No. 16-_____

IN THE

Supreme Court of the United States

ROGER DARIN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Due Process Clause of the Fifth Amendment permits the government to prosecute a defendant who lacks minimum contacts to the United States.

Whether foreign criminal defendants must voluntarily travel to the United States, and subject themselves to jurisdiction here, to challenge the government's constitutional authority to hale them into court in this country.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Roger Darin respectfully petitions for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

This case is about the constitutional limits on the extraterritorial reach of U.S. criminal law. Roger Darin is a Swiss citizen residing in his home country of Switzerland. He has been charged by complaint with conspiring to manipulate a *foreign* financial benchmark (Libor), for a *foreign* currency (Yen), while working for a *foreign* bank (UBS), in a *foreign* country (Japan). The only allegation connecting Mr. Darin to the United States is the claim that he participated in the manipulation of Libor—which is published worldwide, including in the United States.

Under established "minimum contacts" principles governing personal jurisdiction, foreign defendants cannot be haled into federal court for foreign conduct aimed generally at world financial markets; the defendant must "follow[] a course of conduct directed at the" United States—as opposed to the world as a whole—to satisfy due process. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion). Applying this standard, courts have repeatedly dismissed civil complaints alleging Libor manipulation for lack of personal jurisdiction. *See infra* at 20-21. The central and increasingly important constitutional question in this case is whether due process demands any less in the criminal context.

When this Court first articulated the minimum contacts test in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), it relied interchangeably on due process cases from the criminal and civil context. *Id.* at 316 (citing *Blackmer v. United States*, 284 U.S. 421, 436-38 (1932)). And in the more than seventy years since *International Shoe*, the Court has never suggested that criminal defendants are entitled to less due process in this context than civil ones. Yet a disagreement has developed among the circuits about the due process limitations on extraterritorial prosecutions—and whether this Court's minimum contacts jurisprudence is of any relevance to that analysis.

The Fifth and Ninth Circuits have recognized that the Due Process Clause of the Fifth Amendment requires a "sufficient nexus" between the United States and a foreign defendant. *See United States v. Rojas*, 812 F.3d 382, 393 (5th Cir. 2016); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1256-58 (9th Cir. 1998). As the Ninth Circuit has explained, "[t]he nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court' in this country." *Klimavicius-Viloria*, 144 F.3d at 1257 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The First, Third, and Eleventh Circuits, in contrast, have rejected the sufficient nexus test, holding instead that extraterritorial criminal prose-

cutions must simply "not be arbitrary or fundamentally unfair." *See United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1055-57 (3d Cir. 1993); *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378-79 (11th Cir. 2011). The Third Circuit has also expressly rejected the relevance of minimum contacts in the criminal due process context. *See United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002). And while the D.C. Circuit has neither embraced nor rejected the sufficient nexus test, it has rejected the relevance of civil personal jurisdiction principles in the criminal setting. *See United States v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013).

As for the Second Circuit, prior to this case, it had recognized and applied the sufficient nexus test, as articulated by the Ninth Circuit. *See United States v. Yousef*, 327 F.3d 56, 111-12 (2d Cir. 2003). In this case, however, the Second Circuit implicitly sided with the Third and D.C. Circuits and let stand a district court decision that rejected the relevance of this Court's minimum contacts jurisprudence. Given that Mr. Darin plainly lacks minimum contacts with the United States, this case provides an ideal vehicle to clarify the due process standard for extraterritorial criminal prosecutions and its relationship to the equivalent protection in civil cases.

Regardless of how it is defined, this Fifth Amendment protection is meaningful only if it can actually be invoked by foreign defendants, residing outside the United States, who have been criminally charged in this country. This case thus raises a sec-

ond question appropriate for *certiorari*: whether foreign defendants must voluntarily travel to the United States to assert their Fifth Amendment due process rights.

In the civil context, it is settled law that foreign defendants may appear through counsel and contest personal jurisdiction. *See, e.g.*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 412, 418-19 (1984). Here, in contrast, Mr. Darin has been repeatedly denied a ruling on his motion to dismiss because he remains in his home country of Switzerland. The district court refused to consider Mr. Darin's motion on the ground that he was a fugitive, even though Mr. Darin was never present in (let alone fled) the United States at any relevant time. The Second Circuit then declined to take jurisdiction over Roger Darin's appeal on the ground that the district court's decision was not a final judgment. The court reached this decision even though it was clear there would *never* be a final judgment. Mr. Darin cannot be tried in his absence, *see Crosby v. United States*, 506 U.S. 255, 262 (1993), and the government cannot extradite him from Switzerland, where he lives openly and lawfully and which forbids the extradition of its nationals, *see* Federal Constitution of the Swiss Confederation, Apr. 18, 1999, SR 101, art. 25, § 1 (hereinafter, "Swiss Federal Constitution").

Taken together, these rulings effectively deprive Mr. Darin of *any* opportunity to vindicate his Fifth Amendment rights. His only recourse is to voluntarily travel to the United States and subject himself to federal jurisdiction—an incongruous and

profoundly inequitable outcome given that Mr. Darin's essential claim is that the Fifth Amendment prohibits the government from haling him into court in this country.

