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JUTHAMAS SIRIWAN and JITTISOPA SIRIWAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v.	CR Nos. 09-00081-1; 09-00081-2 The Honorable George H. Wu, Crtrm. 10 **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THE INDICTMENT** Date: October 20, 2011 Time: 8:30 a.m. Crtrm.: 10

JUTHAMAS SIRIWAN

and

JITTISOPA SIRIWAN,

Defendants.

[*Declaration of Shaun M. Gehan and [Proposed] Order filed concurrently herewith*]

Date of Filing: August 19, 2011

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TO THE COURT, THE PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE that on October 20, 2011, at 8:30 a.m., or as soon thereafter as the parties may be heard, before the Honorable George H. Wu, United States District Judge, in Courtroom 10, located at the 312 North Spring Street, Los Angeles, CA 90012, Defendants Juthamas Siriwan ("Governor Siriwan") and Jittisopa Siriwan ("Ms. Siriwan") (collectively, "the Siriwans"), through undersigned counsel, will and hereby do move for an order dismissing the indictment against them pursuant to Rule 12(b)(3).

This Motion is made on the grounds that (1) this Court lacks jurisdiction to try the crimes alleged and (2) that the Indictment fails to allege the Defendants committed a crime under federal law.

This Motion is based upon this Notice of Motion and Motion, the Declaration of Shaun M. Gehan and papers appended thereto, the pleadings and papers on file in this action, and upon such other oral argument and/or documentary matters as may be presented to this Court at or before the hearing on this Motion.

DATED: August 19, 2011

Respectfully submitted,
KELLEY DRYE & WARREN LLP
By /s David E. Fink
David E. Fink
Attorneys Appearing Specially for Defendants
Juthamas Siriwan and Jittisopa Siriwan

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I. INTRODUCTION

This is a case of first impression. Defendants Juthamas Siriwan ("Governor Siriwan") and Jittisopa Siriwan ("Ms. Siriwan") are charged with "conspiring" with and "willfully causing" Gerald and Patricia Green to pay the Siriwans bribes in exchange for favorable Thai government activity. The Greens' offense, in which the Siriwans are alleged to have conspired, is a violation of the Money Laundering Control Act ("MLCA"), 18 U.S.C. § 1956(a)(2)(A). The predicate "specified unlawful activities" include allegations of violations by the Greens of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2(a)(1), and two provisions of Thailand's Penal Code: Sections 149 and 152. (Indictment ¶¶ 2-3 (Jan. 28, 2009) (Dock. No. 1).) The final Count, criminal forfeiture, is only warranted if Defendants are "convicted of any of the offenses charged." (*Id.* ¶ 34.)

This is the first judicial challenge to a novel prosecutorial approach the Government recently developed to charge foreign officials allegedly involved in corruption.[1] That approach is aimed at overcoming a fundamental FCPA limitation. The FCPA does not criminalize a foreign public official's receipt of a bribe. *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991). Nor can the Government employ an FCPA conspiracy charge against a foreign public official. *Id.* at 836. Accordingly, these new enforcement initiatives require expansive interpretations of MLCA Section 1956(a) "promotion" money laundering.

Here, however, the Government's attempt founders on its failure to allege a distinct MLCA violation. The Government also must rely on an interpretation of

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[1] *See* U.S. Dept. of Justice, *Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* 15-16 (discussing the case of Robert Antoine, a former Haitian official who, in a plea deal, "became the first foreign official ever convicted in the United States on money laundering charges where the specified unlawful activity to which the laundered funds related was a felony violation of the FCPA"), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/05-28-10oecd-convention.pdf (last visited Aug. 12, 2011).

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the MLCA's ambiguous phrase "to promote the carrying on of" the predicate crimes that cannot be sustained by the rule of lenity or due process considerations.

There also exist U.S. and international law jurisdictional bars. Significantly, the MLCA's limit on extraterritorial personal jurisdiction unambiguously bars this action. Moreover, as this Court recognized during oral argument regarding Defendants' special appearance motion, a functioning foreign state like Thailand has a keen interest in policing alleged acts of official misconduct by its own public officials. In its tentative ruling on that motion, the Court stated, "even though Defendants no longer serve in roles representing the Thai government, an *American* prosecution tied to their alleged misdeeds while serving in those roles relatively obviously implicates issues of Thai sovereignty and/or foreign relations." (Minutes at 4 (July 28, 2011) (Dock. No. 60).) Indeed, Thailand's Parliament has spoken directly and clearly to that country's interest. Thai Penal Code Section 9 states, "Government Officials commits the offences as provided in Section 147 to Section 166 . . . outside the Kingdom shall be punished in the Kingdom." (*See* Dock. No. 20-1 at 5) (excerpts from Thai Penal Code, Ex. 1 to Decl. of Shaun M. Gehan (May 27, 2011) (Dock. No. 20).) The Indictment, in part, is predicated on alleged violations of these Thai Penal Code sections, thus plainly implicating Section 9.

The Court must thus assess the Government's tactic of charging the Siriwans' alleged receipt of a bribe against not one, but two countries' legislative determinations that this Court does not offer the proper forum to impose criminal sanctions on these former Thai officials for allegedly receiving bribes. To succeed, the government must establish all the following, many of which are unique to this case and its specific foreign public corruption overlay:

- The conduct charged is wholly money laundering, not merely the consummation of the alleged bribes;
- The Indictment adequately alleges promotion money laundering;

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- Interpreting the MLCA in this manner violates neither the rule of lenity nor U.S. due process standards;
- The MLCA's limited jurisdictional reach extends to these foreign defendants;
- Principles of statutory construction requiring a narrow reading of such extraterritorial grants of jurisdiction support such a strained application;
- Thai Penal Code Section 9 does not operate to limit U.S. authority over the Thai anti-bribery laws charged as predicates;
- This Court has jurisdiction to prescribe under principles of international law;
- The MLCA's foreign law predicates apply to the offenses charged; and
- The U.S. interest in prosecuting the defendants supersedes the interests of Thailand in regulating the conduct of its own foreign officials.

