UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	CRIM NO. 3:12CR238 (JBA)
v.	
LAWRENCE HOSKINS	March 2, 2020

GOVERNMENT'S MEMORANDUM IN AID OF SENTENCING

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The defendant Lawrence Hoskins ("Hoskins") knowingly and willfully participated in a conspiracy to bribe high-ranking Indonesian public officials in order to secure a $118 million government power plant contract for Alstom Power Inc. ("API") and its consortium partners. He was a part of frequent email exchanges and discussions about the bribery scheme, including efforts to funnel the bribes through so-called "consultants"; to hide those bribes through sham consulting contracts that purport to bar bribery payments; to convince API to select a different consultant when he learned that the first was not trusted by Indonesian power officials to make the right payoffs; and to negotiate accelerated terms of payments to get more money into officials' pockets earlier. When he left Alstom shortly after API won the Tarahan project, he heralded the business as the result of their hard work, a sign of Alstom's resurgence, and encouraged his colleagues to keep up their efforts. The contracts that he helped negotiate triggered bribe payments for years after his departure. The defendant and his co-conspirators knew their conduct was illegal, but pressed forward nonetheless in an effort that would make millions in gross profits for Alstom. Nor was this conduct isolated to Tarahan—the defendant actively engaged in discussions to bribe officials on several other Indonesian projects as well as projects in India and Malaysia.

In anticipation of sentencing, Hoskins for the first time avers that he regrets his actions, but does not actually take responsibility for any wrongdoing. Instead, he claims that he was an innocent bystander to a culture of corruption and that his only crime was not resigning sooner—a resignation that had nothing to do with the corrupt conduct in which he participated. He pushes the blame off on his co-conspirators, and submits to the Court countless letters heralding his integrity without coming to grips with the significant contrary evidence of his professional failings.

The Government respectfully requests that the Court impose a sentence that adequately reflects the defendant's conduct in this case, and in particular his willful disregard for the law and

his furthering of a culture of corruption that placed the corporate bottom line over ethical conduct and the interests of the citizens of the countries in which Alstom operated. While the Government agrees that a Guidelines sentence is unnecessary here, the defendant should receive punishment substantially greater than co-defendant Frederic Pierucci. Based on the factors set out below, the Government suggests a sentence between seven and nine years.

I. Introduction and Background

A. Procedural History

On July 30, 2013, a grand jury in New Haven, Connecticut, initially charged the defendant Lawrence Hoskins in a twelve-count Second Superseding Indictment with conspiring to violate the Foreign Corrupt Practices Act ("FCPA"), pursuant to 18 U.S.C. § 371 (Count 1), substantive violations of the FCPA, pursuant to 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2 (Counts 2-7), conspiring to launder money, pursuant to 18 U.S.C. § 1956(h) (Count 8), and substantive money laundering, pursuant to 18 U.S.C. § 1956(a)(2)(A) and 18 U.S.C. § 2 (Counts 9-12). Hoskins was charged with co-defendant William Pomponi.[1]

On April 23, 2014, the defendant was arrested upon his arrival into the United States Virgin Islands ("USVI"). He was presented before the United States District Court on the same day, waived an identity hearing, any preliminary hearing, and any detention hearing, in favor of those hearings being held in this district. An order of removal to this District was issued on April 24, 2014. Subsequently, the defendant was transported from the USVI to Puerto Rico as part of the normal transportation process for a defendant arrested in the USVI, with the understanding that he would be further moved to Oklahoma City—the location of the transportation hub for the United

[1] On July 29, 2013, co-defendant Frederic Pierucci pleaded guilty to Counts One and Two of the original indictment in this case.

States Marshal Service ("USMS")—before arriving in Connecticut. However, because of delays in the transfer, the Government requested, and the Court ordered, the defendant's release from custody on May 19, 2014 so that he could travel from Puerto Rico (in the custody of his counsel or the FBI) to court in Connecticut. The defendant appeared before the Hon. William I. Garfinkel on May 19, 2014, and was released on a bond.

On April 15, 2015 the grand jury returned a Third Superseding Indictment with the same charges, but removing William Pomponi, who had pleaded guilty on July 17, 2014. On November 8, 2019, following a two-week jury trial, the defendant was convicted on Counts 1-10 and 12 of the Third Superseding Indictment.

On February 26, 2020, the Court granted the defendant's motion for acquittal as to Counts 1-7, holding that there was insufficient evidence that the defendant was an agent of Alstom Power Inc., and denied the motion as to Counts 8-10 and 12. Doc. 617. The Court conditionally granted a new trial as to Counts 1-7, and denied a motion for a new trial as to Counts 8-10 and 12.

B. Summary of the Facts

A fulsome summary of the offense conduct is set out in the PSR at ¶¶ 15-81, which the Government incorporates by reference and will briefly summarize here.

The defendant, Lawrence Hoskins, is a United Kingdom national who spent large portions of his professional career at Alstom and its predecessor entities, initially between 1978 and 1995 and then again between 2001 and 2004. PSR ¶¶ 20, 150; *see also* PSR ¶ 49 (Hoskins referring Alstom as "my home company"). Alstom, a French-based power and transportation company, had many subsidiaries around the world. PSR ¶ 19. Between November 1, 2001 and August 31, 2004, Hoskins was employed by Alstom UK Ltd. (a United Kingdom-based Alstom subsidiary) but was seconded to another subsidiary, Alstom Resources Management S.A., in France. PSR ¶ 20. He

was assigned to work in Alstom's International Network and was the Area Senior Vice President for the Asia Pacific region. PSR ¶ 20. In that capacity, Mr. Hoskins was directly involved in supporting the efforts of Connecticut-based API and its consortium partners (Japan's Marubeni Co. and Alstom's Indonesian subsidiary PT ESI) to win the Tarahan Project, a $118 million government-owned coal-fired power plant in South Sumatra, Indonesia. PSR ¶¶ 21, 24. Among other support activities, Hoskins assisted API in selecting consultants, negotiating terms of payment with the consultants, and approving aspects of the consultancy agreements according to Alstom policy, knowing that the consultants' principal function was to funnel bribes to Indonesian officials. PSR ¶ 24. He supported API both directly as well as through others working under him in International Network, including Reza Moenaf and Eko Sulianto. PSR ¶ 29.

Hoskins Tarahan-related support activities began at least as early as 2002, when he "game plan[ned]" with Moenaf and Sulianto about Tarahan strategy, including (1) trying to prevent Mitsui from bidding, and (2) "appoint[ing] Emir [Moeis]" as consultant. PSR ¶ 30. Emir Moeis was an influential member of the Indonesian Parliament, a fact of which Hoskins was made aware at least by December 2002 when Moeis was discussed as a key decision-maker on the Muara Tawar projects. PSR ¶ 31. Hoskins met with Fred Pierucci of API and received Pierucci's approval to "proceed with" Moeis as consultant through a representative company (fronted by Mr. Harsono), and then Moenaf sought from API the terms of the agreement. PSR ¶ 32. However, Pierucci and API's Dave Rothschild decided that—while Moeis was still a target of the bribes—Harsono was too close to Moeis and that API would hire Pirooz Sharafi to funnel the bribes. PSR ¶ 33. Moenaf emphasized to API and then to Hoskins that Sharafi would also have to bribe officials at PLN, the Indonesian state-owned power company. PSR ¶ 33.

A consultancy agreement was concluded between API and Sharafi's company Pacific Resources International ("PRI") in March 2003 that called for API to pay PRI three percent of the Tarahan contract price, *pro rata* to the payments received from PLN. PSR ¶¶ 34, 35. Hoskins signed off on the key elements of the agreement according to Alstom policy, which included an anti-bribery provision even though Hoskins well knew that Sharafi's function was to pass on part of his commission to Indonesian officials. PSR ¶ 35. Hoskins's sign-off was followed by sign-off by Pierucci for API. PSR ¶ 35. Hoskins initially protested the use of Sharafi's U.S. company (and U.S. Dollars), again applying Alstom policy, but ultimately approved the use of PRI at the request of API notwithstanding that policy. PSR ¶ 34.

Hoskins was actively involved, in September 2003, in replacing Sharafi with Azmin Aulia as Tarahan consultant. PSR ¶¶ 36-42. Several complaints (including from Moenaf) were aired to Hoskins that Sharafi was not trusted by PLN officials to deliver on bribery promises. PSR ¶ 36. The origin of the complaints was principally Eddie Widiono, President of PLN, who "wasn't happy with what promises Pirooz Sharafi had made to him, and he didn't see any evidence that Pirooz was going to take care of the proper bribe." PSR ¶ 37. Hoskins was well aware that Widiono's support was crucial because Widiono was also a decision maker in the Muara Tawar projects, and had compelled Alstom to hire Auilia as a conduit to pay off Widiono. PSR ¶ 38. As a result, API decided to replace Sharafi with Aulia and Hoskins led meetings in September 2003 where he delivered the news to both consultants. PSR ¶ 39. Hoskins explained that Sharafi would get a one percent commission to share with Moeis, and Aulia would get a 2% commission to cover PLN. PSR ¶ 39.

Following the change in consultants, Hoskins helped conclude new consultancy agreements with PRI and Aulia's company (PT Gajendra), and approved agreements that included

anti-bribery provisions that Hoskins knew would be violated. PSR ¶¶ 40-42. Hoskins was also involved, on behalf of API, in negotiating terms of payment for the agreement between API and Aulia's company, PT Gajendra. PSR ¶¶ 43-46. Aulia (and Widiono himself) pushed for accelerated terms of payment because Aulia's payoffs would happen earlier than he would get paid by API. PSR ¶ 43. At Hoskins's instruction, his International Network employee Yves Mouillet proposed faster terms of payment to API, but API resisted because of API's cash flow concerns. PSR ¶¶ 43-44. Hoskins passed on local information regarding election funding as driving the need for faster payments, and ultimately API agreed to a 12-month schedule for 95% of the payoff. PSR ¶ 46.