As this Court has repeatedly made clear, the collateral order doctrine exists to address this precise situation: it empowers courts of appeals to exercise appellate jurisdiction over a district court decision that does "not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citation and internal quotation marks omitted). And even if there were some possibility that Roger Darin might be tried (there is not), appellate jurisdiction would still exist because the right he is seeking to invoke—a "right not to stand trial"—would be worthless if he were forced to stand trial to assert it. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (plurality portion of opinion). In analogous cases, the Seventh Circuit has repeatedly recognized this predicament and has found jurisdiction to reach the merits of motions to dismiss filed by foreign defendants. *See United States v. Bokhari*, 757 F.3d 664, 669-71 (7th Cir. 2014); *United States v. Kashamu*, 656 F.3d 679, 681-83 (7th Cir. 2011). The Second Circuit's departure from these precedents, and the resulting Catch-22[1] its decision creates, render *certiorari* appropriate on this basis as well.

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[1] Joseph Heller, *Catch-22* at 46 (Simon & Schuster Paperbacks 2004) (1961) ("There was only one catch and that was Catch-22, (...continued)

OPINIONS BELOW

The magistrate judge's memorandum and order denying Mr. Darin's motion to dismiss (Pet. App. 23a-60a) is reported at 99 F. Supp. 3d 409. The district court's order denying Mr. Darin's motion to dismiss (Pet. App. 4a-22a) is reported at 118 F. Supp. 3d 620. The court of appeals's order dismissing Mr. Darin's appeal (Pet. App. 1a-3a) is unreported. The court of appeals's order denying Mr. Darin's mandamus petition (*id.*) is unreported. The court of appeals's orders denying reconsideration and reconsideration *en banc* (Pet. App. 61a-64a) are unreported.

JURISDICTION

The order of the court of appeals was entered on March 15, 2016. Pet. App. 1a-3a. Timely motions for panel reconsideration and reconsideration *en banc* were denied on June 28, 2016. Pet. App. 61a-64a. On September 8, 2016, Justice Ginsburg extended the time to file a petition for a writ of *certiorari* to and including October 26, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution is reproduced in the appendix to the petition. Pet. App. 65a.

STATEMENT OF THE CASE

I. Factual Background

The London Interbank Offered Rate ("Libor") is a benchmark interest rate that, during the time period relevant to this case, was administered by the British Bankers' Association ("BBA"), a private trade association based in London. Pet. App. 24a. Libor was offered by the BBA for several currencies, including the Japanese Yen. Pet. App. 24a-25a. To determine Yen Libor, the BBA and its agent, Thomson Reuters, solicited 16 member banks for their opinions as to the hypothetical estimated rate at which the banks could borrow Yen in the inter-bank market. Pet. App. 24a. Thomson Reuters then averaged the opinions of the banks, after excluding the four highest and four lowest rates. *Id.* Once the final Yen Libor numbers (or "fixings") were calculated, they were published worldwide by Thomson Reuters, including in the United States. Pet. App. 24a-25a.

Mr. Darin is a Swiss citizen who has never lived or worked in the United States. Pet. App. 27a, 35a. The government has alleged that, during the relevant time period, Mr. Darin was employed by UBS, a Swiss financial services company, in its Singapore, Tokyo, and Zurich offices. Pet. App. 25a.

Among his responsibilities, Mr. Darin was allegedly responsible for UBS's Yen Libor submissions. *Id.*

On December 12, 2012, the government filed a criminal complaint, which alleged that Mr. Darin conspired with another UBS employee, Tom Hayes, a senior trader in Tokyo, to commit wire fraud. Pet. App. 7a & n.2, 20a, 25a-27a. According to the complaint, "Mr. Hayes would ask Mr. Darin or Mr. Darin's subordinates" (who allegedly "had been instructed" by Mr. Darin "to heed" Mr. Hayes's requests) to alter their opinions about the hypothetical interest rate at which UBS could borrow Yen. Pet. App. 26a. Mr. Darin or his subordinates allegedly complied, thereby allegedly causing Yen Libor to move in directions favorable to Mr. Hayes's trading positions. *Id.*

The complaint alleges that, for several of these trades, Mr. Hayes's counterparty was located in Purchase, New York. Pet. App. 20a. The complaint does not, however, allege that Mr. Darin had any knowledge of these transactions or participated in them in any way. Accordingly, the only allegation connecting Mr. Darin to the United States is the claim that he was involved in the formulation of Yen Libor, which was published worldwide, including in the United States.

II. The Proceedings Below

A. Mr. Darin's Motion To Dismiss The Government's Complaint

On October 2, 2014, Mr. Darin moved to dismiss the complaint on the ground that it failed to allege a sufficient nexus between Mr. Darin and the United States for purposes of the Due Process Clause of the Fifth Amendment. Pet. App. 5a.[2] The district court had subject matter jurisdiction to hear Mr. Darin's motion pursuant to 18 U.S.C. § 3231.