The Government must "run the table" on all these issues to proceed with the Indictment. It cannot, and the Indictment must be dismissed in its entirety.

II. ARGUMENT

A. The Siriwans Have Been Charged with No Cognizable Crime

The Government's "solution" for evading the FCPA's limits on charging foreign officials in corruption cases involves recasting the transfer of alleged bribe payments as money laundering transactions, intended to "promote the carrying on of" the same bribe scheme. This artifice will not suffice to carry the MLCA conspiracy and 18 U.S.C. § 2 "willfully causing" charges here predicated on the specified bribery-related offenses. Longstanding precedent, coupled with the appropriate application of the rule of lenity,[2] requires that, for money laundering to occur, the transactions at issue must amount to more than what is necessary to allege the underlying specified unlawful activity: "The offense of money laundering must be separate and distinct from the underlying offense that generated

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[2] *See United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.").

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the money to be laundered." United States v. Hall, 613 F.3d 249, 254 (D.C. Cir. 2010) (citing cases). This "separate and distinct" offense is precisely what the Indictment lacks.

1. The Indictment's Alleged Bribe Payments Pull "Double Duty" as Elements of the Specified Bribery Offenses and as MLCA Promotion Transactions

The MLCA's promotion money laundering provisions extend to:

> Whoever *transports, transmits, or transfers, or attempts [to do the same] . . . a monetary instrument or funds* from a place in the United States to or through a place outside the United States . . . with the intent to promote the carrying on of specified unlawful activity . . . .

18 U.S.C. § 1956(a)(2)-(2)(A) (emphasis added). For its part, the FCPA provides:

> It shall be unlawful for any domestic concern . . . *to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of* an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—
>
> (1) any foreign official for purposes of—
>
> (A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; . . .
>
> in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person . . . .

15 U.S.C. § 78dd-2(a) (emphasis added).

Under the facts alleged in this case, both the MLCA's and FCPA's statutory terms require a monetary transfer as an essential element. More specifically, "mak[ing] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" an alleged bribe payment can, as a literal matter, define the same conduct as "transport[ing] or transfer[ing] . . . a monetary instrument or funds . . . with the intent to promote the carrying on of" that alleged bribe payment. Likewise, a transfer is an essential element of Thai Penal Code section 149. (*See*

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Indictment ¶ 2) ("it is unlawful for any governmental official of the Kingdom of Thailand . . . *to accept* property or any other benefit for exercising or not exercising any" official duty) (emphasis added).) Section 152 is discussed *infra* at Part II.B.

In the Indictment, Counts One through Eight, the Government unavailingly attempts to employ the MLCA's literal terms to have the very same "payment" of bribe funds necessary to complete the "specified unlawful activity" under the FCPA simultaneously serve as the MLCA transaction which "promotes" that same "payment" activity. In other words, the United States reads the MLCA as if it criminalized transactions conducted "as part of" or "as an element of" specified unlawful activities, depriving the words "to promote the carrying on of" of any independent significance. This reading causes the predicate crime and the money laundering charges to distill wholly into the very same crime, which the law does not allow. The Government cannot make each wire transfer at issue pull double duty, serving both as an alleged bribe payment and a monetary transaction designed "to promote the carrying on of" the very same bribe.[3]

2. <u>The Indictment Fails for Lack of Independent MLCA Transaction</u>

"The legislative history indicates that Congress passed the money laundering statutes to criminalize the means criminals use to cleanse their ill-gotten gains." *United States v. Savage*, 67 F.3d 1435, 1441 (9th Cir. 1995). "'Congress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered.'" *Id.* at 1442 (quoting *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992)). "The main issue in a money laundering charge, therefore, is determining when the predicate crime becomes a 'completed offense'

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[3] *Cf. United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991) (holding that the cashing of a bribe check by a politician "amounts to an 'intent to promote the carrying on of' the specified unlawful activity, in this case the bribery"). In *Montoya*, the check-cashing activity following delivery and receipt of the bribe check was considered promotion, not, as in this case, the initial delivery and receipt of payment by wire transfer from the briber to the "bribee."

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after which money laundering can occur." *United States v. Christo*, 129 F.3d 578, 579-80 (11th Cir. 1997) (quoting *United States v. Kennedy*, 64 F.3d 1465, 1477-78 (10th Cir. 1995)).

The most instructive case on the MLCA promotion issue is the D.C. Circuit's recent decision in *Hall*. *Hall* involved a count of conspiracy and multiple counts of bank and wire fraud, which were also charged as predicates for a separate money laundering conspiracy charge. 613 F.3d at 251. The complex scheme involved the "flipping" of run-down properties using false appraisals, sham buyers, and co-conspirators with defrauded mortgage companies who approved the necessary paperwork. *Id.* Portions of prior mortgages were used as down-payments on new mortgages, which were never repaid. *Id.* at 251-52. Prior loans were cashed, and cashier's checks were purchased to make the phony down payments. *Id.* at 253-54.

The court rejected the government's theory that transactions necessary to complete the bank fraud could also constitute promotion money laundering. *Hall* found that, "based on the scheme alleged in the indictment, this purchasing of cashier's checks to be used as cash from the borrowers at settlement was a necessary element to complete the bank fraud. This same transaction, however, was alleged in the indictment as the overt act for money laundering." *Id.* at 254. "[T]his same transaction cannot be money laundering. . . . [T]he offense of money laundering must be separate and distinct from the underlying offense that generated the money to be laundered." *Id.* at 254-55.