On July 26, 2004, API successfully concluded its negotiation with PLN and (with Marubeni and PTESI) signed the contract to build the Tarahan Project. PSR ¶ 48. Pomponi led the negotiation on behalf of API. PSR ¶ 48. On the same day, Pierucci wrote to congratulate Pomponi, Moenaf, Mr. Hoskins, and others, including "Lawrence/Reza/Eko for the local support without which we would not have been able to achieve this result." PSR ¶ 48.

Hoskins submitted his letter of resignation from Alstom on June 30, 2004, and left employment on August 31, 2004. PSR ¶ 49. He referred to Alstom as his "home company," and wished "Alstom every success in the future." PSR ¶ 49. He communicated only positive things about Tarahan to those co-conspirators that he told about his departure, including telling Moenaf that "I hope that Tarahan will be the start of many future successes for Alstom in Indoensia." PSR ¶ 50.

API and the consortium paid in accordance with the consultancy agreements that Hoskins helped negotiate, and for which he approved certain terms. PSR ¶¶ 51-79. API paid $666,880 and Marubeni paid $515,165.79 to PRI, of which Sharafi passed on $424,150 to a company in

Indonesia that then transferred at least $357,000 to Moeis. API (through Alstom Prom) paid $1,267,072 and Marubeni paid $1,159,635 to PT Gajendra.

C. Summary of Other Acts

Hoskins's involvement in bribery on Tarahan was not an isolated situation. First, the PSR discusses the extensive evidence of Hoskins's involvement in bribery on other Indonesian projects such as Muara Tawar. Beyond that, there is evidence of his involvement in discussions about bribery on various other projects in India and Malaysia.

First, Hoskins participated in the hiring of consultants to funnel bribes to Indian officials in exchange for helping API win the Sipat and Barh (I and II) Projects. PSR ¶¶ 83-90. Among other evidence of Hoskins's involvement were emails where: Hoskins sent to API proposals for consultancy agreements, PSR ¶ 85; received an e-mail from API's William Pomponi complaining that "our friends," that is, lower level government employees, must not just be a "collection agency" but must come through with information needed by Alstom, PSR ¶ 87; Hoskins receiving an email discussing matching their competitor's "incentives," PSR ¶ 88; and Hoskins receiving an e-mail that "our friends" must help derail a competitor's bid, PSR ¶ 90.

Second, Hoskins also participated in hiring consultants for the Manjung 4 project in Malaysia, also known as "Project Cherry," to funnel bribes to Malaysian officials. PSR ¶¶ 91-103. In particular, Hoskins worked with others at Alstom to funnel bribes to Malaysian Member of Parliament and Second Minister of Finance Jamaluddin Jarjis ("Jarjis"). PSR ¶ 92. Among the evidence tying Hoskins to the Malaysian scheme included emails to Hoskins explicitly discussing the bribery of Jarjis, PSR ¶ 94 (referring to an agreement with Jarjis "cooked up for election funding next year"); Hoskins emailing others about consultancy agreements with an associate of Jarjis, PSR ¶ 96; Hoskins requesting that another Alstom employee complete the "keys" for a

consultancy agreement with Jarjis, PSR ¶ 98; and Hoskins sending still other emails about the terms of Manjung consultancy agreements, including reference to commissions as "chocolates," PSR ¶¶ 99-101.

II. Sentencing Guidelines

A. Guidelines Calculation

The PSR's guidelines calculations are correct, *see* PSR ¶¶ 107-120, although Paragraphs 108 and 109 should be amended to reflect that the sentencing will only relate to the money laundering counts. The four money laundering counts of conviction, 8-10 and 12, are grouped. U.S.S.G. §§ 3D1.2(b), 3D1.2 cmt. n. 4.

1. Base Offense Level

According to U.S.S.G. § 2S1.1(a)(1), the base offense level is "the offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined." Further, U.S.S.G. § 1B1.3(a)(1)(A) holds a defendant accountable, for Guidelines purposes only, for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." If either of the two predicates for § 2S1.1(a)(1) do not apply, then the base offense level is determined by adding 8 levels to "the number of offense levels in § 2B1.1 . . . corresponding to the value of the laundered funds."

Here, the predicates for § 2S1.1(a)(1) are met, and so the base offense level is determined by the underlying FCPA violations. Leaving aside whether the Government has proven by a

preponderance of the evidence that the defendant "committed" the underlying FCPA offense,[2] at a minimum the Government has proven that he "aided, abetted, counseled, commanded, induced, procured, or willfully caused" others to commit the "acts and omissions" that formed the basis of the underlying violation. §§ 2S1.1(a)(1), 1B1.3(a)(1)(A). There is no question here that others, including domestic concern API, committed the FCPA violations, and that Hoskins aided and abetted the acts and omissions committed by API. While the *Gebardi* principle may have shielded Hoskins from *criminal liability* as a conspirator, aider, and abettor, *see United States v. Hoskins*, 902 F.3d 69 (2018), he can find no such protection under the Guidelines, which permit inclusion of broader conduct. Indeed, Section 1B1.3 of the Guidelines utilizes the term "acts or omissions," and specifically does not require that the defendant have aided and abetted an actual violation of law. U.S.S.G. § 1B1.3(a) and cmt. n. 1 ("Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.").

In addition, the commentary to the Guidelines make clear that the defendant falls within the class of offenders whom the Sentencing Commission intended to cover in § 2S1.1(a)(1). The current version of § 2S1.1 was adopted in 2001, and replaced a regime principally driven by the amount of the laundered funds. *See* U.S.S.G. supp. to app. C, amend. 634 (2001), at 161-62. The Commission created the current formulation to differentiate between cases in which the defendant was involved in the underlying offense from those in which he was not. The Sentencing Commission explained that this amendment answered concerns that the prior regime "did not

[2] The Government maintains its position that the jury's verdict on this score, applying the Court's carefully crafted instructions, should have been upheld.

reflect adequately the culpability of the defendant or the seriousness of the money laundering conduct because the offense level for money laundering was determined without sufficient consideration of the defendant's involvement in, or the relative seriousness of, the underlying offense." *Id*. at 167. To address this concern, the Commission "separated money laundering offenders into two categories for purposes of determining the base offense level," that is, direct versus third-party money launderers. *Id*. Direct money launders are those "offenders who commit or would be accountable under §1B1.3(a)(1)(A) (Relevant Conduct) for the underlying offense which generated the criminal proceeds," and third party money launderers are "offenders who launder the proceeds generated from underlying offenses that the defendant did not commit or would not be accountable for under §1B1.3(a)(1)(A))." *Id*. For the former, the Guidelines use the underlying offense to reach the base offense level, whereas for the latter the Guidelines look to the value of the laundered funds. *Id*.

This distinction between direct and third-party money launderers has been reiterated and applied by several courts. *See United States v. Menendez*, 600 F.3d 263, 267 (2d Cir. 2010) ("In shorthand, the Sentencing Manual and the courts have referred to section 2S1.1(a)(1)'s sentencing formula as punishing 'direct money launderers' and section 2S1.1(a)(2)'s alternative formula as punishing 'third party money launderers.'"); *United States v. Blackmon*, 557 F.3d 113, 119 (3d Cir. 2009) (The Guideline distinguishes between direct money launderers under subsection (a)(1) and third-party money launderers under subsection (a)(2)."); *United States v. Campbell*, 764 F.3d 874, 877 (11th Cir. 2014) ("the Guidelines distinguish between direct money launderers in § 2S1.1(a)(1) and third-party launderers in § 2S1.1(a)(2)"); *United States v. Glass*, 189 F. App'x 788, 795 (10th Cir. 2006) ("[§ 2S1.1 was] amended to its present form in order to distinguish between 'direct money launderers' and 'third party launderers.'").

The plain language of the Guidelines holds accountable as direct launderers not just those who "commit" the underlying offense, but also those who "aided, abetted, counseled, commanded, induced, procured, or willfully caused" others to commit "acts or omissions" constituting that offense. §§ 2S1.1(a)(1), 1B1.3(a)(1)(A). Conversely, courts have found that the hallmark of third-party launderers is that they "have no involvement in the underlying offense—they only launder the money generated from that offense." *Glass*, 189 F. App'x at 795; *see also Blackmon*, 557 F. 3d at 119 ("third-party launderers have no involvement in the underlying offense and only launder the money generated from that offense"); *United States v. Tokhtakhounov*, 607 F. App'x 8, 13, (2d Cir. 2015) (referring to third-party launderers as "those who launder funds other than those obtained through their own criminal activity"). Accordingly, the Guidelines intentionally handle third-party launderers more leniently because they did not participate in generating the illicit funds. *See Glass*, 189 F. App'x at 796 (describing lower sentences for "less-culpable third-party launderers"); *Blackmon*, 557 F.3d at 119 ("Not surprisingly, a defendant sentenced under subsection (a)(1) often gets a higher sentence than a less culpable offender sentenced under subsection (a)(2).").

Thus, both the Guidelines and the related cases make clear that the defendant—as someone who aided and abetted API's acts underlying the violations of the FCPA—was a "direct launderer," that is, he was involved in the underlying crime itself and did not simply launder funds generated from others' criminal activity. Accordingly, § 2S1.1(a)(1) should apply.