The government opposed the motion, disputing Mr. Darin's arguments on the merits and invoking the fugitive disentitlement doctrine, which permits courts to decline to address motions made by fugitives from justice because of their fugitive status. Pet. App. 5a-6a. The government argued that, under the doctrine, Mr. Darin could not challenge the complaint while remaining in Switzerland. Pet. App. 9a-10a.[3]

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[2] Mr. Darin also argued that the complaint should be dismissed because (i) he lacked constitutionally sufficient notice that his alleged conduct was criminal; and (ii) the complaint constituted an impermissible extraterritorial application of the conspiracy and wire fraud statutes. Pet. App. 5a. Mr. Darin is not seeking review of either of these issues.

[3] The government initially argued that the Fifth Amendment rights at issue in Mr. Darin's motion did not protect persons located outside the United States. Pet App. 28a-32a. The government abandoned this argument before the district court. Pet. App. 6a.

B. The Magistrate Judge's Decision

On March 20, 2015, the magistrate judge denied Mr. Darin's motion to dismiss. Pet. App. 23a-60a.

As a threshold matter, the magistrate judge rejected the government's argument that the fugitive disentitlement doctrine barred the court from hearing Mr. Darin's motion. Pet. App. 32a-40a. The magistrate judge cited cases that limit the definition of "fugitive" to only those present in the jurisdiction at the time of the alleged offense and expressed skepticism that Mr. Darin qualified under this definition: "[T]he record . . . does not indicate that Mr. Darin has ever even entered the United States. Nor has he hidden his whereabouts from United States authorities. He has merely remained in his home country." Pet. App. 33a-35a.

The magistrate judge then noted that even if Mr. Darin qualified as a "fugitive," none of the rationales for the fugitive disentitlement doctrine would apply to him. Pet. App. 35a-40a. The magistrate judge found that Mr. Darin's motion did not lack "mutuality"—which is lacking if "a decision in favor of an applicant would benefit him, but a decision against him would not be enforceable or would not operate to his disadvantage." Pet. App. 35. Rather, the magistrate judge explained that "affirming the validity of the complaint will entail significant burdens for Mr. Darin." Pet. App. 37a. Relying on *In re Hijazi*, 589 F.3d 401 (7th Cir. 2009), a Seventh Circuit "case with remarkably similar relevant facts," the magistrate judge observed that Mr. Darin

is confined to Switzerland, "unable to visit family even in neighboring Austria," and cannot find a job. Pet. App. 37a.

The magistrate judge also found that Mr. Darin did not flee the United States and was not "flouting the judicial process by refusing to appear." Pet. App. 38a (internal quotation marks omitted). Rather, "[h]e is avoiding the arrest warrant—a document that does not compel his voluntary surrender—merely by remaining in his home country." *Id.* In light of these considerations, the magistrate judge declined to apply the fugitive disentitlement doctrine. Pet. App. 39a-40a.

The magistrate judge then proceeded to the merits of Mr. Darin's motion to dismiss, ultimately denying it. Pet. App. 40a-59a. The magistrate judge applied the sufficient nexus test—as required by Second Circuit law—but did not accept the relevance of civil personal jurisdiction principles to this test. Pet. App. 49a-52a & n.4. Disregarding this Court's minimum contacts jurisprudence, the magistrate judge concluded that the complaint alleged a sufficient nexus between Mr. Darin and the United States for purposes of due process. Pet. App. 49a-57a & n.4.

C. The District Court's Decision

On August 3, 2015, the United States District Court for the Southern District of New York partially adopted the magistrate judge's memorandum and order. Pet. App. 4a-6a.

Contrary to the magistrate judge's decision, the district court determined that the fugitive disentitlement doctrine barred Mr. Darin's motion to dismiss and refused to squarely reach the merits of Mr. Darin's arguments. Pet. App. 8a-17a. Declining to follow previous cases that limit "fugitive" status to only those present in the United States at the time of the alleged offense, the court reasoned that it "cannot be bound by the semantics that limit fugitive status to fleeing or failing to return when dealing with an international criminal defendant who allegedly violated United States law from abroad." Pet. App. 14a. The district court then found, contrary to the magistrate judge's analysis, that all the factors underpinning the fugitive disentitlement doctrine weighed in favor of disentitlement. Pet. App. 14a-17a.

Adding an "alternative holding" to "give any reviewing court a complete judicial record of the proceeding," Pet. App. 17a & n.4, the district court nonetheless explained that, if it were to consider the merits, it would affirm the magistrate judge's holding that the complaint comported with the Fifth Amendment. Pet. App. 19a-22a.

On August 12, 2015, Mr. Darin timely appealed the district court's decision to the United States Court of Appeals for the Second Circuit. On November 3, 2015, the government moved to dismiss Mr. Darin's appeal for lack of appellate jurisdiction. On November 16, 2016, Mr. Darin opposed the government's motion, arguing that the district court's decision was immediately appealable under the col-

lateral order doctrine. On December 3, 2015, in order to place all possible avenues of relief before the court, Mr. Darin also filed a petition for mandamus.