As in *Hall*, here the Government has alleged a series of wire transfers, each from the Greens' accounts to accounts allegedly owned or controlled by the Siriwans. (*See* Indictment ¶¶ 31, 32.) It has not, however, alleged any distinct transactions apart from these alleged bribe payments and, thus, as in *Hall*, the money laundering conspiracy and "willfully causing" counts all must fail.

Case law shows that courts have struggled with the issue of what types of transactions constitute "promotion," particularly in relation to predicate crimes that

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involve monetary transactions. Not surprisingly, the holdings run the gamut. As mentioned above, *supra* n.3, in an early MLCA case representing one extreme, the Ninth Circuit found the cashing of a bribe check demonstrated intent to "promote" the bribe because "depositing the check provided an opportunity for Montoya to carry out the illegal bribery by characterizing the funds as a legitimate honorarium." *Montoya*, 945 F.2d at 1076. This holding seems to conflate promotion with concealment under 18 U.S.C. § 1956(a)(1)(B)(i), but in any event relates to a transaction different from those at issue here.

The counts at issue here rely on the Greens' alleged actual transfers of funds to Siriwan-controlled accounts, not subsequent transactions involving Siriwans' "use of the funds." *See* 945 F.2d at 1076 ("Montoya could not have made use of the funds without depositing the check.") They are thus analogous to the initial transmission of the bribe check to Montoya, an essential element of the California anti-bribery statute that formed the basis of the requisite "specified unlawful activity." *Id.* at 1075 (citing and quoting CAL. PENAL CODE § 86). No court has allowed the making of a payment that is an essential element of the predicate unlawful activity – such as a bribe in bribery case – constitute "promotion" of that same activity.

For example, *United States v. Jolivet*, 224 F.3d 902 (8th Cir. 2000), involved a conspiracy to defraud insurance companies by reporting a series of false car accidents and then submitting falsified medical bills and expenses. *Id.* at 905. Noting that "the government bears the burden of proving that the money was used to further the *carrying on* of such illegal activity," the Eighth Circuit rejected the argument that depositing checks made out to fictitious accident victims in defendant's personal account amounted to promotion money laundering. *Id.* at 909. "We find no logic in the government's suggestion that Jolivet could promote the carrying on of an already completed crime." *Id.* The court noted the "split among our sister circuits on this issue," comparing *Montoya* and *United States v. Paramo*,

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998 F.2d 1212 (3d Cir. 1993), as cases where cashing checks representing proceeds were sufficient to sustain the money laundering charge, with *United States v. Calderon*, 169 F.3d 718 (11th Cir. 1999) and *United States v. Heaps*, 39 F.3d 479 (4th Cir. 1994), as more persuasive authority requiring a greater showing to sustain a finding of the intent to promote. *Jolivet*, 224 F.3d at 909-10.

Christo and *Edgmon* were each "proceeds" cases in which the question was whether a transaction involved "criminally derived property" under 18 U.S.C. § 1957(a) in the former case, 129 F.3d at 579 n.3, and, in the latter, whether the defendant sought to conceal the proceeds of specified unlawful activities under 18 U.S.C. § 1956(a)(1)(B)(i). 952 F.2d at 1210. *Savage* involved promotion under section 1956(a)(2)(A), specifically whether transfers to a foreign bank account by the operator of a pyramid scheme "promoted" the underlying mail and wire fraud. 67 F.3d at 1439. In each case, the courts looked to see if the alleged money laundering transaction was "separate and distinct" from the underlying predicate offense. In *Edgmon* and *Savage*, the answer was yes, while the court in *Christo* reached a negative conclusion.

This Court should reach the same conclusion as did *Hall* and *Jolivet*, and dismiss the Indictment. The Government has failed to allege an MLCA crime in which the Siriwans could have conspired or "willfully caused." The wire transfers that allegedly constitute use of an "instrumentality of interstate commerce" to consummate the bribes under the FCPA are the same wire transfers that allegedly constitute the "promotion" under the MLCA.

3. <u>The Rule of Lenity Prohibits The Government's Approach</u>

"[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citing cases). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes

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the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985) (citing *United States v. Bass*, 404 U.S. 336, 348 (1955)). Most recently, in *Santos*, the Supreme Court reaffirmed the "venerable" rule of lenity, which "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." 553 U.S. at 514. This rule of construction directs courts to resolve any ambiguities in a criminal statute "in favor of the defendants subjected to them." *Id.* (citations omitted). As *Santos* demonstrates, concerns about the uncertain application of laws become most grave when the elements of the predicate crime and those supporting money laundering "merge" into a single crime with disparate penalties.

Santos involved an illegal lottery, and the money laundering charges were premised on payouts to winners and "salaries" for the numbers runners. 553 U.S. at 509. The payments were characterized as "proceeds" intended to "promote the carrying on of specified unlawful activity," and the issue was whether the MLCA definition of "proceeds" should be interpreted as "receipts" (all money taken in by the operation) or "profits" (moneys beyond the normal operating costs). *Id.* at 510-11. "If 'proceeds' meant 'receipts,' nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery," and thus "illegal lotteries would 'merge' with the money-laundering statute." 553 U.S. at 515-16 (citation omitted).

The Court went on to note that "[t]he merger problem is not limited to lottery operators. For a host of predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime." *Id.* at 516. Justice Stevens, in a narrow concurrence that produced a majority, held that "proceeds" may mean either revenues or profits, depending on the nature of the

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unlawful activity. *Id.* at 526. However, he joined the plurality on the "merger" problem. *Id.* at 526-27 (footnote omitted). The Court was also troubled by the disparity in punishment between the money laundering charge and the predicate lottery charge. *Id.*; *see also id.* at 516.