The Second Circuit's decision in *Hoskins* does not undermine the conclusion that the defendant aided and abetted an FCPA violation for purposes of applying § 2S1.1(a)(1), even assuming Hoskins was not an agent of API and thus not himself criminally liable for substantive FCPA violations. The court in *Hoskins* was solely concerned with the limits of criminal liability

under the FCPA. *See* 902 F.3d at 85 ("The question thus becomes whether there is . . . a policy basis for Congress to exclude Hoskins's category of defendants from *criminal* liability." (emphasis added)). Conversely, the Guidelines are solely concerned with accountability for sentencing purposes. *See* § 1B1.3 cmt. n. 1 ("The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability."). At this sentencing phase, the question of criminal liability has already been answered—the defendant has been found guilty of causing financial transactions to promote FCPA violations. Thus Congress's intent to include or exclude certain classes of people in the FCPA is entirely irrelevant. The principal question for Guidelines purposes is simply whether the defendant's culpability is best measured under provisions regarding "direct" or "third party" laundering. Here, Hoskins was directly engaged with domestic concerns API, David Rothschild, Larry Puckett, Fred Pierucci, William Pomponi, and others to commit FCPA violations, and the charged transactions were directly derived from the proceeds of the FCPA violations, that is, the payments to Sharafi and Aulia were percentages of what API received from PLN as a result of the bribe scheme. Indeed, the specific money laundering provision for which the defendant was convicted is Section 1956(a)(2)(A)—promoting the FCPA violation by transferring money from inside the United States to outside the United States—which as the parties agreed, requires specific intent. Thus, there is no question that his culpability is best assessed under § 2S1.1(a)(1), assuming the offense level for the FCPA offense can be calculated (see below). To hold otherwise would run contrary to the objective of the current § 2S1.1 Guideline, which means to punish defendants according to their wrongdoing. The defendant's conduct in promoting FCPA violations would be under-

punished if the Guidelines treated him as only responsible for the funds that traveled from the United States, rather than the full scope of the criminal activity in which he was actively involved.[3]

2. Base Offense Level Calculation and Additional Enhancements

Applying § 2S1.1(a)(1), the underlying FCPA offense is calculated under U.S.S.G. § 2C1.1. The starting offense level is 12. U.S.S.G. § 2C1.1(a)(2). Two levels are added as the offense involved more than one bribe. U.S.S.G. § 2C1.1(b)(1). Eighteen levels are added as the value of the benefit received in return for the bribe payments was more than $3,500,000 but less than $9,500,000. U.S.S.G. § 2C1.1(b)(2), incorporating U.S.S.G. §2B1.1(b)(1)(J). Four levels are added as the offense involved an elected public official (Moeis) and a public official in a high-level decision-making or sensitive position (Widiono). U.S.S.G. § 2C1.1(b)(3). Accordingly, the base offense level is 36.

From there, two levels are added as the defendant was convicted under 18 U.S.C. § 1956. USSG §2S1.1(b)(2)(B). Two levels are added as the offense involved sophisticated laundering. USSG § 2S1.1(b)(3). Among other things, the offense involved the use of offshore accounts and so-called "consultants" to hide bribes to foreign officials. USSG §§2S1.1(a)(1) and 2C1.1.

Three levels are added because the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive. Specifically, Hoskins supervised some of the activities of his subordinates in International Network, including Reza Moenaf, Eko Sulianto, and Yves Mouillet. USSG §3B1.1(b).

[3] The defendant did not raise *United States v. Dhafir*, 577 F.3d 411 (2d Cir. 2009) in his sentencing memorandum. To the extent that his reply does so, the Government points the Court to its letter to the Probation Office on this subject. *See* Doc. 608-2.

A total offense level of 43, with a Criminal History Category I, yields a recommended sentence of life imprisonment and a $50,000 to $500,000 fine.

B. Response to the Defendant's Guidelines Arguments

The defendant concedes the accuracy of all but two enhancements—calculation of the benefit to Alstom and Marubeni, Defendant's Sentencing Memorandum, Doc. 615 ("Def. Mem."), at 25-27, and assessment of three points for being a manager or supervisor, Def. Mem. at 27-28. Both enhancements are well founded.

1. Benefit Calculation

U.S.S.G. § 2C1.1(b)(2) states, in relevant part, that "[i]f the value of the payment [or] the benefit received or to be received in return for the payment, whichever is greatest, exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount." Courts have interpreted the phrase "to be received" as the benefit expect at the time of the crime. *See United States v. Vazquez-Boyd* (1st Cir. 2008) ("the best interpretation of 'benefit . . . to be received in return for the payment' is the benefit a person in the defendant's position at the time of the extortion would reasonably have expected the victim to receive by paying him the money he demanded."); *see also United States v. Griffin*, 324 F.3d 330, 366 (5th Cir. 2003) ("[I]n determining the amount of benefit to be received, courts may consider the expected benefits, not only the actual benefits received."); *United States v. Quinn*, 359 F.3d 666, 680 (4th Cir. 2004) ("Thus, the district court should determine the value of the bribery payment and the value of the benefit to be received as if the contracts proposed to CTI and West had been executed."); *United States v. Purdy*, 144 F.3d 241, 248 (2d Cir. 1998) ("[T]he 'benefit to be conferred' is normally calculated in such situations on the basis of the profits realized (or intended to be realized) on sales obtained by bribery.").

Where, as here, the defendant helped pay a bribe to benefit a company on whose behalf he was acting, the commentary to the Sentencing Guidelines and several courts have made clear that the value of the "benefit received or to be received" refers to the benefit received by the company on whose behalf the individual paid the bribe, as well as any co-conspirator company. *See* U.S.S.G. § 2B4.1 ("As with non-commercial bribery, this guideline considers not only the amount of the bribe but also the value of the action received in return. Thus, for example, . . . [i]f a gambler paid a player $5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he *and his confederates* won or stood to gain." (emphasis added)); *United States v. Cohen*, 171 F.3d 796, 803 (3d Cir. 1999) ("'[I]mproper benefit' refers to the net value accruing to the entity on whose behalf the individual paid the bribe."); *United States v. Kinter*, 235 F.3d 192, 197 (4th Cir. 2000) ("[W]e join all of the other circuit courts that have considered the issue, which have uniformly held that when a middleman defendant acts on behalf of a third-party payer of the bribe, the district court may consider the payer's bribe-generated benefits when calculating the 'benefit received' under U.S.S.G. § 2C1.1, as long as those profits were reasonably foreseeable or the result of acts aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."); *United States v. Montani*, 204 F.3d 761, 770 (7th Cir. 2000) (noting that "the value should be considered as a *whole*, not as individual shares to each co-conspirator" (emphasis in original)).

"The value of 'the benefit received or to be received' means the net value of such benefit." U.S.S.G. § 2C1.1 cmt. n. 3. The Guidelines commentary equates "net value" to profit. *See id.* ("Examples: . . . (B) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000."). However, regardless of the profit as

reported by the company, the Court may *not* deduct the value of the bribe. *Id*. ("Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received.").

To calculate the "net value" of the benefit, courts start with gross revenue from the ill-gotten benefit, and then subtract "direct costs"; courts do not deduct either the value of the bribe payment or any "indirect costs." *See, e.g.*, *United States v. Glick*, 142 F.3d 520, 525 (2d Cir. 1998) ("In calculating the amount of 'improper benefit,' only direct costs, not indirect costs, should be subtracted from the gross value received."). Direct costs are "all variable costs that can be specifically identified as costs of performing a contract. This might include, for example, transportation costs for the goods in question." *United States v. Landers*, 68 F.3d 882, 884 n.2 (5th Cir. 1995).

One the other hand, "[i]ndirect costs (fixed costs) are the costs incurred independently of output. For example, rent and debt obligations are costs a business incurs no matter how many contracts it receives. For the most part, overhead costs are fixed costs. The marginal increase in variable overhead costs from a wrongfully obtained contract is normally so *de minimis* that accounting for them during sentencing would be impractical." *Id.* at 885 n.3; *see also id*. at 884 n.2 ("Thus, variable overhead costs that cannot easily be identified to a specific contract are not direct costs."). "Like a bribe, indirect costs have no impact on the harm caused by the illegal conduct. This is true whether one considers the pecuniary benefit to the bribing party or the pecuniary loss to a competitor. For both parties, the benefit of an additional contract is measured by gross revenue minus direct costs. By definition, indirect costs do not affect that value." *Id.* at 885; *see United States v. Lianidis*, 599 F.3d 273, 281 (3d Cir. 2010) ("Put succinctly, whether a cost is direct or indirect depends on whether it can be easily attributed to the specific contract at issue."); *United States v. DeVegter*, 439 F.3d 1299, 1304 (11th Cir. 2006) ("Unlike the accounting

term 'direct costs,' for sentencing purposes, variable overhead costs not easily identifiable to a specific contract are not direct costs. The court can ignore these variable costs in sentencing because the sentencing courts are not required to make precise calculations." (internal citations omitted)).

"The government bears the burden of establishing the estimated net value with reliable and specific evidence." *DeVegter*, 439 F.3d at 1304; *see also Lianidis*, 599 F.3d at 278 ("We have held that the Government bears the burden of showing 'benefit received.'"). However, in several circuits "the defendants have the burden of proving what direct costs should be subtracted in determining the net improper benefit." *DeVegter*, 439 F.3d at 1305; *see Glick*, 142 F.3d 520 at 525 (refusing to deduct costs from the value of the improper benefit received because the defendant "failed to establish direct costs sufficient to warrant a reduction of his sentence"); *Lianidis*, 599 F.3d at 281 ("[A]lthough it is the Government's burden to show 'net value,' the defendant bears the burden of producing the necessary documents. To hold otherwise would, in practice, prevent the Government from meeting its burden of proof."); *but see United States v. Sapoznik*, 161 F.3d 1117 (7th Cir. 1998) ("The government does not deny that it was its burden, not the defendant's, to provide evidence from which [the costs associated with the gambling that the bribes facilitated] could be estimated.").