D. The Second Circuit's Decisions

On March 15, 2016, a panel of the Second Circuit issued an order dismissing the appeal and denying mandamus relief, holding as follows:

> In 15-2597, the Government moves to dismiss the appeal for lack of appellate jurisdiction, and, under 15-3896, Roger Darin petitions for a writ of mandamus. Upon due consideration, it is hereby ORDERED that the Government's motion to dismiss is granted because the district court's order is not immediately appealable. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). It is further ORDERED that the mandamus petition is DENIED because Darin has not demonstrated that exceptional circumstances warrant the requested relief. *See In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010).

Pet. App. 1a-3a. On June 28, 2016, the Second Circuit denied panel and *en banc* reconsideration in summary orders. Pet. App. 61a-64a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision raises two issues that are appropriate for review: (i) whether the government can constitutionally prosecute a foreign dedefendant who lacks the minimum contacts with the United States that would be required for civil personal jurisdiction; and (ii) whether foreign defendants must voluntarily travel to the United States, and subject themselves to federal jurisdiction, to challenge the government's constitutional authority to hale them into court in this country.

On the first issue, *certiorari* is necessary to resolve a disagreement among the circuits. Although each circuit to consider the question has recognized that the Fifth Amendment constrains the government's ability to hale a foreign defendant into federal court to face criminal charges, they have disagreed on whether due process requires a sufficient nexus to the United States—analogous to minimum contacts in the civil context—such that the defendant could reasonably anticipate being haled into court in this country. This case is an ideal vehicle to resolve this disagreement, because the complaint against Mr. Darin clearly fails to allege minimum contacts between him and the United States. Thus, if this Court's minimum contacts jurisprudence is relevant in the criminal due process context—as it is—then Mr. Darin's motion must be granted.

On the second issue, *certiorari* is necessary to ensure that the Fifth Amendment meaningfully protects against excessive extraterritorial prosecutions. Through a broad interpretation of the fugitive disen-

titlement doctrine and a narrow interpretation of the collateral order doctrine, the Second Circuit decision leaves foreign defendants in a Catch-22: their constitutional argument is that they should not be forced to appear in the United States and stand trial, yet the only way they can assert this argument is by traveling to the United States, appearing in federal court, and subjecting themselves to personal jurisdiction. This incongruous outcome is contrary to this Court's prior rulings on the collateral order and fugitive disentitlement doctrines and several decisions of the Seventh Circuit, which have permitted foreign defendants to bring analogous challenges while remaining outside the United States.

I. The Federal Courts Of Appeals Disagree Regarding The Due Process Test That Applies In Criminal Prosecutions Of Foreign Defendants.

This Court has long held that due process requires civil defendants to have "minimum contacts" with the United States such that requiring them to appear in court in this country would "not offend traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316 (internal quotation marks omitted). The Court derived this principle from both civil and criminal cases, *see id.*, and it has never suggested that criminal defendants are entitled to less due process in this context than civil ones. To the contrary, it has stated "explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil

litigation." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (footnote omitted). Yet a disagreement has developed among the circuits regarding when foreign criminal defendants can be charged in the United States for foreign conduct, and whether this Court's minimum contacts jurisprudence has any relevance to that question. This disagreement is central to the overall scope of the Fifth Amendment protection, as is exemplified by this case, where rejection of the civil standard led directly to the denial of Mr. Darin's motion.

1. All circuits to decide the question have held that the Due Process Clause of the Fifth Amendment constrains the prosecutions of foreign defendants for conduct occurring entirely abroad. *See United States v. Rojas*, 812 F.3d 382, 393 (5th Cir. 2016); *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378-79 (11th Cir. 2011); *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1055-57 (3d Cir. 1993); *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990); *cf. United States v. Ali*, 718 F.3d 929, 943-44 (D.C. Cir. 2013) (assuming without deciding that the Due Process Clause constrains extraterritorial prosecutions).

2. The circuits have disagreed, however, on the appropriate Fifth Amendment standard to apply in this context. The Fifth and Ninth Circuits have embraced a sufficient nexus test under which they assess the connection between the defendant and the United States. The test was first articulated by the

Ninth Circuit, which held that "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." *Davis*, 905 F.2d at 248-49 (citing *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987)).

As the Ninth Circuit explained, "[t]he nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court' in this country." *Klimavicius-Viloria*, 144 F.3d at 1257 (quoting *World-Wide Volkswagen*, 444 U.S. at 297); *see also United States v. Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006) ("The nexus requirement is a judicial gloss applied to ensure that a defendant is not improperly haled before a court for trial. It serves the same purpose as the 'minimum contacts' test in personal jurisdiction." (alterations omitted)). The Fifth Circuit has since adopted the sufficient nexus test, as articulated by the Ninth Circuit. *See Rojas*, 812 F.3d at 393; *United States v. Lawrence*, 727 F.3d 386, 396 (5th Cir. 2013).[4]

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[4] In an earlier decision, the Fifth Circuit concluded that, in the specific context of the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 *et seq*., the Due Process Clause "does not impose a nexus requirement." *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002).