Sentencing disparities exist here, as well. An FCPA charge likewise carries an illegal lottery's five year maximum sentence, 15 U.S.C. § 78ff(c)(2), compared to the MLCA maximum of twenty years. 18 U.S.C. § 1956(a)(2). In fact, in this case, this disparity is more stark because the Siriwans would have no liability in the U.S. under the FCPA or Thai law predicates but for the MLCA conspiracy and derivative liability charges.

Although the Ninth Circuit has limited the specific *Santos* holding to so-called "proceeds" cases, *see, e.g., United States v. Moreland*, 622 F.3d 1147, 1167 (9th Cir. 2010), its importance here is *Santos*' revitalization of the rule of lenity. *See* Note, *Money Laundering, Rule of Lenity*, 122 HARV. L. REV. 475, 475 (2008-2009) (noting the revival of lenity by *Santos*) (citation omitted). As shown above in Part II.A.2, courts' varying constructions of the MLCA phrase "promote the carrying on of" the predicate crime demonstrate its malleability in both the phrase's terms and its application to specific facts.[4]

In this case, the question is whether the Government can read this statutory promotion phrase in such an overly literal way as to extend independent MLCA liability to the transactions that consummate the alleged predicate bribes themselves, thus eliding the essential requirement that a separate act of promotion be alleged. The Government's effort to exploit this MLCA ambiguity is cast in relief by the potential criminal liability and sentencing disparities that turn on the outcome of this phrase's construction. The rule of lenity directs this Court to the

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[4] *Cf. United States v. Inclema*, 363 F.3d 1177, 1182 (11th Cir. 2004) (rule of lenity applies when ambiguity arises from application of facts to statutory language; in *Inclema*, the ambiguity arose from applying sentencing guidelines to the facts).

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proper construction – the MLCA's ambiguous "promotion" terms must be construed in favor of the defendant.

Vagueness in the application of the law in this instance also raises concerns of due process. *See Lanier*, 520 U.S. at 266 ("due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope") (citing cases). In view of the long-standing congressional and judicial limit on extending FCPA liability to foreign officials, there is no "fair warning" of such a novel extension of the money laundering statute. Indeed, money laundering is not even charged directly, but rather via conspiracy and 18 U.S.C. § 2(b). Such application is neither presaged nor warranted by statute or judicial opinion.

Congress has extensively amended the FCPA,[5] yet it deliberately has not extended FCPA liability to foreign officials. If the Government wishes to extend U.S. criminal penalties to foreign officials accepting a bribe, it must go back to Congress, rather than employ dubious charging tactics to evade the direct and repeated congressional choice not to apply FCPA criminal liability to such officials.

B. Thai Penal Code Section 152 Cannot Constitute a Predicate Unlawful Act Specified by the MLCA

The Government's partial translation of Thai Penal Code Section 152 – to wit, "it is unlawful for any governmental official [of the Kingdom of Thailand], having the duty of managing or looking after any activity, to take an interest for the benefit of herself or another person concerning such activity" (Indictment ¶ 3) – is both incomplete and misleading. The official translation of Section 152 is: "Any official in charge of managing or supervising any affair takes advantage, *in the nature of conflict of interests in such affair*, for the benefit of himself or herself, or any other person shall be liable to imprisonment . . . ." (Dock. No. 20-1 at 7

[5] *See* International Anti-Bribery Act of 1998, Pub. L. No. 105-366, 112 STAT. 3302 (Nov. 10, 1998).

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(emphasis added).) The italicized clause, omitted from the Indictment, is essential to understanding this criminal provision's true nature.

Using this incomplete rendering of Section 152, the Government attempts to characterize it as "misappropriation, theft, or embezzlement of public funds" within the meaning of 18 U.S.C. § 1856(c)(7)(B)(iv). (Indictment ¶¶ 3,15.) By its full terms, however, Section 152 involves a crime akin to a "scheme or artifice to deprive another of the intangible right of honest services" under 18 U.S.C. § 1346, an offense against a foreign nation that is not a predicate under the MLCA.

As the Supreme Court recently discussed in *Skilling v. United States*, 561 U.S. __, 130 S. Ct. 2896 (2010), section 1346 criminalizes the harm the public suffers when one of its officials engages in a "bribe-and-kickback" scheme in "violation of a fiduciary duty," thereby depriving the public of honest services. *Id.* at 2930-31. As part of the this decision, the Court vacated a long line of "conflict of interest" honest services cases including the type of conduct spelled out in Section 152. *Id.* at 2932. These cases include *United States v. Weyhrauch*, 548 F.3d 1237, 1247 (9th Cir. 2008) (an official may commit "honest services fraud by failing to disclose a conflict of interest or by taking official actions with the expectation that he would receive future legal work for doing so"), *vacated in light of Skilling*, 130 S.Ct. 2971; and *United States v. Antico,* 275 F.3d 245, 262-63 (3d Cir. 2001) ("Honest services fraud typically occurs in two scenarios: … (2) failure to disclose a conflict of interest resulting in personal gain), *abrogated by Skilling.* While *Skilling* found that 18 U.S.C. § 1342 no longer covers these types of conflicts of interests cases, Section 152 still does. It is a conflict-of-interest honest services statute, not a theft, fraud, or embezzlement provision, which, as to foreign offenses, is not an MLCA predicate.

