federal statute applies

[13] The FCPA provides for jurisdiction over foreign persons when they act as an "agents" for a "domestic concern" that is within the United States. 15 U.S.C. §§ 78dd-2(a), (h)(1)(4). Domestic concern is a broad term that covers "any individual who is a citizen, national, or resident of the United States," wherever that person happens to be in the world. *Hoskins*, 902 F.3d at 84 (citing 15 U.S.C. § 78dd-2(h)(1)(A)). The FCPA prohibits any "person"—defined with respect to individuals as "any natural person other than a national of the United States"— from using interstate commerce in furtherance of corrupt payments to foreign officials, but only while the person is in the territory of the United States." *Id.* at 85 (citing §§ 78dd-3(a), (f)(1)).

extraterritorially. *See, e.g.*, *Boureslan v. Aramco, Arabian Americana Oil Co.*, 892 F.2d 1271 (5th Cir. 1990) (en banc) (affirming dismissal for lack of subject matter jurisdiction because Title VII does not apply to employer conduct occurring outside of the United States). In *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991), the court held that the district court did not lack subject matter jurisdiction over Securities Exchange Act and RICO Act claims where the relevant conduct occurred "primarily" inside the United States. The operative term in *Fenn* is "primarily," suggesting that part of the crime must occur in the United States and that it concerned persons over whom the court has jurisdiction. *Id.* at 480.

C. Jurisdiction under Sections 78dd-2 and 78dd-3 of the FCPA.

Counts One and Three, of the SSI charge the defendant with conspiracy to violate the MLCA, as set out in 18 U.S.C. §§ 371 and 1956(h), and the substantive offense of Money Laundering, 18 U.S.C. § 1956(a)(1)(B)(i), (2). Count Two of the SSI charges conspiracy to violate the FCPA, 18 U.S.C. §§ 371 and 78dd-(2)(a) and 78dd-3(a). The jurisdictional basis for charging a foreign citizen with conspiracy under the FCPA or the MLCA must be found in either the underlying kickback/bribery scheme, for which the defendant's codefendants are charged, or the limited basis set out in the MLCA.

Section 78dd-2 states a limited basis for extraterritorial jurisdiction under the FCPA. The relevant provision states:

> It [is] unlawful for any domestic concern . . . or . . . any officer, director, employee, or *agent* of such domestic concern . . . to pay, promise to pay, . . . any money . . . to . . . any foreign official for purposes of – influencing any act or decision . . . of that official . . . in order to assist such domestic concern in obtaining or retaining business. (Emphasis supplied).

15 U.S.C. § 77-d(2)(a). Jurisdiction over the defendant under the FCPA rests in whether the government can establish that the defendant was an "officer, director, employee or agent" of a domestic concern. Congress has determined that the FCPA does not apply extraterritorially to a foreign national beyond these four categories. 15 U.S.C. § 78dd; *see also Hopkins I*, 902 F.3d at 78.[14]

The government asserts that the defendant was an agent of a domestic concern. In this case, however, agency is more than a fact to be proved as part of a criminal act; it is jurisdictional. Hence, agency does not exist simply because the government alleges in the SSI that the defendant committed certain acts. Agency must be established, apart from the facts that support the charge.[15] Agency, in this context, raises a question of law that must be established in a way that satisfies the jurisdictional requirements of the statute.

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[14] Outside of those categories, the FCPA applies to a foreign national only if she committed part of the crime while in the United States. *Id.* at 85 (citing 15 U.S.C. § 77-d(3)(a)). However, because the SSI does not allege that the defendant conspired to violate the FCPA in the United States, section 77-d(3) does not apply to her.

[15] An indictment is not evidence states to the charges, setting forth what the government intends to prove. Moreover, as set forth in the SSI, the term "agent" is not jurisdictional but an element of proof of the alleged crime(s).

When there is no allegation that an agent of a domestic concern acted unlawfully while in the United States, establishing that agency exists as the jurisdictional basis for a criminal charge requires direct evidence of an agency relationship, apart from other types of professional relationship. As a matter of law, it requires undisputed evidence of mutual assent and control over the details of the person and agency, such that the principal controls the details over the assignment. *Christiana Trust v. Riddle*, 911 F.3d 799, 803 (5th Cir. 2018) (citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Absent direct or undisputed evidence, an agency does not exist.