3. The First, Third, and Eleventh Circuits, in contrast, have expressly rejected the sufficient nexus test. In *Martinez-Hidalgo*, the Third Circuit declined to follow Ninth Circuit law and found that no nexus to the United States was needed for purposes of due process. 993 F.2d at 1055-57. In a later decision, the Third Circuit made clear that in rejecting the sufficient nexus test, it was also rejecting the relevance of civil personal jurisdiction principles. *See Perez-Oviedo*, 281 F.3d at 403 ("Perez-Oviedo's reference to cases such as *International Shoe Co. v. Washington* and *Asahi Metal Industry Co., Ltd. v. Superior Court of California* is unavailing, for those cases, which deal with non-resident corporations subject to liability for placing goods in the stream of commerce of another state, are inapposite." (citations omitted)).[5]

In *Cardales*, the First Circuit also held that the Fifth Amendment does not require a nexus between the defendant and the United States. 168 F.3d at 553. Rather, the First Circuit held that to satisfy due process, the application of the criminal statute simply "must not be arbitrary or fundamentally unfair." *Id.* And most recently, in *Ibarguen-Mosquera*, the Eleventh Circuit refused to apply the nexus test. 634 F.3d at 1378-79. Citing the First Circuit's holding in *Cardales*, the Eleventh Circuit

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[5] As noted *supra* at 3 & 16, the D.C. Circuit has neither accepted nor rejected the sufficient nexus test. It has, however, rejected the relevance of civil minimum contacts principles in the criminal context. *See Ali*, 718 F.3d at 944 (finding "the law of personal jurisdiction is simply inapposite" in the criminal context).

held that due process requires only that the application of law "not be arbitrary or fundamentally ununfair." *Id.*

4. Prior to this case, the Second Circuit had accepted the sufficient nexus test, as articulated by the Ninth Circuit. *See Yousef*, 327 F.3d at 111-12 (expressly adopting the Ninth Circuit standard); *see also Al Kassar*, 660 F.3d at 118 (applying sufficient nexus test). In this case, however, the panel's countenancing of the district court decision places the Second Circuit alongside the Third and D.C. Circuits in rejecting the relevance of minimum contacts principles. Pet. App. 3a, 19a-20a.

Indeed, it was only by rejecting the relevance of such principles that the district court was able to conclude that Mr. Darin's prosecution comported with due process. As discussed *supra* at 8, the only allegation against Mr. Darin was that he conspired to alter UBS's Yen Libor submission, which in turn affected the overall Yen Libor fixings.[6] Under established principles of civil personal jurisdiction, this

[6] The district court also used the alleged U.S. connections of Tom Hayes, Mr. Darin's alleged co-conspirator, to conclude that a sufficient nexus existed for Mr. Darin. *See* Pet. App. 20a-21a. This conclusion, too, was at odds with established principles of personal jurisdiction, which recognize that due process is a threshold standard that demands fairness to each individual defendant. *See Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (personal jurisdiction depends on "contacts that the defendant *himself* creates with the forum State" (internal quotation marks omitted)); *see also Calder v. Jones*, 465 U.S. 783, 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually.").

allegation would be insufficient to satisfy due process because Mr. Darin's alleged conduct was aimed at world financial markets as a whole, not the United States. *See Nicastro*, 564 U.S. at 884 (plurality opinion) ("The question is whether a defendant has followed a course of conduct *directed* at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." (emphasis added)); *see also Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1342 (2d Cir. 1972) (Friendly, C.J.) ("Although such worldwide reliance may be, in a sense, foreseeable, it is not sufficiently so to constitute a basis of personal jurisdiction consonant with due process."), *abrogated on other grounds by Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

The failure of the complaint against Mr. Darin to allege "minimum contacts" between him and the United States is underscored by the fate of civil complaints that have involved essentially the same allegations. In multiple cases, courts have dismissed for lack of personal jurisdiction civil complaints involving allegations that foreign defendants manipulated Libor outside the United States. *See 7 W. 57th Street Realty Co. v. Citigroup Inc.*, No. 13-981, 2015 WL 1514539, at *11 (S.D.N.Y. Mar. 31, 2015) (concluding that although the harm "was a foreseeable result of the Foreign Banks' alleged LIBOR manipulation, the fact that harm in the forum is foreseeable . . . is insufficient for the purpose of establishing specific personal jurisdiction over a defendant" (internal quotation marks omitted));

Laydon v. Mizuho Bank, Ltd., No. 12-3419, 2015 WL 1515358, at *2-7 (S.D.N.Y. Mar. 31, 2015) (holding Libor "manipulation using electronic means that entered the United States through the Bloomberg network" and allegedly causing domestic effects was insufficient to establish personal jurisdiction (internal quotation marks omitted)).

Here, the district court's refusal to apply minimum contacts principles was dispositive of Mr. Darin's motion. If the court had applied such principles, it would have been bound to grant Mr. Darin's motion, given the clear failure of the complaint to allege minimum contacts between Mr. Darin and the United States. This case is accordingly an ideal vehicle to resolve the disagreement among the circuits regarding the relevance of minimum contacts principles in the criminal due process context.