In calculating the value of the benefit received, "[t]he district court need not determine the value of the benefit with precision." *United States v. Griffin*, 324 F.3d 330, 366 (5th Cir. 2003) (addressing § 2C1.1 in the context of an extortion case); *see also United States v. Collins*, No. 10-4898, 2011 U.S. App. LEXIS 8774, at *3 (4th Cir. Apr. 29, 2011) ("A district court need only make a reasonable estimate, given the available information before it."); *United States v. Gray*,

521 F.3d 514, 543 (6th Cir. 2008) (stating that the amount of benefit "need not be determined with precision").

Here, the total value of the benefit to Alstom was $6,724,952, calculated as follows.[4] Attached as Exhibit 1 is a Consolidated Financial Summary for the Tarahan Project for API and PT ESI. This is the U.S. Dollar equivalent of the defendant's Exhibit 7.[5] The sale price paid by PLN to Alstom was $66,880,000. *Glick*, 142 F.3d at 525 (starting calculation with "gross value received"). Alstom incurred or expected to incur (as of September 30, 2008) $61,897,000 in direct costs as part of executing the Tarahan contract. *Id*. ("direct costs . . . should be subtracted from the gross value received"). Of those direct costs, $60,654,000 had already been incurred and $1,243,000 were anticipated.[6] However, those costs included payments to the consultants (included in the "other costs" item), which should not have been subtracted for Guidelines purposes. U.S.S.G. § 2C1.1 cmt. n. 3. ("Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received."). As discussed above, API paid $666,880 to PRI and $1,267,072 to PT Gajendra (via Alstom Prom), for a total of $1,933,952 that should not be deducted as direct costs. Thus the total countable direct costs were $59,963,048. Subtracting those direct costs from the sale price yields a gross profit of $6,724,952.

[4] The Government has consulted with Christopher Varney of GE regarding this and related exhibits, and information provided herein is a result of those conversations. Should the defendant intend to press his objections to the benefit calculation, the Government can make Mr. Varney available as a witness at sentencing.

[5] Indeed, the defendant's Exhibit 7 has an exchange rate of 1.4179 in the upper right hand corner which was used to convert the dollar amounts to Euros.

[6] According to Mr. Varney, the unallocated costs were largely warranty costs anticipated by PT ESI. Since PT ESI is no longer in operation, the Government is unlikely to determine whether those costs were actually incurred or became a part of margin. Thus we will assume they were incurred for purposes of this calculation, and will not be considered part of margin.

The defendant's claim that the "S&A, R&D, Licenses, etc." category should be subtracted as well is incorrect. Def. Mem. at 26. According to Varney, those costs are not directly related to performance on the Tarahan project, but represent an allocation of corporate overhead based on a percentage of the selling price. Thus those costs should not be deducted. *See Glick*, 142 F.3d at 525 (excluding indirect costs); *Landers*, 68 F.3d at 884 n.2 ("Thus, variable overhead costs that cannot easily be identified to a specific contract are not direct costs."); *Lianidis*, 599 F.3d at 281 ("whether a cost is direct or indirect depends on whether it can be easily attributed to the specific contract at issue"); *DeVegter*, 439 F.3d at 1304 ("for sentencing purposes, variable overhead costs not easily identifiable to a specific contract are not direct costs"). Moreover, the defendant has made no attempt to justify subtraction of these additional costs from margin. *See Glick*, 142 F.3d 520 at 525 (defendant "failed to establish direct costs sufficient to warrant a reduction of his sentence"). In fact, the defendant's invocation of the "Situation as Sold" column itself is inapt. That column reflects Alstom's projections at the time it sold the work, not the actual accounting after most of the costs were incurred.[7]

2. Manager or Supervisor

The defendant's objection to a role enhancement is also misplaced.

A three-level enhancement is required "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1. "A defendant may properly be considered a manager or supervisor if he 'exercise[d] some degree of control over others involved in the commission of the

[7] Alstom initially provided a figure of $3.6 million as gross margin as part of its resolution in 2014. However, a review of the evidence shows that the actual gross profit is higher than originally estimated. The Government is also awaiting supporting documentation from Marubeni for its figure of $5.6 million gross margin in connection with its own guilty plea. However, the Alstom gross margin is within the Guidelines benefit level suggested by Probation, and therefore sufficient by itself to support the proposed Guidelines range.

offense . . . or play[ed] a significant role in the decision to recruit or to supervise lower-level participants.'" *United States v. Burgos*, 324 F.3d 88, 92 (2d Cir. 2003) (quoting *United States v. Blount*, 291 F.3d 201, 217 (2d Cir. 2002) (alterations in original)). "It is enough to manage or supervise a single other participant." *Id*. Moreover, "[t]he fact that [a] defendant was subordinate to another participant in the offense does not preclude a finding that the defendant himself was a manager or supervisor within the meaning of § 3B1.1." *United States v. Brophil*, 122 F.3d 1057, 1997 WL 537991, at *1 (2d Cir. 1997) (unpublished).

There was ample evidence at trial of Hoskins's management of other participants in the crime; that is, those under him in International Network. The defendant does not appear to contest that Reza Moenaf and Yves Mouillet were supervised by him within International Network. Def. Mem. at 27. Indeed, the evidence makes clear not only that these employees formally reported to the defendant, but also reported to him in the context of the Tarahan project. First, Hoskins was Moenaf's "direct manager" and was responsible for reviewing his performance and eligibility for annual financial incentives. Government's Trial Exhibit ("GX") 527A. Indeed, in Moenaf's 2004/2005 performance evaluation, Hoskins rated Moenaf based on his "effective control of Tarahan." *Id*. Second, in practice Moenaf reported to Hoskins regularly on issues related to Tarahan and consultants. *See*, e.g., GX 422 (providing Hoskins background on Moeis, among other things); GX 454 (seeking Hoskins's "advice" on how to deal with consultant problems on Tarahan). Although there is less evidence regarding Mouillet, it is equally clear that he reported to Hoskins in the context of the criminal activity. *See*, *e.g.*, GX 486 (Hoskins instructed Mouillet to come up with alternative payment terms to permit Azmin Aulia to receive more money up front).

In addition, any argument by the defendant that this enhancement is inapplicable given that he was found to be an "agent" of API has been mooted by the Court's decision that the defendant was not under the control of API and/or Frederic Pierucci.

III. Sentencing Factors

Consideration of the Guidelines and the statutory factors in 18 U.S.C. § 3553(a)(2) demonstrate that this is a serious crime warranting punishment and supervision, even in light of the history and characteristics of this defendant, *see* 18 U.S.C. § 3553(a)(1).

A. Seriousness of the Offense, Respect for the Law, and Just Punishment

By far the most significant consideration that augurs for punishment in this case is the seriousness of the offense. Hoskins's actions on the Tarahan project were not a one-off lapse in judgment, but a multi-year conspiracy in which Hoskins and others at Alstom and Marubeni bribed their way into a $118 million contract that was vitally important to Alstom, which had gone through economic difficulties brought on by its merger with ABB. *See* Def. Mem. at 17. Even looking at the defendant's conduct on Tarahan demonstrates that this was not aberrant behavior—he engaged in a scheme for three years during which time he had multiple opportunities to disavow the corruption, and instead sought to further it. But the Tarahan conduct was not isolated—the defendant also participated in corrupt schemes across projects in Indonesia, India, and Malaysia.

While Hoskins may be accurate that there was a culture of corruption at Alstom, *see* Def. Mem. at 32, it is a culture that he and others willingly participated in, despite being well aware of its illegality. Indeed, the woeful inadequacy of Alstom's compliance program was in significant part borne of a failure of the company's executive-level leadership—of which Hoskins was a member—to follow and enforce upon others the anti-corruption rules of which they were all well aware.

On the surface, Alstom maintained an unequivocal anti-bribery policy, as explained by its chairman in 1999: "It has been and is the policy of ALSTOM to prohibit the use of bribes and similar corrupt practices in the conduct of its affairs." GX 651. This "General Instruction" further explained various bribery laws, described different types of bribery subject to criminal prosecution, and explained that "[m]embers of the management of ALSTOM at all levels should remain aware that their personal liability may be involved in the performance of their duties." *Id*.

Hoskins was well aware of this policy and his role in policing it. For example, on March 22, 2004, he received an email containing two International Network PowerPoint presentations, *see* GX 660, one of which was called "APC Seminar 23-03-04 International Network Up-date on Representation and Compliance policy," GX 660B. That presentation included (1) a review of various bribery laws, including the FCPA, (2) a restatement of Alstom's policies, including that it "objects to all forms of bribery and corruption," (3) a review of the various places in which this corporate anti-bribery policy was located, (4) directions regarding Alstom policies in hiring agents, and (5) warnings that "violations of the Corporate Procedures [are] subject to severe disciplinary action, in addition to civil or criminal actions as the case may be," and "[m]embers of the management of ALSTOM at all levels should remain aware that their personal liability may be involved in the performance of their duties." GX 660B.

As Area SVP for International Network, Hoskins was specifically tasked with ensuring compliance with Alstom policy in the retention of consultants. Defendant's Trial Exhibit ("DX") 913 at 21 ("Area SVP Key Missions . . . For countries with Representation & Compliance issues, contribute to the selection of Agents, and approve the key elements of the related agreements, applying ALSTOM policies."). Indeed, the agreements that Hoskins "approved" also pretended that bribery was forbidden by Alstom policy. *See* GX55 at 7 ("No Unlawful Payments" section of

PT Gajendra consultancy agreement); GX56 at 4 ("No Unlawful Payments" section of PRI consultancy agreement). The so-called "Practical Guide for Implementation of the Representation & Compliance Consultancy Agreement Process" called upon those involved in the approval process, including the Area SVP, to ensure that all potential consultants "must be fully briefed and shall understand the ALSTOM anti-bribery policy and must be aware and commit to comply with the relevant provisions of the ICC rules, FCPA, and OECD Convention in respect of fight against corruption and money laundering, and with the applicable laws of the country concerned by the Agreement." DX 917A at 10.