It is conceded by the government that the defendant as a foreign national and has no ties to the United States. The "ties" that the government relies upon are communications through the interstate commerce. This approach does not present direct evidence that the defendant was an agent, as a matter of law. Nevertheless, the government points to acts by the defendant contained in paragraphs 65, 66, 81, 82, 83, 147, 149, 150, 153, 156 and 168 of the SSI. These recorded acts, allegedly committed by the defendant in behalf of the codefendants, specifically related to the codefendant's conduct committed in Venezuela and the United States. They do

not point to any act by the defendant committed in either nation[16]. Hence, no agency relationship is established in the United States by the alleged acts.

The government's reliance on 18 U.S.C. § 371, the conspiracy statute, to connect the defendant to the underlying Venezuelan bribery/kickbacks scheme is problematic. The government recognizes that the alleged conspiracy relies on a substantive underlying offense as its basis. In this regard, the government proffers *United States v. Rabinowich,* 238 U.S. 78, 86 (1915) and *Salinas v. United States*, 522 U.S. 52, 64 (1997) to support its claim that a conspiracy charge may exist apart from a substantive, or "objective," offense. Citing to language in the *Rabinowich* opinion, the government postulates that "a person may be guilty of

[16] In these paragraphs, the government states that Rincon, Shera and others directed wire transfers to the selected financial institutions. In this regard, the government states that "[the defendant] and Rincon created false justifications for the [kickback funds]"; that "[the defendant] assisted in setting up the bank accounts"; that "[the defendant] communicated [by] email, phone and various messaging applications [] [concerning] the account set-up and the need to submit documentation to justify the payments." In one instance, the government states, the defendant communicated: "We will email you next week the new account numbers and the wiring instructions." On another occasion, the government states, the defendant communicated: "Shall I go ahead and order a new Nevis Company for Cesar?" Pleading further, the government states that the defendant communicated: "A new Nevis Company called [Swiss Account 8] will be formed with Cesar as the director/BO/shareholder."

In other overt acts, the government states the following: "On June 15, 2012, Villalabos instructed [the defendant] to transfer CHF 75,000 from Swiss Account 1 to an account in the name of Law Firm 2." In response to a communication, the defendant communicated that: "We will email you next week the new account numbers and the wiring instructions to begin transfer of funds into the main . . . Swiss Account 1." In yet another communication, the defendant communicated: "The meeting with Nevis regarding Grey Hair [Official B] was very positive, open and excellent." Lastly, the government asserts that: "On February 16, 2012, De Leon provided handwritten instructions to [the defendant] directing [her] to transfer [funds] from Swiss Account 1 to Swiss Account 3. . . ." Based on these communications, the government argues that the defendant was an agent of one or more domestic concerns.

conspiring although incapable of committing the objective offense," or in this case, incapable of violating the FCPA. *Rabinowich*, 238 U.S. at 86.

Neither *Rabinowich*, nor *Salinas* supports the government's position. The general principle, already recognized in common law concerning conspiracy and accomplice liability, teaches that a defendant may commit the offense of conspiracy even though incapable of physically committing the objective offense. There are exceptions to this general principle but, more importantly, the principle does not apply here. *See Hoskins I*, 902 F.3d at 78 (citing to *Regina v. Tyrell* [1984] 1 Q.B. 710). As a general rule, accomplice liability may exist where Congress criminalizes an act that necessarily requires the participation of two persons, but chooses to punish only one party to the offending conduct. *United States v. Castle*, 925 F.2d 831, 833 (5th Cir. 1991) (citing *Gebardi v. United States*, 53 S.Ct. 35, 37 (1932). However, the general rule, as applied in *Gebardi*, contemplates instances in which courts have jurisdiction over the person even though she is excluded from prosecution.