5. There is no likelihood that this disagreement will be resolved without review by this Court; the conflict among the circuits is entrenched and well-recognized. *See United States v. Campbell*, 798 F. Supp. 2d 293, 306 (D.D.C. 2011) ("Whether the test for due process in such a circumstance requires a 'sufficient nexus' to the United States . . . has split the circuits."); *see also* Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 Hastings Int'l & Comp. L. Rev. 323, 347-72 (2012). Meanwhile, the government is increasingly applying criminal statutes to extraterritorial conduct. *See, e.g.*, Leslie R. Caldwell, Assistant Attorney General, Criminal Division, Department of Justice, Assistant

Attorney General Leslie R. Caldwell Delivers Remarks at the Securities Enforcement Forum West Conference (May 12, 2016), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-securities-enforcement ("[W]e find that we are increasingly drawn into international investigations, sometimes involving many different countries."); Stephanie Clifford, *A Growing Body of Law Allows the U.S. to Prosecute Foreign Citizens*, N.Y. Times, June 10, 2015, at A9 ("Using a growing body of law that allows the United States to prosecute foreign citizens for some actions, the government has been turning the federal courts into international law-enforcement arenas.").[7] Review by this Court is accordingly necessary to clarify the applicable due process protection in this increasingly important context.

II. Review Is Also Necessary To Avoid A Catch-22 In Which Foreign Defendants Lack Any Opportunity To Vindicate Their Fifth Amendment Rights.

In the civil context, it is settled law that foreign defendants may appear through counsel and contest personal jurisdiction. *See, e.g.*, *Helicopteros Nacionales*, 466 U.S. at 412, 418-19. This procedure

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[7] This expanding reach of federal law has long caused scholars to urge courts to "apply[] the Constitution to limit the extraterritorial application of American federal law." Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1223 (1992).

ensures that only civil defendants with minimum contacts to the United States are haled into court in this country. *See World-Wide Volkswagen*, 444 U.S. at 291-92. The Fifth Amendment constraint on extraterritorial prosecutions likewise "ensure[s] that a [criminal] defendant is not improperly haled before a court for trial." *Klimavicius-Viloria*, 144 F.3d at 1257.

According to the decisions below, however, the only way foreign defendants can assert their Fifth Amendment rights is by voluntarily traveling to the United States and submitting themselves to jurisdiction in federal court. Through a narrow interpretation of the collateral order doctrine and an expansive interpretation of the fugitive disentitlement doctrine, the Second Circuit's decision would place foreign defendants in a Catch-22 without *any* meaningful opportunity to vindicate their Fifth Amendment rights. This patently unjust outcome is in conflict with both this Court's holdings and multiple decisions of the Seventh Circuit. *Certiorari* is accordingly appropriate on this ground as well.

A. The Second Circuit's Narrow Interpretation Of The Collateral Order Doctrine Misapplies This Court's Decisions And Conflicts With Seventh Circuit Law.

The courts of appeals are vested with jurisdiction to hear "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The collateral order doctrine is "a practical construction of" this statute that

> entitles a party to appeal not only from a district court decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment, but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final.

Digital Equip., 511 U.S. at 867 (citations and internal quotation marks omitted).

To qualify as immediately appealable under the collateral order doctrine, the order at issue "must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (internal quotation marks omitted). Underlying each of these prongs is a concern about finality and the inefficient "piecemeal appellate review of trial court decisions which do not terminate the litigation." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam). Accordingly, when the denial of a motion to dismiss means that a defendant will next be tried, "[t]he law normally requires [the] defendant to wait until the end of the trial to obtain appellate review of a pretrial order." *Sell v. United States*, 539 U.S. 166, 176 (2003). But when a pretrial order effectively terminates the case—and there will be no trial—there is no risk of "piecemeal appellate review," *Hollywood Motor*, 458

U.S. at 265, and no basis to deny appellate review under the doctrine.

Even where district court decisions are not effectively final—and piecemeal appeals are possible—this Court has "consistently held" that the collateral order doctrine applies "[w]hen a district court has denied a defendant's claim of right not to stand trial." *Mitchell*, 472 U.S. at 525 (plurality portion of opinion). In *Abney v. United States*, 431 U.S. 651, 662 (1977), this Court held that decisions denying pretrial motions to dismiss on double jeopardy grounds are appealable collateral orders. First, the Court reasoned, such decisions are conclusive: "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee." *Id.* at 659. Second, this Court found that such decisions are collateral: "the defendant makes no challenge whatsoever to the merits of the charge against him. . . . *Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.*" *Id.* (emphasis added). Third, this Court held that "the Double Jeopardy Clause would be significantly undermined if appellate review . . . were postponed until after conviction" because it "protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense." *Id.* at 660-61.

Since *Abney*, this Court has extended the collateral order doctrine to other situations involving the same "essential attribute"—*i.e.*, the "entitlement

not to stand trial under certain circumstances." *See Mitchell*, 472 U.S. at 525, 530 (plurality portion of opinion) (allowing appeal from denial of qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982) (same for absolute immunity); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979) (same for denial of protection under the Speech or Debate Clause).