Moreover, the facts alleged in the Indictment do not comport with the 18 U.S.C. § 1956(c)(7)(B)(iv) element that the crime involve "public funds." Under the U.S. theft statute, 18 U.S.C. § 641, the embezzled "property must be a 'record,

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voucher, money, or thing of value *of the United States* or of any department or agency thereof.'" *United States v. Kranovich*, 401 F.3d 1107, 1113 (9th Cir. 2005) (quoting § 641). "To satisfy this requirement, the United States must have 'title to, possession of, or control over the funds involved.'" *Id.* (quoting *United States v. Faust*, 850 F.2d 575, 579 (9th Cir. 1988)). The Indictment alleges that funds received by the Siriwans came from monies that were in various bank accounts owned by the Greens (*see, e.g.,* Indictment ¶ 11), and thus does not make out the crime of misappropriation, theft, or embezzlement of public funds. As a result, alleged violations of Section 152 cannot form the basis of any of the counts alleged.

C. This Court Lacks Jurisdiction Over Defendants and Offenses Charged

Assuming that the Government could navigate the obstacles presented by the case law on promotion money laundering, which it cannot, this Court lacks jurisdiction over the Defendants under the MLCA.

1. No Jurisdiction Exists for Count One Under the MLCA

By its express terms, the MLCA provides jurisdiction over a "foreign person" only if "the foreign person *commits an offense under subsection (a)* involving a financial transaction that occurs in whole or in part in the United States." 18 U.S.C. § 1956(b)(2)(A) (emphasis added). It is undisputed the Siriwans are citizens of a foreign nation, the Kingdom of Thailand. (*See* Indictment ¶¶ 5,6.) Thus, they are each a "foreign person" as that term is used in the MLCA,[6] and there can only be jurisdiction over them for a violation of subsection (a). *See United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 314, 317 (S.D.N.Y. 2009) ("Subsection 1956(b)(2) deals with obtaining *personal jurisdiction* over a foreign person . . . .").

But the Siriwans are not charged with violating subsection (a). Count One charges them under § 1956(h), with conspiring to violate § 1956(a)(2)(A) MLCA

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[6] The MLCA does not define the term "foreign person," but "[w]hen a term is undefined, we give it its ordinary meaning." *Santos*, 553 U.S. at 511 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)).

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subsection (h) does not provide an independent basis for exercising jurisdiction over the Siriwans as they are not charged with violating subsection (a) directly.

There is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991) (quoting *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Federal laws are deemed to apply only to the territorial jurisdiction of the United States unless Congress provides "affirmative evidence" to the contrary. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993). Moreover, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. __, 130 S.Ct. 2869, 2883 (2010) (citing *Microsoft Corp. v. AT&T Corp.*, 550 U. S. 437, 455–456 (2007)).

Congress provided two separate bases for criminal liability under the MLCA: (1) for a violation of subsection (a) (*e.g.*, the unlawful transferring of funds from the U.S. to another country, or *vice versa*); and (2) for conspiring with others to violate subsection (a). 18 U.S.C. § 1956(a),(h). Congress expressly provided federal district courts jurisdiction over foreign persons who violate subsection (a), but made no similar grant of jurisdiction over foreign persons who violate subsection (h). *Id.* § 1956(b)(2)(a). This choice makes sense; Congress intended to extend the inherently pliable MLCA to a foreign person's direct, not derivative, violations. Principles of statutory construction require this extraterritorial grant of personal jurisdiction be narrowly construed. *Morrison*, 130 S.Ct. at 2883.

Count One does not allege that the Siriwans engaged in any conduct prohibited by subsection (a). Rather, the Indictment alleges that Gerald and Patricia Green transferred funds from bank accounts in the United States to foreign accounts controlled by the Siriwans. (*See* Indictment ¶¶ 25, 26, 31, 32.) Because Count

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One is based on MLCA subsection (h), this Court has no jurisdiction over the Defendants and, for this reason alone, Count One must be dismissed.

2. No Jurisdiction for Counts Two Through Eight Exists Via 18 U.S.C. § 2(b)

Similarly, Counts Two through Eight charge the Siriwans, under 18 U.S.C. § 2(b), with "willfully causing" the Greens to violate subsection (a)(2)(A), and not with any direct violation of subsection (a). The Indictment does allege defendants "knowingly transported, transmitted, and transferred and willfully caused others" to transfer "the following" monetary instruments (individual wire transfers). (Indictment ¶ 32.) However, this cannot be construed as a direct violation of the MLCA because each of "the following" is a description of a Green-controlled business transferring funds to a foreign bank account. (*Id.*) None allege a transfer effected by either of the Siriwans. As such, it is evident that the Siriwans are not being charged under § 1956(a)(2)(A), but rather under 18 U.S.C. § 2(b) for "willfully causing" the Greens to violate subsection (a) of the MLCA.

18 U.S.C. § 2(b) provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." While 18 U.S.C. § 2 typically imputes liability for willfully causing the violation of any other criminal statute, the statute is "not so broad as to expand the extraterritorial reach of the underlying statute." *United States v. Yakou*, 428 F.3d 241, 252 (D.C. Cir. 2005).

In *Yakou*, the defendant was a foreign citizen charged under 18 USC § 2(a) with aiding and abetting a co-defendant's arms trafficking violation. *Id.* at 245. The anti-trafficking statute applied to any "U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States." *Id.* at 243 (citation omitted). The court held that section 2 could not provide jurisdiction over the foreign defendant because the underlying statute itself provided no such jurisdiction. *Id.* at 252-53.

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As discussed above, the extraterritorial reach of the MLCA is limited to foreign persons who have committed a violation of subsection (a) of that statute. Because there is no jurisdiction over the Siriwans under the MLCA (*i.e.*, they have not been charged directly under 18 U.S.C. § 1956(a)), there can be no jurisdiction over them for causing others to violate the MLCA. *Id.* at 252-53. Accordingly, Counts Two through Eight must also be dismissed.