Another instance closer to the facts in this case exists where a foreign official accepts a bribe from a domestic concern. Under the FCPA, a foreign official who accepts the bribe cannot be prosecuted for the offense of bribery, even though his conduct could be prosecuted were he to participate in the criminal conduct while in the United States. *Castle*, 925 F.2d at 836. It is clear that, absent

one of the four enumerated relationships to a domestic concern, the FCPA intends to criminalize the conduct of a foreign person only to the extent such conduct occurs while the person is present in or where she has previously established ties to United States. *Castle*, 925 F.2d at 833, 836; *see also Hopkins I*, 902 F.2d at 78.[17]

D. Jurisdictional Reach Under the MLCA, 18 U.S.C. §§ 1956 and 2.

Count Three of the SSI charges the defendant with the substantive offense of money laundering, a violation of the MLCA, pursuant to Title 18 U.S.C. § 1956(a)(1)(B)(i), and aiding and abetting a money laundering offense, pursuant to Title 18 U.S.C. § 2. A person violates § 1956 when she, knowing that the proceeds involved in a financial transaction represent proceeds of unlawful activity, conducts or attempts to conduct a transaction involving those proceeds with knowledge that the transaction is designed to conceal or disguise its owner, or from where it originated. *See Id.* § 1956(a)(1)(B)(i).

It is also a violation of § 1956 when a person transfers or attempts to transfer money from a place in the United States to a place outside the United States, or from or through a place outside the United States into the United States, with the

[17] There are strong policy reasons for circumscribing the government's reach in instances where Congress has affirmatively stated its intent. "It is a basic premise of our legal system that, in general, the United States law governs domestically, but does not rule the world." *RJR Nabisco, Inc. v. European Cmty*, 579 U.S. 325, 130 S.Ct. 2090, 2100, 195 L. Ed.2d 476 (2016) (internal quotation marks omitted). Unless Congress expresses an affirmative intent and that intent is clearly expressed, United States law should not apply extraterritorially. *EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 248 (1991). To seek to punish beyond its territories creates serious risks of international discord. *See Hoskins I*, 902 F.3d at 85; *Castle,* 925 F.3d at 835.

intent to promote unlawful activity. *See id.* § 1956(a)(2). *See also United States v. Stein,* No. 93-375 1994 WL 285020, at *1 (E.D. La. June 23, 1994). Here, again, the scope of the statute establishes the persons that it seeks to reach. As a threshold argument for both the substantive and aiding and abetting charges, the defendant argues that the acts recorded in the SSI fail to show that the defendant conducted a "transaction"[18] in the United States and that, therefore, the acts alleged are not the subject of statute.

Importantly, the SSI does not state a basis for jurisdiction over the defendant, apart from those recorded in § 1956(f). A person who is a non-United States citizen commits the offense while outside the United States "if the [prohibited] conduct occurs *in part* in the United States[.]" 18 U.S.C. § 1956(f)(1) (emphasis added). The Court interprets the "in part" language of § 1956(f) as a "catch-all" to punish or prosecute persons who commit some portion of the offense while in the United States but completes the act after departing the jurisdiction of the United States. In this instance, the Court has jurisdiction over a foreign person because of either her earlier presence in the United States, or her involvement in the crime while in the United States.

[18] "Financial transaction" means "(A) a transaction which in any way or degree effects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4).

In the case at bar, the SSI does not state that the offense of money laundering occurred outside the United States by persons subject to the jurisdiction of the United States courts. It is noted that any transfer of alleged illegal proceeds was not *to* the defendant or made by the defendant, but instead, occurred *between* the codefendants and the financial institutions or banks. The alleged unlawful acts engaged in by the defendant, whether cast as a violation of the FCPA or a violation of the MLCA all occurred in the United States or a foreign country.

Absent evidence of congressional intent, this Court simply lacks jurisdiction over a foreign national. It would be ill-advised for this Court to presume that Congress intended to fundamentally change the relationship between the United States and other Nations other than doing so explicitly, or by treaty. *Cf. Burrage v. United States*, 571 U.S. 204 (2014).[19] Likewise, § 2, the aiding and abetting statute, does not assist the government in this endeavor. The logic of the law teaches that if the government lacks jurisdiction to prosecute a person based on the substantive offense, it cannot do so by circumvention, under the aiding and abetting statute. *Hoskins I*, 902 F.3d at 96–97.