Here, the Second Circuit summarily determined that it lacked jurisdiction to consider Mr. Darin's appeal. Yet a straightforward application of the collateral order doctrine makes clear that Mr. Darin's motion is immediately appealable, for two independent reasons. First, the district court decision is effectively final. As a practical matter, Roger Darin's district court case is over. The government lacks a legal basis to extradite Mr. Darin from Switzerland, where he lives openly and lawfully, *see* Swiss Federal Constitution, art. 25, § 1, and Mr. Darin will not voluntarily travel to this country when his essential claim is that it is unconstitutional for the government to hale him into court in the United States.[8]

As noted *supra* at 24-25, finality is the unifying concern for each of the three prongs of the

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[8] At various times, the government has speculated that Mr. Darin might travel to a third country from which he could be extradited, but this does not render the district court's decision any less final for purposes of the collateral order doctrine. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 (1983) (holding that the speculative possibility that the district court might revisit its decision did not defeat jurisdiction under the collateral order doctrine).

collateral order doctrine. Where, as here, a district court decision is effectively final, it "conclusively determine[s] the disputed question." *Midland Asphalt*, 489 U.S. at 799 (internal quotation marks omitted). It also necessarily resolves an "issue completely separate from the merits of the action" because there will be no "merits of the action" to consider. *Id.* (internal quotation marks omitted).[9] Lastly, such an order is also "effectively unreviewable on appeal from a final judgment" because there will be no trial and no final judgment to appeal. *Id.* (internal quotation marks omitted).

Second, even if it were possible for this case to proceed to trial, the collateral order doctrine would still apply because the Fifth Amendment right at issue "would be significantly undermined if appellate review . . . were postponed until after conviction . . . ." *Abney*, 431 U.S. at 660. When foreign defendants like Mr. Darin challenge the government's authority to hale them into U.S. court, their cases share the same "essential attribute" as *Abney—i.e.,* they involve the right "not to stand trial." *Mitchell*, 472 U.S. at 525 (plurality portion of opin-

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[9] Even setting aside the fact that there will be no "merits of the action," *Midland Asphalt*, 489 U.S. at 799, the question of Mr. Darin's nexus to the United States is "completely independent from his guilt or innocence," *Abney*, 431 U.S. at 660. For purposes of the Fifth Amendment right at issue, the question is rather whether the relationship between the defendant and the United States is sufficiently close such that application of United States criminal law "would not be arbitrary or fundamentally unfair." *Al Kassar*, 660 F.3d at 118 (internal quotation marks omitted).

ion). It is for precisely this reason that the Seventh Circuit has interpreted *Abney* to permit immediate appeals of denials of motions to dismiss on behalf of foreign defendants residing outside the United States, where the defendant was invoking a right "not to stand trial."

In *Kashamu*, the Seventh Circuit permitted the defendant, a Nigerian citizen believed to be residing in Nigeria, to appeal the denial of a motion to dismiss based on the collateral estoppel effect of a foreign court judgment. 656 F.3d at 681-83. Relying on *Abney*, the court noted that "Kashamu is asserting a right not just not to be convicted, but not to be tried, and such a right would be lost forever if review were postponed until final judgment." *Id.* at 681. The court explained that this "right . . . not to be tried" protects against "the burdens of suit," which "would not be avoided if the defendant had to wait to challenge the denial of [a motion to dismiss] until a final judgment against him was entered." *Id.* at 682.

Similarly, in *Bokhari*, the Seventh Circuit permitted the defendant, a dual citizen of the United States and Pakistan residing in Pakistan, to immediately appeal the denial of a motion to dismiss based on international comity. 757 F.3d at 666, 669-71. Again relying on *Abney*, the court explained that "if we wait until after trial to hear Bokhari's appeal, his claim to dismiss the indictment without trial will be moot and unreviewable." *Id.* at 669-70.

The Second Circuit's decision here cannot be reconciled with these Seventh Circuit cases. The Fifth Amendment right Mr. Darin seeks to invoke

protects against more than just the possibility of being *convicted* without a sufficient connection to the United States. It also "ensure[s] that a defendant is not improperly haled before a court for trial." *Klimavicius-Viloria*, 144 F.3d at 1257. Like the defendants in *Bokhari* and *Kashamu*, in other words, Mr. Darin seeks to invoke "a right . . . not to be tried."

If anything, Mr. Darin's appeal offers an even more compelling basis for applying the collateral order doctrine than in *Bokhari* and *Kashamu*. In both those cases, there was at least a possibility that the defendant could be extradited and face trial. Here, in contrast, Mr. Darin is not subject to extradition in his home country of Switzerland. *See* Swiss Federal Constitution, art. 25, § 1. His case is as final as it will ever be.