D. This Court is Not the Proper Forum for Adjudicating These Allegations

The formidable substantive and jurisdictional challenges posed above by domestic law comprise only some of the reasons the Indictment should be dismissed. The remainder are based on principles of statutory construction, international law, and the Thai government's determined judgment that it has sole jurisdiction over alleged corrupt acts of its officials. Just as the MLCA and FCPA assert broad jurisdiction over U.S. citizens and "domestic concerns" while limiting their reach over "foreign persons" and activities committed abroad, Thailand takes a similar approach. Well-established international law principles provide a "tie breaker" when dual sovereigns seek jurisdiction over common activities and the persons alleged to have engaged in them. Here, Thailand's interests are superior.

1. Application of Thailand's Section 9

Section 9 of Thailand's Penal Code states: "Government Officials commits the offences as provided in Section 147 to Section 166, and Section 200 to Section 205 outside the Kingdom shall be punished in the Kingdom." (Dock. No. 20-1 at 5.) Sections 147 through 166 are all "Offences Committed in Public Office," while the latter sections encompasses "Offences Committed in Judicial Office." (*See* Exh. A to the Declaration of Shaun M. Gehan ("Gehan Decl.").) Such classes of crimes are of particular sensitivity to Thailand, given that, of necessity, they can be committed only by holders of a public trust. Section 9 expresses a grant of sole jurisdiction over such offenses. Yet, the U.S. Government has charged that the Siriwans violated Thai Penal Code Sections 149 and 152 as MLCA predicates.

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While, on its face, Section 9 speaks of "punishment," Thai Supreme Court precedent demonstrates that official malfeasance by Thai public officials is to be tried in Thailand, no matter where the act is alleged to have occurred. Thai Supreme Court Decision 1035/2464 (1921) involved the corrupt sale of the Thai Embassy in Rome, in which the *charge d'affaires* misstated the selling price, pocketing some excess proceeds for himself and offering the balance to the Thai ambassador to Italy in exchange for acquiescence and other benefits. (*See* Thai Sup. Ct. Decision 1035/2464 at 3-4, Exh. B to Gehan Decl.) Under the Penal Code for the Kingdom of Siam (1908), then in force, Section 10 (today's Section 9 predecessor) did not provide for the same breadth of jurisdiction over Thai officials abroad. It required "punishment" of crimes committed by Siamese (Thai) citizens outside the country only under certain enumerated circumstances. (*See* Penal Code of 1908 at 5, Exh. C to Gehan Decl.) Defendant argued the government was "obligated to prove according to Sub-section 4, Section of the Criminal Code" these circumstances as an element of jurisdiction. (Ex. B to Gehan Decl. at 3.)

The Thai Supreme Court disagreed. It first held the "Defendant was a charge d'affaires [who] committed a crime of malfeasance in his office against the Kingdom of Siam." (*Id.* at 4.) "We all agreed further that the question about the court jurisdiction when a diplomatic officer committed a crime of malfeasance in his office, the laws deems that Siam courts shall have jurisdiction over the case as if the crime [were] committed in the Kingdom."[7] (*Id.*) In other words, despite the apparently limited grant of jurisdiction then conveyed by Section 10, the Thai Supreme Court asserted full jurisdiction over this official's extraterritorial crime.

Section 9 of the current Thai Penal Code states even more clearly Thailand asserts the broadest jurisdiction over its public officials' extraterritorial crimes.

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[7] The Court also noted that, as the defendant "had domicile in Siam, the Siam Court shall have jurisdiction over him to adjudicate punishment." (*Id.*)

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2. The Principles of Prescriptive Jurisdiction

Thailand's assertion of exclusive jurisdiction over its public officials under Section 9 is legally relevant in this case. The predicate crimes alleged to support the MLCA counts against the Siriwans, FCPA as well as the Thai Penal Code violations, all fall in the ambit of exclusive Thai jurisdiction. Indeed, the United States disclaims jurisdiction over the bribery of foreign officials under the FCPA and, as shown below, the "specified unlawful activities" involving "an offense against a foreign nation" involving corruption under 18 U.S.C. § 1956(c)(7)(B)(iv) are not implicated by the facts of this case (nor, as shown in Part II.B *supra*, does it cover Section 152 at all). More importantly, as between Thailand and the United States, recognized principles of law hold Thailand is the proper adjudicatory forum.

"Under international law, a state is subject to limitations on [its] jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons . . . by legislation . . . ." 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987) ("RESTATEMENT (THIRD)"). "International law has long recognized limitations on the authority of states to exercise jurisdiction to prescribe in circumstances affecting the interests of other states." *Id.* at 235. Such "prescriptive jurisdiction" includes elements of conflict of laws[8] and comity among nations,[9] and "embrac[es] principles of reasonableness and fairness to accommodate overlapping or conflicting interests of states, and affected private interests." *Id.* at 237; *see also Marsoner v. United States*, 40 F.3d 959, 965 (9th Cir. 1995) (*per curiam*) (Restatement test of "reasonableness is 'an essential

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[8] *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) ("Nevertheless, it is quite true that we are not to read general words, such as those in [the Sherman Act], without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'").

[9] *See, e.g., Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 612 (9th Cir. 1979) ("American courts have, in fact, often displayed a regard for comity and the prerogatives of other nations and considered their interests as well as other parts of the factual circumstances.") (citation omitted).

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element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe.'"). In the current context, the relevant inquiry is not whether Congress has the power to criminalize the activity at issue here, but whether the MLCA should be construed as having done so. *Cf. Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J, dissenting).