Yet Hoskins well knew these agreements were shams, meant to feign compliance while papering over rampant corruption. When one of Hoskins's underlings, Malaysia country president Wayne Roberts (DX 913 at 14), requested to remove the "no unlawful payments" provision from a consulting agreement, he was told by International Network administrator Veronique Etienne that "I never agree on this point but I guess here has been a misunderstanding. Sorry to say that this clause (unlawful payments) is Compulsory as it is required by the OECD rules and in line with our legislation. So there is no possibility to delete, avoid or change." Exhibit 2. Hoskins, who was copied on Ms. Etienne's response, did not speak up in defense of this anti-bribery provision. Instead, the evidence reveals Hoskins's and Roberts's continued efforts at bribery in Malaysia during the same period, despite Alstom's policies and the deceptive language in the consultancy agreements. PSR ¶¶ 91-103.

Indeed, Hoskins used his position within Alstom *not* to stand up for the titular Alstom anti-bribery policy, but to flout it and provide assistance to others at Alstom also looking to violate it over and over again. When Ed Thiessen emailed Hoskins about a bifurcated bribery arrangement for Muara Tawar, placing one consultant in charge of bribing high-level officials and another

focused on PLN, Hoskins replied "all understood," and discussed the use of a "service agreement" to avoid an Alstom-policy-driven cap on commission rates. GX 447. Similarly, when Thiessen sent Hoskins a "friend analysis" spreadsheet detailing consultants' abilities to bribe the necessary officials for Muara Tawar, and suggested the same bifurcated arrangement, Hoskins suggested they confirm with the political players themselves and asked for Moenaf's position. GX 450. On Tarahan, when Aulia protested a longer term of payment, with Moenaf explaining that Aulia was "willing to pre-finance his scope, fulfilling his commitment up-front (prior he get paid) to get the right influence, but certainly not waiting 2 to 3 years to get paid while most of his scope completed in the beginning," Hoskins responded by recommending to API that they agree to a shorter term of payment. GX 490. And in the process of trying to convince API to agree to that shorter time frame, Hoskins explicitly invoked the anticipated bribery, explaining to Pierucci that the issue was "driven by Elections - driving short term thinking re TOP." GX 500.

It is all the more alarming, given Mr. Hoskins's failure to live up to the requirements of his position, that he has consistently denied real responsibility. At trial, Hoskins argued that he "at all times acted in good faith," Trial Transcript ("Tr.") 1398, and claimed that "if you look at his e-mails, all of them are entirely consistent with an innocent state of mind and merely reflect that he knew that he was involved in a process to hire agents to lobby and influence and to try to help Alstom win the Tarahan contracts. In other words, you will find a man doing his job, providing the services his role in the company required him to provide." Tr. 1404. According to the defendant, he was simply too busy to read the countless bribery-related emails sent to him, and that at any rate they were too confusing for him to understand. Tr. 1406. Put differently, Hoskins did not claim to simply follow along with others at Alstom, but to have been entirely unaware of the corruption. Given the evidence, the jury rightly rejected that argument.

At sentencing, the defendant's position has changed. Instead of completely denying knowledge, he now claims that bribery was "a broadly accepted and normalized practice at Alstom involving many individuals playing many different roles," and that "regrettably Mr. Hoskins's job responsibilities led him to become associated with this established practice: participating in the selection of consultants and approving consultancy agreements for his region." Def. Mem. at 32. Hoskins new position seems to suggest that he was somehow a victim of this bribery activity that was perpetrated by others—that he is guilty by association, and that his family's so-called "nightmare" is simply because he did not resign earlier. *Id*. But that is hardly reflected by the evidence. As discussed above, Hoskins was a full participant in bribery despite his role in enforcing Alstom policy. And his suggestion that his resignation was somehow borne of discomfort with Alstom's bribery is directly opposite of the evidence. In truth, Hoskins never raised his voice against bribery either during his active participation in hiring consultants to bribe officials, or on his way out the door. Hoskins said to Moenaf, "If you agree, Yves [Mouillet] should visit regularly and with you, Ed, and Bill and others continue the close relationship with PLN and others." GX 520. This "close relationship with PLN" was the same one that was developed through bribery on the Tarahan project that Hoskins helped arrange. The Court should find suspect the defendant's claimed "regret," which is clearly more a function of the fact that he is being held to account for his criminal conduct that any true acceptance of responsibility.

Hoskins attempts to mischaracterize the Government's agency arguments to further minimize his conduct and deny responsibility. At trial, the Government argued that Hoskins's approval function was a "sham," in that he was "making sure they have the no unlawful payments section," when in fact "the only thing the consultancy agreement really serves is to paper over the bribery that's happening on behalf of the business." Tr. 1450-51. In its Rule 29 response, the

Government explained this argument, contending that the approval function was "rote at best," and concerned agreements that were "simply designed to give the illusion of compliance with the law." Doc. 604 at 19. The defendant now claims—apparently accepting the Government's argument as fact—that his lack of attention to this compliance role equated to a lesser role in the bribery scheme altogether. Def Mem. at 1, 27, 50. Yet that is not what the Government argued, and is not supported by the facts. Rather, the Government argued—and the facts showed—that the approval role was not something that provided any meaningful check on Alstom's corruption because the defendant did not actually apply Alstom policy, but simply signed off as requested. *See* Tr. at 1457 ("But worst of all is the guy who was supposed to be enforcing Alstom policy had no integrity himself. He did what the business asked him to do. He put these agreements in place to cover over the business's bribery and now it's time to hold him accountable."). Indeed, the defendant's willingness to approve consultants without actually applying the anti-bribery policy allowed the scheme to function. More importantly, the evidence showed (as discussed above) that the defendant was intimately involved in helping to hire agents on Tarahan and other projects, far beyond his approval function.

In short, Hoskins was well aware of his ethical and legal obligations, and his responsibility to impart those obligations on those that reported to him. Instead, Hoskins opted to engage in corrupt conduct and ratify the illicit behavior of his subordinates. Hoskins's invocation of Alstom's "culture" is thus problematic. Alstom, as an entity, did not generate this culture on its own; rather, it reflected the willingness of its management, including Hoskins, to look past the laws and ethics of the myriad countries in which they operated and to look past their own written (if disingenuous) policies, for the benefit of the company and ultimately their own jobs and wallets.

Along those lines, the fact that Hoskins did not himself pocket the entire amount of the Tarahan profit misses the mark in assessing the motive for participation in this conspiracy. *See* Def. Mem. at 1 ("What is more, there is no dispute that he did not profit or personally benefit from the scheme."), 37, 38. Hoskins, like other Alstom management and their subordinates, were required to produce business to ensure their continuing employment, and that production was further encouraged by financial incentives that could substantially increase salaries. *See* GX 611 (Hoskins's employment contract, noting eligibility for "Senior Executive Management Incentive Scheme" which "will provide for a target bonus of 20% of base annual salary in any complete financial year, which may rise to a maximum of 30% of base annual salary if the financial targets are exceeded."). Hoskins was not alone in his economic motivations—most of Alstom's sales-related employees were similarly incentivized to bring in as much new business as possible, although their respective metrics may have differed. *See* GX 511 (regarding Thiessen's bonus); GX 527A (regarding Moenaf's bonus).

In sum, Hoskins failed to comply with the law or Alstom official policy, failed to stop his colleagues from similarly violating the law and Alstom policy, and instead joined his co-conspirators to enhance their own position within the company and to meet metrics that would yield substantial financial incentives. In doing so, Hoskins and his co-conspirators helped deprive the citizens of Indonesia of the honest services of their public officials; they encouraged a system that made it impossible for honest and ethical businesses to compete for work; and they undermined confidence in public institutions in Indonesia. *See* Jakarta Globe, April 14, 2014, "Court Sentences [Official 1] to Three Years for Graft," *available at* http://jakartaglobe.id/news/court-sentences-emir-moeis-three-years-graft (attached as Exhibit 3). Thiessen explained that in 2002 Indonesia was coming out of a devastating financial crisis which

had meant they could not build new power plants for several years, Tr. 671, and the money paid to greedy officials could just have easily been savings for the Indonesian people, Tr. 691. Exploiting these corrupt officials, as Hoskins and his co-conspirators did, thus has potentially dire consequences for the citizens of the contracting country. As this Court observed in sentencing Pierucci:

> The effect of such public corruption through the bribery of public officials for the purpose of obtaining Public Works project contracts has the effect of steering politicians in office away from good government, away from adherence to the rule of law. These are the officials whose decisions to accept bribes and steer the public project contracts out of the fair and level playing field of bid and competition, has those public officials put their personal interests above the public interest, with the potential of diverting scarce resources from those countries, including their disadvantaged people, and corrupting the possibility and the objective of public interest dictating policy.

Transcript of Sentencing of Frederic Pierucci ("Pierucci Sn. Tr.") at 30-31.

B. Adequate Deterrence and Protection of the Public

The Government does not quarrel with Hoskins's argument that he is not at high risk for recidivism, and as a result specific deterrence is not a central basis for sentencing in this case. Def. Mem. at 48. At the same time, his continued failure to take meaningful responsibility for his crime is of significant concern. The Court's words to Pierucci resonate here: "Frankly, the Court was disheartened today that Mr. Pierucci gave no recognition in his apologies to the serious consequences beyond the impact on his family, which has been eloquently set out in the letters that the Court has received." Pierucci Sn. Tr. 31. In fact, the Court's words are even more apropos here, where Hoskins (unlike Pierucci) has not actually conceded his knowing involvement in a bribery scheme. Hoskins spends far more time informing the Court of the problems caused to him and his family by this prosecution, and virtually no time coming to grips with his criminal conduct.