[19] Although *Burrage* deals with statutory jurisdiction, it teaches that the government's prosecutorial approach must be "reconciled with sound policy" to insure "clarity and certainty in criminal law." *Id.* at 217.

E. Vagueness Renders the Term Agent Unconstitutional

Apart from the Court's determination that it lacks jurisdiction over the defendant under the FCPA and the MLCA, the Court finds merit in the defendant's claim that both the FCPA and the MLCA are unconstitutionally vague as applied to her. It is clear that Congress did not intend that criminal jurisdiction for charges under either the FCPA or the MLCA be established simply by proof of the elements of the offense. To prosecute the defendant, the government must show either that the defendant was intimately and separately connected to a domestic concern in the United States such as by employment, as an officer, director or shareholder, or by an established agency relationship that occurred in the United States.

Because none of the above relationships has been established, the defendant argues that the term "agent" is so vague that, as applied to her, it is unjustified and violative of the "due process" clauses of the federal Constitution. To prevail on an "as applied" challenge to the constitutionality of a statute, the defendant must show that the statute is unconstitutional, by its scope or as applies to her conduct *cf. Catholic Leadership Coal. Of Texas v. Reisman,* 764 F.3d 409, 425 (5th Cir. 2014). The defendant's challenge raises the issue of vagueness as to what constitutes an agent.

Under the vagueness doctrine, courts are forbidden from enforcing "a statute which either forbids or requires the doing of act in terms so vague that [a woman] of common intelligence must necessarily guess at its meaning [and where courts may] differ as to its application." *Lanier*, 520 U.S. 259, 266 (internal citations omitted). That principle is also relevant in instances where the accused's conduct is not prosecutable in the accused's own country. The application of the term "agent" to the defendant, as a basis for jurisdiction, is such a novel application that no court has interpreted the statute or rendered a judicial decision that fairly discloses the manner in which the term may be applied to establish jurisdiction. That fact alone establishes the vagueness of the term.[20]

D. Conclusion

The test for the validity of this SSI, as applied to the defendant, rests in whether it conforms to minimal constitutional standards. *United States v. Grant*, 850 F.3d 209, 214 (5th Cir. 2017) (quoting *United States v.* Fitzgerald, 89 F.3d 218, 222 (5th Cir. 1996)). A lack of jurisdiction precludes the Court from addressing the merits of the government's case, and all that remains is for the Court to dismiss the case. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (citing *Ex Parte McCardle,* 7 Wal. 506, 514 (1868); *see also Hotze*

[20] The law seeks certainty, particularly concerning a court's jurisdiction. Certainty in the law provides fair warnings which should be given to the world in language that non-citizens and foreign nationals understand, of what the law of the United States seeks to do, and how they may steer clear of any transgressions. *See United States v. Kay*, 513 F.3d 432, 441 (5th Cir. 2007).

v. Burwell, 784 F.3d 984, 991 (5th Cir. 2015). As well, the term "agent", as a jurisdictional basis to prosecute a foreign national, is so vague that it denies a defendant the "due process" that the federal Constitution mandates.

The Court concludes that neither the FCPA nor the MLCA extends criminal liability to a foreign national located outside the United States, except in the specific circumstances where the agency relationship is established in the United States. *See Hoskins I*, 902 F.3d at 89 (citing to *United States v. Bodmer*, 342 F. Supp. 2d 176, 188 (S.D.N.Y. 2004)). [21] Therefore, Counts One, Two and Three of the Superseding Indictment are dismissed, with prejudice, as to the defendant, Daisy T. Rafoi-Bleuler for lack of jurisdiction.

It is so ORDERED.

SIGNED on this 10th day of November, 2021.

Kenneth M. Hoyt
United States District Judge

[21] Congress has also expressed a clear intent that the FCPA should have limited extraterritorial application. Accordingly, foreign nationals who are not agents, employees, officers, directors, or shareholders of an American domestic concern may have conspiracy and complicity liability for related FCPA violations only where they have conducted business or engaged in criminal activities while in the United States. *Hopkins (I)*, 902 F.3d at 96.