As explained below, given the allegations in this case, the jurisdictional predicates upon which the money laundering charges rely, and the MLCA's limited extraterritorial reach (discussed above), it would be unreasonable for this Court to construe the MLCA as providing prescriptive jurisdiction over these crimes.

a. The Principles of Statutory Construction

The jurisdiction to prescribe, a canon of statutory construction, is "relevant to determining the extraterritorial reach of a statute," *Hartford Fire Ins.*, 509 U.S. at 813 (citations omitted), and is related to the presumption of territorial application of domestic laws. *Aramco*, 499 U.S. at 248. However, even "if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: '[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *Hartford Ins.*, 509 U.S. at 814-15 (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (Marshall, C.J.)) (alteration in original). The *Charming Betsy* canon, in particular, "is relevant to determining the substantive reach of a statute because 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe." *Id.* at 815 (citing RESTATEMENT (THIRD) §§ 401–416).

In general, a state has prescriptive jurisdiction with respect to (1) conduct occurring "wholly or in substantial part . . . within its territory," persons within its territory, or conduct outside its territory having "or intended to have substantial effect within its territory"; (2) its own nationals both outside and within its territory; and (3) activities by persons of other nationalities outside its territory whose

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conduct "is directed against the security of the state" or other limited classes of state interests. RESTATEMENT (THIRD) § 402.

Prescriptive jurisdiction may not be exercised under the law of nations, even when one of the bases for jurisdiction under § 402 exist, when such would be "unreasonable." *Id.* § 403(1). Among the "reasonableness factors" to be considered are: (1a) "the link of the activity to the regulating state [here, the U.S.], *i.e.*, the extent to which the activity takes place within the territory, or [(1b)] has a substantial, direct, and foreseeable effect upon or in the territory"; (2) "connections, such as nationality [and] residence . . . , between the regulating state and the person primarily responsible for the activity to be regulated"; (3) "importance of regulation to the regulating state"; (4) whether such regulation is "consistent with the traditions of the international system"; and, (5) "the extent to which another state may have an interest in regulating the activity." *Id.* § (2)(a),(b),(c),(f),(g); *see Timberlane Lumber*, 549 F.2d at 614-15 (applying § 403). These factors also apply to criminal laws, and "legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication." RESTATEMENT (THIRD) § 403 cmt.f.

The question here presented is how these factors play out as between the United States and Thailand, when the U.S. is bootstrapping unsupportable money laundering claims onto a nucleus of facts involving alleged corruption by Thai public officials, involving Thai contracts, for work performed in Thailand, over which Thailand asserts the broadest jurisdictional scope of its criminal laws. To find that Congress has conveyed jurisdiction to prescribe as to the charges against the Siriwans, this Court would have to make a series of decisions regarding the MLCA's scope that violate the principles of construction enunciated in *Charming Betsy* and *Aramco*. There is no compelling reason to do so.

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b. Application of the Restatement Principles to this Case

The Restatement section 402, under the territoriality principle, provides some basis for assertion of U.S. jurisdiction. As a result, the Restatement requires analysis of the following "reasonableness" factors set forth in section 403, and set forth in relevant part above. RESTATEMENT (THIRD) § 403(2):

(1a) Link of activity to state prescribing or enforcing the law: The "center of gravity"[10] of events given rise to the Siriwans' alleged culpability is decidedly in Thailand, from whence the contracts issued, where the subject Bangkok International Film Festival took place, where the Governor and Ms. Siriwan are domiciled, and where they spent the overwhelming majority of their time during the period alleged in the Indictment.[11]

(1b) Substantial, direct, and foreseeable effect upon the territory: While the United States has an interest in preventing its financial institutions from being used to launder proceeds of unlawful activity, the making of an alleged bribe payment from a domestic concern to a foreign official does not fall neatly, if at all, into that category, as the MLCA's extraterritorial personal jurisdiction provisions and its legislative history (described below) demonstrate. Nor is this the province of the topically more relevant FCPA, under which neither Defendant could be prosecuted directly or for conspiring to violate, per repeated express, considered congressional choices. Conversely, this case involves the integrity of Thailand's public procurement processes and officials.

(2) Nationality and residence of persons regulated: The Siriwans are Thai citizens residing in their home country, and both Thailand and the United

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[10] RESTATEMENT (THIRD) 237.

[11] The Government's argument of evidence in another case during the special appearance motion hearing notwithstanding, the Indictment does not allege Ms. Siriwan was ever in the United States, although even Defendant's occasional presence in the U.S. where a few alleged acts may have occurred does not tip the balance of interests here.

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States seek to enforce their laws based on the same nucleus of operative alleged facts, albeit on different (but related) theories.

(3) Importance of regulation to the regulating state: As to the underlying "specified unlawful acts" resting on alleged violations of Thai laws, that nation, via Section 9, has asserted the fullest jurisdiction consistent with international law. By stark contrast, the United States limits MLCA jurisdiction in several important and, indeed, dispositive ways. *See supra* Part II.C.1. These limited grants of jurisdiction must be strictly construed. *Morrison*, 130 S.Ct. at 2883. Indeed, Congress added the MLCA's extraterritorial personal jurisdiction as section 317 of the USA PATRIOT Act of 2001 ("Patriot Act"), Pub. L. 107-56, 115 Stat. 310-11 (Oct. 26, 2001) (codified at 18 U.S.C. § 1956(b)(2)(a)), when it added the charged foreign public integrity crimes as MLCA specified unlawful offenses at Patriot Act section 315, 115 Stat. 308-09 (Oct. 26, 2001), *codified at* 18 U.S.C. § 1956(c)(7)(B)(iv). Codification of these two elements together is telling.

Moreover, when Congress added "offense[s] against a foreign nation involving . . . bribery of a public official" as an MLCA specified unlawful offense in the Patriot Act, it was interested in preventing U.S. financial institutions from being used to launder proceeds of foreign crime and corruption, particularly activity that might fund foreign terrorism.[12] The House report on the bill that resulted in the expansion of the MLCA's "specified unlawful activity" list stated that its purpose was "to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds" of foreign public

[12] *See, e.g.* 147 CONG. REC. S11039 (daily ed. Oct. 25, 2001) (statement of Sen. Sarbanes) ("Money laundering is the transmission belt that gives terrorists the resources to carry out their campaigns of carnage, but we intend, with the money-laundering title of this bill, to end that transmission belt in its ability to bring resources to the networks that enable terrorists to carry out their campaigns of violence.").