Beyond specific deterrence, a sentence in this matter plays an important role in deterring generally those who would consider engaging in similar conduct under similar scenarios. Given the strong economic incentives in taking advantage of countries with public officials willing to trade contracts for kickbacks, it is critical that there be equally strong counterincentives. *See United States v. Blech*, 550 F. App'x 70, 71 (2d Cir. 2014) (summary order) ("Blech was sentenced based on the 18 U.S.C. § 3553(a) factors, including the need for specific deterrence for a recidivist, and the need for general deterrence for those who might otherwise feel that some white-collar crimes are 'game[s] worth playing.'") (quoting *United States v. Goffer*, 721 F.3d 113, 132 (2d Cir. 2013)); S. Rep. No. 98-225, at 76 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3259 ("The second purpose of sentencing is to deter others from committing the offense. This is particularly important in the area of white collar crime. Major white collar criminals often are sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.")).

The defendant's claim (Def. Mem. at 48) that white collar offenders are sufficiently deterred by any sentence, regardless of duration, must fail. That a white collar offender like Hoskins may have had every advantage in life does not make him less deserving of an otherwise appropriate prison sentence, simply because (as the defendant implies) those in his community generally may be more frightened of jail than those who commit, for example, drug crimes. While the defendant latches on to some scholarship to this end, such a view is at odds with "[o]ne of the goals of the entire guidelines regime," that is, "to minimize discrepancies in the treatment of 'white collar' and 'blue collar' offenses." *United States v. Thurston*, 456 F.3d 211, 218 (1st Cir. 2006), vacated on other grounds sub nom *Thurston v. United States*, 552 U.S. 1092 (2008).

Moreover, despite robust enforcement of the FCPA and other bribery laws over the last several years, criminal prosecutions of these complicated multinational schemes are still relatively rare as compared to other offenses. Threat of meaningful punishment is critical to creating real deterrence to corporate executives looking to do business with corrupt regimes. As this Court noted in sentencing Pierucci: "And this case, among others, will stand as a marker that that vicious cycle is going to be broken by making the costs to those who resort to bribing public officials in the third world, or anywhere, who resort to bribes to get third world public project business, is going to be more costly than anything they would have gotten out of achieving those projects for their company." Pierucci Sn. Tr. 31.

C. History and Characteristics of the Defendant

A significant portion of Hoskins's sentencing memorandum concerns, appropriately, his personal history, including acts of kindness to others, and personal and family circumstances, which include his own "advanced" age and health problems facing his wife and other family and friends. Def. Mem. 4-15, 48-50. The Government readily agrees that these factors should be considered by the Court in arriving at a sentence under 18 U.S.C. § 3553(a), but there is little in his application that sets him apart from similarly situated defendants in this district (and elsewhere), who face the same or similar challenges to incarceration and whose families often suffer disproportionately despite having no role in the criminal conduct. Those factors may augur for a more moderate punishment, but they cannot absolve him of responsibility for his criminal conduct, and certainly do not warrant the full measure of leniency the defendant seeks, that is, an unenforceable house arrest in his home country.

For example, the defendant claims that the simple fact that he is 70 years old should augur for a lesser sentence because "a period of incarceration in a secure prison facility will be unduly

harsh given his advanced age." Def. Mem. at 48. But the PSR presents a picture of a healthy, "physically active" man who "walks and goes to the gym." PSR ¶ 140. Absent some unique health concern that cannot be handled by the Bureau of Prisons, his age alone should not bar him from an appropriate punishment here. Of course, were the defendant younger, he would no doubt have other mitigation arguments—for example, Pierucci rightly invoked the difficulties his own incarceration posed for his family emotionally and economically, far beyond anything Hoskins claims now, including younger children who needed their father to help them through difficult psychological issues. Yet as the Court noted, "Sadly, it is well known that the impact of the parent's prosecution may hit the innocent family and friends the hardest, even though they have no involvement or responsibility. And it's sad to hear of the consequences to Mr. Pierucci's family. It's hard to hear that while he values and cherishes them, he failed to think through this decisions and actions to the potential end point." Pierucci Sn. Tr. 29.

IV. Responses to Other Defense Arguments

In addition to the arguments addressed above, Hoskins argues for leniency principally because he believes that any substantial sentence here would be disproportionate to others in this case and in other FCPA cases, and his status as a foreign national without immigration status will result in harsher treatment in prison. First, justice dictates that the Court sentence Hoskins to a substantially greater term of imprisonment than Pierucci.[8] Second, Hoskins's comparisons to a

[8] The defendant also claims that the Court should be mindful that Sharafi was not prosecuted. At the time Sharafi negotiated his non-prosecution agreement, the Government had no evidence of wrongdoing on Tarahan or any other project. Sharafi's cooperation was a significant factor in kick starting an investigation that has led to $800 million in criminal fines for two corrupt multinational corporations and the indictment of seven executives of those companies. Moreover, Sharafi's role as a bagman only existed because there were corrupt executives like Hoskins willing to authorize them to pass money to foreign officials. Sharafi, although not prosecuted, forfeited his ill-gotten gains, paid back taxes and penalties, and shall face prosecution for this bribery scheme if he ever engages in another crime in any jurisdiction. Def. Mem. Ex. 10.

select number of other FCPA cases are inapt, and a more robust look at other FCPA cases supports a substantial term of incarceration here. Third, precedent counsels against strong consideration of Hoskins's status as an alien, the import of which are largely speculative and at rate are substantially less harsh than what Pieurcci faced during his pretrial confinement. Finally, the defendant's appeal for home confinement in the United Kingdom is unenforceable, undeserved, and undermines the respect for the law that our sentencing scheme demands.

A. Hoskins's Sentence Should Be Substantially Higher Than Pierucci's

Pierucci was convicted by guilty plea of one count of conspiracy to violate the FCPA and one substantive violation of the FCPA, resulting in a maximum sentence of 10 years' imprisonment. Pierucci Plea Transcript (Doc. 56) at 54-55, Pierucci Sn. Tr. at 6. In his Guidelines calculation, he received a four-level leadership enhancement, but otherwise his enhancements were the same as Hoskins's enhancements for the underlying FCPA offense. Pierucci Sn. Tr. at 8. At sentencing the Court gave the defendant Guidelines credit for "having entered a guilty plea and accepted personal responsibility for the offense," Pierucci Sn. Tr. at 7. Pierucci had no criminal history, and before application of the 10-year statutory maximum had an advisory range of 262 to 327 months' imprisonment, which the Court looked towards because "it gives at least some reference point on the issue of seriousness of the offense." Pierucci Sn. Tr. at 6.

In sentencing Pierucci to 30 months' imprisonment, far below the 10-year maximum and far below what would otherwise have been the advisory range, the Court considered several factors, including: (1) Pierucci's cooperation, in that the Court granted the Government's motion under U.S.S.G. § 5K1.1; (2) the harsh conditions involved in Pierucci's 14-month pretrial detention at the Wyatt Detention Center; (3) his lack of any criminal history at all; (4) the fact that the loss amount (or value of the benefit) under the Guidelines overstated Pierucci's individual

culpability, since he did not personally profit anywhere near that extent; and (5) the stress and anxiety that the years-long pendency of this case had on his life, notwithstanding that the Court had permitted Pierucci to live in France for a substantial portion of that time. Pierucci Sn. Tr. at 32-33. The Court also considered the "significant detrimental impact" the case had on "his wife, his children, his family," noting that "it is well known that the impact of a parent's prosecution may hit the innocent family and friends the hardest, even though they have no involvement or responsibility." Pierucci Sn. Tr. at 29. At the same time, the Court assigned responsibility for that detrimental impact to Pierucci himself, who "failed to think through his decisions and actions to the potential end point." Pierucci Sn. Tr. at 29.

Pierucci's sentence and the Court's rationale for it points decidedly toward a substantially more severe sentence here. First, while Pierucci quickly and completely accepted responsibility for his crime, Hoskins did not accept responsibility and plead guilty before trial, and in fact continues to deny any wrongdoing even after being convicted. As discussed above, Hoskins's post-trial expressions of "regret" are half-hearted, unconvincing, and not aimed at his own illegal conduct. Second, Pierucci's cooperation with the Government entitled him to a substantial reduction not available to Hoskins, who made no such effort. *See United States v. Vazquez-Rivera*, 470 F.3d 443, 449 (1st Cir. 2006) ("Although a district court may consider disparities among co-defendants in determining a sentence, we do not find Vázquez's sentence to be unreasonable simply because his co-defendants agreed to help the government in exchange for reduced sentences."). Third, there is no difference between Hoskins and Pierucci in terms of risk of reoffending—both are (and were) unlikely felons. Fourth, Hoskins's argument that he did not directly profit from Tarahan applied with equal force to Pierucci, whose (like Hoskins's) performance was to some degree by sales targets. Fifth, the conditions of incarceration for Pierucci

were far harsher than those faced by Hoskins. Pierucci spent a substantial portion of his time at Wyatt, a maximum security private pretrial detention facility, before serving the last several months at a low security facility. Even crediting Hoskins's argument that he will be housed at a low security facility, his speculative complaints are overwhelmed by the *actual* challenges faced by Pierucci at Wyatt. And sixth, the stress caused by this case was arguably worse for Pierucci, whose incarceration for 14 months placed a significant burden on him and his family. Moreover, Pierucci, the principal source of income for a family with school age children, faced serious challenges that the retired, financially secure Hoskins did not.