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corruption.[13] Consistently, a 2004 Senate report described the expansion of the MLCA specified unlawful activities list as intending "to make it illegal for a bank in the United States knowingly to accept funds that were the proceeds of foreign corruption."[14] Courts have applied these foreign law predicates consistent with expressed congressional intent. *See United States v. All Assets Held At Bank Julius Baer & Co., Ltd.*, 571 F. Supp. 2d 1, 10 (D.D.C. 2008) (quoting the above-quoted language of H.R. REP. NO. 107-250 (2001)).

Congress was perhaps even more sensitive to issues of extraterritoriality and law of nations impacts when it drafted the FCPA. *Castle* explained:

> The drafters of the statute knew that they could, consistently with international law, reach foreign officials in certain circumstances. But they were equally well aware of, and actively considered, the "inherent jurisdictional, enforcement, and diplomatic difficulties" raised by the application of the bill to non-citizens of the United States. *See* H.R. Conf. Rep. No. 831, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4121, 4126. In the conference report, the conferees indicated that the bill would reach as far as possible, and listed all the persons or entities who could be prosecuted. The list includes virtually every person or entity involved, including foreign nationals who participated in the payment of the bribe when the U.S. courts had jurisdiction over them. *Id.* But foreign officials were not included.

925 F.2d at 835.

Thailand has not limited its jurisdiction over illegal acts of malfeasance in office by its public officials, as did the U.S. in the FCPA. As Thailand's Supreme Court found, that country has even exercised jurisdiction beyond its physical borders via what is now Thai Penal Code Section 9. Thailand is, moreover, investigating this matter, vigorously, even laying charges against the Siriwans, as explained in Defendants' Special Appearance Motion. (Dock. No. 19 at 4-5.)

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[13] *See* H.R. REP. NO. 107-250, Pt. 1, at 55 (2001), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-107hrpt250/pdf/CRPT-107hrpt250-pt1.pdf (last visited Aug. 4, 2011).

[14] MINORITY STAFF OF THE SENATE PERM. SUBCOMM. ON INVESTIGATIONS, MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT 10 (Comm. Print 2004), *available at* http://hsgac.senate.gov/public/_files/ACF5F8.pdf (last visited Aug. 4, 2011).

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Thailand's demonstrated and statutorily-experssed interests in this matter are superior.

(4) The extent to which regulation is consistent with the traditions of the international system: As explained above, the U.S. Congress was extremely mindful of international law parameters, taking care in drafting the relevant extraterritoriality provisions. In adopting the FCPA, for instance, Congress was expressly aware of its jurisdiction to prescribe and carefully tailored what it termed its "qualified extraterritorial application." *See, e.g.,* H.R. REP. 95-640, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977 (Sept. 28, 1977), at 12 (footnote omitted) ("The Committee believes that the qualified extraterritorial application of this bill clearly supported by the legislative principles of international law.") Likewise, the Restatement extends criminal law extraterritorial jurisdiction in cases of express statement or clear implication in the pertinent law. RESTATEMENT (THIRD) § 403 cmt.f. Meanwhile, it is precisely congruent with the international system that Thailand have jurisdiction over its public officials' alleged corruption, as Thai Penal Code Section 9 expressly prescribes.

(5) The extent to which another state may have interests in regulating the activity: Thailand not only has a strong interest in these allegations, it is actively pursuing them, based on a very clear and expansive Thai parliamentary mandate. *See Lloyd's TSB Bank*, 639 F. Supp. 2d at 325 (applying this factor to a factually similar situation).

All the factors weigh strongly against finding that Congress intended these crimes be charged in this particular manner against foreign officials. No such intent is apparent in the MLCA; nor do 18 U.S.C. § 2's derivative liability provisions expand the MLCA's reach. Exercise of jurisdiction in this case is unreasonable.

III. CONCLUSION

Defendants have shown that the Government's novel and untested money laundering theory, as applied to the facts alleged, cannot be sustained. Money

laundering must comprise an offense distinct from the underlying "specified unlawful activity." In this, the government has failed. The bribe transactions under the FCPA and Thai bribery laws are one with the alleged transfers supporting the MLCA conspiracy and 18 U.S.C. § 2 "willfully causing" claims, meaning that no "promotion money laundering" has occurred. Moreover, the principle of lenity suggests that this Court should not accept the Government's unreasonable interpretation of the statute in order to find a crime that does not exist.

Perhaps even more persuasive, the MLCA does not provide extraterritorial jurisdiction over the Siriwans for the crimes alleged. Time-honored canons of statutory construction caution the Court against reading these limiting jurisdictional provisions in an unduly broad manner, extending the MLCA's extraterritorial application in ways Congress did not intend. More generally, the principles the Supreme Court enunciated in *Aramco* and *Charming Betsy*, respectively, provide presumptions that our laws are to be read to apply domestically and, to the extent of any extraterritorial application, that their interpretation should be consistent with the law of nations. No reading of the MLCA's territorial limitations and plain terms can support an extension of these alleged crimes against these foreign defendants under the RESTATEMENT's test of reasonableness. For these reasons, Counts One through Eight must be dismissed and, because Count Nine, forfeiture, is predicated on guilt of at least one prior count, it too must be dismissed. For all these reasons, Defendants respectfully request their Motion to Dismiss be granted.

DATED: August 19, 2011

Respectfully submitted,
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