Hoskins's claim that Pierucci's role within the Tarahan bribery scheme dictates a substantially higher sentence for Pierucci than for Hoskins, Def. Mem. at 33, misses the mark, and is particularly inapt given the Court's recent ruling that Hoskins was not controlled by API. It is certainly true that Pierucci, on behalf of API, controlled the Tarahan project and made ultimate decisions about which consultant to hire and on what terms. *See* Doc. 617 at 18. Indeed, Pierucci and API were responsible for a lot more than just consultants; they were responsible for the bottom line of the project itself, *i.e.*, selling a power plant with the specifications needed by PLN in a way that would make money for API and Alstom. *See* Tr. 563 ("the business units were the ones that made money on the project or lost money on the project"); 709 ("the P&L was where the money was made and the risk was managed"). "International Network was just a cost center," that is, it provided support for the business units in winning business and did not have responsibility for the project itself. Tr. 565; *see also* GX 490 (Hoskins: "for your info Azmin is also requesting tougher terms on other projects at the moment. I cannot comment on your cash flow…"). The evidence in this case focused on Hoskins's involvement in a narrow band of activities—assistance in gathering local information, identifying consultants, hiring them, negotiating terms, and approving

contractual language—that principally concerned the bribery scheme. Put differently, unlike Pierucci, who was responsible for the economic success of the entire project, Hoskins's principal contribution was to facilitate the right payoffs. *See* GX 510 (Pierucci thanking "Lawrence/Reza/Eko for the local support" in winning the Tarahan bid.).

Moreover, Hoskins's position within the company also dictates the same, if not more, criminal culpability than Pierucci. While Pierucci was a part of the business organization tasked with making the company money, Hoskins had the responsibility to enforce Alstom corporate policies, which included Alstom's anti-bribery position. DX 913 at 21 ("Area SVP Key Missions . . . For countries with Representation & Compliance issues, contribute to the selection of Agents, and approve the key elements of the related agreements, applying ALSTOM policies."). Hoskins's crimes here are particularly concerning because instead of carrying out his responsibility to burnish Alstom's reputation abroad, he was helping others destroy it.[9]

In addition, for the better part of this case, the defendant has been arguing that he was too high-level within the organization to be controlled by API—he was a Senior Vice President based at the parent company, whereas Pierucci was a Vice President based at a subsidiary. The Court accepted this argument in its recent dismissal of the FCPA counts, holding as a matter of law that, given the defendant's stature and position within the company, no rational trier of fact could have concluded that the defendant was controlled by API in connection with his retaining and approving the use of bribe-paying consultants. The defendant cannot now assert that Pierucci was higher level than the defendant and that the defendant reported to him for purposes of the bribe scheme.

[9] Lest the defendant argue that compliance was really the responsibility of Bruno Kaelin and others in Switzerland, the Court may recall that it was Hoskins who was on the ground in Indonesia and who was tasked with representing the corporation.

B. The Defendant's Comparisons to Other FCPA Cases Are Inapt, Incomplete, and Therefore Misleading

The defendant selectively cherry-picks a handful of cases that he claims are more appropriate benchmarks than Pierucci's sentence in this very case for the very same conduct. The defendant, however, fails to include the relevant facts of these cases and ignores a significant number of other foreign bribery and money laundering cases from the last several years with significantly higher sentences. This failure on the defendant's part only further demonstrates the lack of support for his recommended sentence.

As an initial matter, the defendant reaches back to 2009 to include sentences from foreign bribery cases, but in so doing leaps over a number of more recent and relevant cases. Below are just four examples of more recent sentences following trial convictions in foreign bribery and money laundering cases:

- In 2011, Joel Esquenazi was sentenced to 15 years in prison after being convicted at trial for paying approximately $890,000 in bribes to Haitian officials to secure telecommunication contracts. *United States v. Esquenzi*, 752 F.3d 912, 917-20 (11th Cir. 2014).

- In 2011, Carlos Rodriquez, Esquenazi's co-defendant, was sentenced to 7 years in prison after being convicted at trial for participating in the bribery scheme. *Esquenzi*, 752 F.3d at 917-20.

- In 2012, Jean Rene Duperval was sentenced to 9 years in prison after being convicted at trial for laundering approximately $500,000 in bribes in connection with the Haitian bribery scheme to secure telecommunication contracts. *United States v. Duperval*, 777 F.3d 1324, 1328-31 (11th Cir. 2015).

- In 2016, Mahmoud Thiam was sentenced to 7 years in prison after being convicted at trial for laundering approximately $8 million in bribe proceeds in connection with a Guinean bribery scheme to secure mining contracts. *United States v. Thiam*, 934 F.3d 89, 92-93 (2d Cir. 2019); Judgment, *United States v. Mahmoud Thiam*, No. 17 Cr. 47 (S.D.N.Y.) ECF No. 136.

In fact, there are a number of individuals who recently have pleaded guilty, including some who received a downward departure for cooperation credit and some cases that involved a smaller bribe/laundered amount than the amount at issue here, and still received substantial sentences of imprisonment:

- In 2016, Dimitrij Harder, after pleading guilty, cooperating, and receiving a downward departure pursuant to Section 5K1.1, was sentenced to 5 years in prison—which was within his guidelines range of 57-71 months—for paying approximately $3.5 million in bribes to a European Bank for Reconstruction and Development official to expedite approval and financing in connection with two contracts. *United States v. Harder*, 759 F. App'x 117, 118 (3d Cir. 2018).
- In 2019, Luis Alberto Chacin Haddad and Jesus Ramon Veroes, after pleading guilty, were each sentenced to 51 months in prison for paying approximately $1.5 million in bribes to Venezuelan officials in exchange for receiving approximately $45 million in corrupt contracts. *United States v. Luis Alberto Chacin Haddad and Jesus Ramon Veroes*, No. 19 Cr. 20351 (S.D. Fla.).
- In 2019, Juan Jose Hernandez Comerma, after pleading guilty, was sentenced to 4 years' imprisonment, in connection with bribes he paid to Venezuelan government officials to obtain approximately $145 million in contracts. *United States v. Juan Jose Hernandez Comerma*, No. 17 Cr. 5 (S.D. Tex.).
- In 2019, Frank Chatburn, after pleading guilty, was sentenced to 42 months' imprisonment for intermediating over $3 million in bribes to Ecuadorian officials to secure contracts for several companies. *United States v. Frank Roberto Chatburn Ripalda*, No. 18 Cr. 20312 (S.D. Fla.).
- In 2019, Juan Baquerizo, after pleading guilty, was sentenced to 3 years' imprisonment for paying approximately $1,720,000 in bribes to Ecuadorian officials to secure contracts. *United States v. Juan Andres Baquerizo Escobar*, No. 18 Cr. 20596 (S.D. Fla.).
- In 2019, Jose Luis de la Paz, after pleading guilty, was sentenced to 3 years' imprisonment for paying approximately $8.25 million in bribes to Ecuadorian officials to secure contracts. *United States v. Jose Luis De La Paz Roman*, No. 19 Cr. 20004 (S.D. Fla.).
- In 2019, Frank James Lyon, after pleading guilty, cooperating, and receiving a downward departure pursuant to guideline 5K1.1, was sentenced to 30 months in prison for paying approximately $440,000 in bribes to Micronesian government officials in exchange for receiving contracts worth approximately $10 million in revenue. *United States v. Lyon*, No. 19 CR. 8 (D. Hawaii).

Not only did the defendant in the present case fail to accept responsibility, plead guilty, and/or cooperate, but the bribe amount in this case is significantly higher than the bribe amount in many of the cases cited above, and the defendant helped Alstom secure a contract valued at $118 million, far in excess of all but one of the cases listed above.

In addition to ignoring sentences in cases with circumstances less egregious than those presented here, the defendant either ignores, or relegates to footnotes in this brief, the relevant and distinguishing facts present in the cases he does cite. For example, two of the sentences he cites are for defendants who accepted responsibility, pleaded guilty, and received a downward departure for cooperation:

- In *United States v. Barnett*, the cooperating defendant's guidelines range was zero to six months after the court granted the government's motion for a downward departure pursuant to Section 5K1.1. 16 Cr. 00248, at 3-6 (S.D. Ohio Aug. 2, 2019), ECF No. 37. Therefore, the sentence that the court imposed, three years' probation (including six months of home confinement), was within the guidelines range. The defendant mentions this critical distinction in a footnote of his memorandum. Def.'s Mem. at 37 n.12.
- Similarly, in *United States v. Zuurhout*, the cooperating defendant's guidelines range was zero to six months after the court granted the government's motion for a downward departure pursuant to guideline 5K1.1. 17 Cr. 00122, at 5–6 (S.D. Ohio Aug. 2, 2019), ECF No. 39. Therefore, the sentence that the court imposed, five years' probation, was within the guidelines range. Again, the defendant mentions this critical distinction in a footnote of his memorandum. Def.'s Mem. at 37 n.13.

With respect to the trial convictions that the defendant cites, the defendant fails to include the bribe/laundered amount, and whether there was any realized gain from the scheme.

- In *United States v. Seng*, the defendant omits the fact that the bribe amount was approximately $1.3 million, and that no contracts were ever won. Nevertheless, the defendant was still sentenced to 4 years in prison. Sentencing Transcript, 15 Cr. 706, at 33, 89 (S.D.N.Y. May 11, 2018), ECF No. 791.
- In *United States v. Ho*, the defendant likewise omits the fact that the bribe amount was approximately $2.5 million, no contracts were ever won, and thus there was no realized gain. Government Sentencing Memorandum, *United States v. Ho*, 17-cr-

00779 (LAP), at 2-8 (S.D.N.Y. Mar. 18, 2019), ECF No. 224. Nevertheless, the defendant was sentenced to 3 years in prison. Sentencing Transcript, 17 Cr. 779 (S.D.N.Y. Apr. 22, 2019), ECF No. 230.

- In *United States v. Chi*, the defendant omits that the guidelines range was 18 to 24 months because the loss calculation only accounted for the laundering of $56,000, which was the only count of which Chi was convicted. Sentencing Transcript, 16 Cr. 00824, at 10-15 (C.D. Cal. July 25, 2018), ECF No. 216. The defendant further omits that in varying slightly downward to a sentence of 14 months, the court expressed concern about the Bureau of Prisons ability to care for and treat the defendant Chi's medical conditions. *Id*. at 38.

- In *United States v. Bourke*, the defendant omits that although the bribe amount was approximately $11 million, no contracts were ever won, and thus there was no realized gain. Sentencing Transcript, 05 Cr. 518, at 15-17 (S.D.N.Y. Nov. 10, 2009), ECF No. 262.

In short, the defendant's comparison of other foreign bribery sentences is misleading, and a more complete picture supports the Government's recommended sentence in this case. *See United States v. Harder*, 759 F. App'x 117, 120 (3d Cir. 2018) ("Harder's FCPA survey chart did not indicate the nature and extent of each defendant's cooperation or role in the offenses. If anything, the chart reflected a lack of general consensus on the appropriate sentences for FCPA violators."). The defendant ignores key facts in comparing his case to those he cites, including the bribe amount, contract value and profit amount, the number of officials bribed, and the level of the officials who received the bribes, among others. Here, the defendant helped hire two consultants to bribe a high-ranking member of Parliament, the President of PLN, and countless other PLN officials in connection with the Tarahan Project. The defendant also omits that in many of the cases he cites, there was only one bribery scheme. Here, this was not a one-off aberration. Rather, the defendant was working to facilitate bribes across a number of contracts in the Asia region, including other projects in Indonesia, India, and Malaysia. In fact, the evidence demonstrates that

the defendant was contemplating paying bribes to the President and First Gentleman of Indonesia, as well as the Minister of Finance. GX 450.

C. The Defendant's Concerns With His Anticipated Prison Conditions Should Not Be Considered, And Nevertheless Are Less Significant Than Those For Pierucci

The defendant urges the Court to depart downward based on his assertion that he would not be eligible to be designated to a "camp" due to his status as an alien, and that he would potentially face additional detention while awaiting deportation to the United Kingdom after completing his sentence. As an initial matter, Pierucci, a foreign national non-resident, was subject to the exact same post-sentencing conditions, and as described above, faced substantially harsher pre-sentencing conditions while imprisoned at maximum-security Wyatt Detention Facility for 14 months. At most, the defendant may be subject to detention in a low-security institution.

Based on conversations with Bureau of Prisons officials, the Government has learned that (1) it is true that it is very unlikely, but not impossible, that Hoskins will be assigned to a prison camp, unless the BOP waives his Public Safety Factor; (2) it is speculative whether Hoskins will be assigned to a private contracted facility or a BOP-run facility—placement is based on a multifactor analysis that includes bed availability and proximity to the location of sentence, among other considerations; (3) even if assigned to a private facility, there are BOP employees on site to ensure that the facility has all of the same programming and adheres to BOP regulations; (4) whether or not a prison is over capacity is entirely unrelated to the type of facility—there are crowded prison camps and secure facilities that are not crowded; (5) camps and secure facilities share many of the same features and drawbacks cited by the defendant, including open barracks and communal bathroom facilities; (6) there are no armed correctional officers within *any* BOP facility, regardless of whether a camp or a supermax penitentiary; (7) *all* incoming prisoners,

including those assigned to a camp, are put into a special housing unit upon arrival; and (8) the Bureau of Prisons has seven medical facilities—if the defendant has a condition that warrants such treatment.[10]

Perhaps most importantly, however, the Second Circuit has repeatedly rejected the same argument in the context of a downward departure for reasons that apply with equal force to Hoskins's request for a variance. In *United States v. Restrepo*, 999 F.2d 640, 641 (2d Cir. 1993), the Second Circuit held that, although there may be rare circumstances when alienage can be considered in sentencing a defendant, a district court may *not* consider "(1) the unavailability of preferred conditions of confinement, (2) the possibility of an additional period of detention pending deportation following the completion of sentence, and (3) the effect of deportation as banishment from the United States and separation from family, justified the departure." *Id.* at 644

With respect to the issue of whether the defendant could be designated to a camp, the Second Circuit noted that BOP did not have a steadfast policy against doing so, but noted:

> Even if it were a steadfast policy of the Bureau to deny reassignment to relaxed-security facilities to alien prisoners who must be deported on account of their convictions, we would consider that policy an inappropriate basis for departure from the imprisonment range prescribed by the Guidelines. Assuming that § 3624(c) was intended to apply to deportable aliens, the statute does not on its face require the Bureau to ensure that all prisoners participate in such a program, but only to do so if practicable. For example, the Bureau need not reassign the prisoner to a halfway house if there is no such unit in his home state, and the absence of such a facility has been

[10] Given the limited time, the Government is still in the process of seeking information from the Bureau of Prisons in response to the affidavit of Joel Sickler. It is worth noting that the affidavit was paid for by Hoskins at a rate of $350 per hour to a professional consultant who has made his decades-long career through providing these same services to criminal defendants. Mr. Sickler does not appear to have any experience working at the BOP, and his corrections experience is limited to a brief period as a corrections officer in the District of Columbia while a graduate fellow. *See* Justice Advocacy Group LLC, http://justiceadvocacygroupllc.com.

> held to be an impermissible ground for departure from the Guidelines.

Id. at 645 (citation omitted).

The Second Circuit concluded that, "if there is a defect in the Bureau's policy toward reassignment of deportable aliens, the appropriate way to remedy that defect would be pursuit of an action that challenges such a policy head-on, not the ad hoc granting of departures that have the effect of creating the very type of disparity in sentencing that the adoption of the Guidelines was intended to eliminate." *Id.* at 646.

With respect to detention while awaiting deportation, the Second Circuit held that such detention, which averages approximately two months, is likewise not a sufficient basis for a downward departure. "Since a deportable alien may be detained though he has not been convicted of a crime, a detention that occurs pending deportation following a convicted alien's completion of his term of imprisonment should not be viewed as a detention resulting solely from his conviction. Nor should it be viewed as part and parcel of the punishment for his criminal offense. Rather, it is part of a penalty that has traditionally been termed civil rather than punitive. Hence, in comparing the punishments meted out to an alien and to a citizen, respectively, it is inapt to measure the latter's sentence against the former's sentence plus deportation-related detention." *Id.* at 646 (internal cites omitted).

Even courts—principally in other circuits—who have permitted departures based on alienage have done so "where the conditions in question are 'substantially more onerous than the framers of the guidelines contemplated in fixing the punishment range for the defendant's offense [. . .,] and the differences in the conditions of confinement or other incidents of punishment between deportable aliens and other citizen (or nondeportable alien) defendants . . . are not great.'"

United States v. Mohammed, 315 F. Supp. 2d 354, 367 (S.D.N.Y. 2003) (quoting *United States v. Guzman*, 236 F.3d 830, 834 (7th Cir. 2001)) (alterations in original). The court in *Mohammed*, in rejecting a departure, found that "[i]neligibility for half-way houses or minimum security institutions, the only consequences Mohammed relies upon, are not such extraordinary deprivations as to warrant a finding that the Commission did not take into account the chance that someone in this sentencing range would be subjected to them." *Id*.

The Second Circuit has reaffirmed its holding in *Restrepo* in the post-*Booker* advisory Sentencing Guidelines regime. *See United States v. Duque*, 256 F. App'x 436, 437-38 (2d Cir. 2007) (citing *Restrepo* for the proposition that "'(1) the unavailability of preferred conditions of confinement, [and] (2) the possibility of an additional period of detention pending deportation following the completion of sentence,' generally do not justify a departure from the Sentencing Guidelines range"); *see also United States v. Wills*, 476 F.3d 103, 107 (2d Cir. 2007) ("Now, after *Booker*, we reaffirm the reasoning of *Restrepo* and apply it to Wills's non-Guidelines sentence, which was partly based on the purported 'additional punishment' of deportation."); *Rosario v. United States*, 625 F. Supp. 2d 123, 130 (S.D.N.Y. 2008) (declining to exercise discretion afforded by *Kimbrough v. United States*, 552 U.S. 85 (2007), and holding "[i]n light of the legal authority in this Circuit, therefore, Petitioner's ineligibility for certain correctional programs due to his alien status, while unfortunate, is not an adequate basis for a downward departure of his sentence").

Indeed, the defendant's alienage may end up affording him substantially less time in prison than that imposed by the Court. The defendant, as a U.K. citizen, has the ability to seek a prisoner transfer to the United Kingdom to complete his sentence, at which point his remaining term of imprisonment would be cut in half. If his request is successful, his sentence may be substantially reduced.

D. The Defendant's Proposed Sentence of Home Confinement in the United Kingdom Is Unenforceable and Inappropriate

As described above, the Court should impose a sentence of imprisonment significantly higher than that imposed on Pierucci. It is worth noting, however, that the defendant's requested sentence of home confinement is additionally inappropriate because it is logistically and diplomatically unworkable. Probation has no way to monitor or enforce home confinement in a foreign country, so such a sentence would be illusory at best. The defendant cites one case for support, *United States* v. *Black*¸ Case No. 16-cr-370 (CM) (S.D.N.Y. Oct. 24, 2019). That case, however, is still pending appeal, and did not reflect probation's position on whether home confinement in the United Kingdom would even be feasible. In fact, following Black's sentencing, the Probation Office informed the Government that it will not be able to execute the supervised release condition of home confinement in the United Kingdom, and that it will advise the court that the condition should be removed—leaving the defendant in that case to serve no period of confinement, at his home or otherwise. More generally, *Black* has significantly less persuasive force than the multitude of FCPA cases cited above, and in particular the sentence of Pierucci, a co-defendant guilty of the very same conduct.

Finally, an unenforceable sentence of home confinement is in truth no sentence at all, and runs counter to the overwhelming weight of the evidence in evaluating the Section 3553(a) factors. Such a sentence for a corrupt senior executive who was otherwise responsible for guarding Alstom's image overseas would undermine respect for the law and seriously frustrate the public's interest in fighting global corruption.

V. Conclusion

For the reasons stated above, the Government urges the Court to sentence the defendant to a term of imprisonment consistent with the aims of 18 U.S.C. § 3553(a), and recommends a period of incarceration of between seven and nine years.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on March 2, 2020, a copy of the foregoing Memorandum was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail on anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/

_____

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