The collateral order doctrine, in short, is about whether a defendant can appeal now or must wait until later. But the Second Circuit's refusal to apply the collateral order doctrine means that Mr. Darin will *never* get an opportunity to appeal.[10] The func-

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[10] As noted *supra* at 13, Mr. Darin also sought mandamus review of the district court decision. Because of its deferential and discretionary standard of review, mandamus is no substitute for the *de novo* review afforded by direct appeal. *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 391 (2004) ("[T]he issuance of the writ is a matter vested in the discretion of the court to which the petition is made . . . ."); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) ("It is, of course, well settled, that the writ is not to be used as a substitute for appeal . . . .").

tional effect of the Second Circuit's decision is that Mr. Darin can obtain appellate review of the government's attempt to hale him in to court only by voluntarily traveling to the United States and allowing himself to be haled into court. This incongruous holding disregards both the effective finality of the district court's decision and the fact that Mr. Darin—like the defendants in *Abney*, *Kashamu*, and *Bokhari*—has invoked "a right . . . not to be tried." For both of these reasons, the collateral order doctrine applies in this case, and *certiorari* is necessary to eliminate the Catch-22 created by the Second Circuit decision.

B. The Second Circuit's Broad Interpretation Of The Fugitive Disentitlement Doctrine Misapplies This Court's Decisions And Conflicts With Seventh Circuit Law.

The district court decision from which the Second Circuit refused to hear Roger Darin's appeal based on the collateral order doctrine itself did not base its holding on the merits of Mr. Darin's motion to dismiss. Instead, applying the fugitive disentitlement doctrine, it, too, refused to reach the merits of Mr. Darin's constitutional claim. This decision, in clear contravention of this Court's articulation of the doctrine as well as a clear decision of the Seventh Circuit, furnishes another reason for this Court to grant the petition in this case.

The fugitive disentitlement doctrine allows courts to refuse to hear motions made on behalf of fugitives from justice because of their fugitive status.

See Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (per curiam). If a defendant is a fugitive, then a court must consider whether, in light of the rationales underlying the doctrine, it should abstain from hearing the application. *See Degen v. United States*, 517 U.S. 820, 824-25 (1996), *superseded on other grounds by* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. §§ 983, 985 and 28 U.S.C. §§ 2466-2467); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239-42 (1993). One such rationale is the concern, referred to in the decisions below as "mutuality," that any judgment issued by the court against a fugitive defendant would not "prove enforceable." *Ortega-Rodriguez*, 507 U.S. at 239-40; *see also* Pet. App. 14a-16a, 35a-38a. Other rationales include the need to prevent the flouting of the judicial process and to discourage flights from prosecution and escape. *See Degen*, 517 U.S. at 828; *Ortega-Rodriguez*, 507 U.S. at 240 (quoting *Molinaro*, 396 U.S. at 366).

The Second Circuit sanctioned the district court's order disentitling Mr. Darin, a decision based on findings that Mr. Darin was a "fugitive" and that all rationales for the doctrine supported disentitlement. Pet. App. 3a, 8a-17a. On both counts, the district court's decision misconstrues this Court's holdings on the disentitlement doctrine and conflicts with the Seventh Circuit's decision in *In re Hijazi*, 589 F.3d 401 (7th Cir. 2009).

In *Hijazi*, the Seventh Circuit considered the criminal prosecution of a Lebanese citizen residing in Kuwait. *Id*. at 403. Mr. Hijazi moved to dismiss the

indictment, but the magistrate judge recommended that the motion be denied on the basis of the fugitive disentitlement doctrine because Mr. Hijazi was a fugitive. *Id*. at 405-06. The district court recognized that the doctrine did not "directly" apply to Mr. Hijazi's case because "Hijazi has not yet been convicted of a crime[and] Hijazi has never been physically present within the jurisdiction of this Court." *Id*. at 406 (internal quotation marks omitted). But in considering "the policies behind the doctrine," the district court found there was no "mutuality" because "Hijazi has little to lose—if anything—from an unfavorable ruling on his motion." *Id*. (internal quotation marks omitted). Ultimately, it declined to rule on Mr. Hijazi's motion. *Id*.

On mandamus review, the Seventh Circuit ordered the district court to reach the merits of Mr. Hijazi's motion. *Id*. at 403, 412. The Seventh Circuit agreed with the district court that Mr. Hijazi was not a fugitive because he "did not flee from the jurisdiction or from any restraints placed upon him." *Id*. at 412. But the Seventh Circuit disagreed with the district court's narrow assessment of mutuality: "[T]he district court took too narrow a view of the adverse consequences that Hijazi would suffer if he loses on his motion to dismiss." *Id*. at 413. The court noted that Mr. Hijazi could never leave Kuwait or travel to the United States if he lost on his motion to dismiss. *Id*. Indeed, Mr. Hijazi stood "to lose more than a civil defendant making an old-fashioned special appearance." *Id*.

The decision below to disentitle Roger Darin conflicts squarely with *Hijazi* and serves none of the purposes of the disentitlement doctrine articulated by this Court. First, just as in *Hijazi*, Mr. Darin's motion did not lack "mutuality." To the contrary, a decision upholding the charge against Mr. Darin would "entail significant burdens for" him, including restrictions on his ability to travel and work. Pet. App. 37a. Disentitling Mr. Darin would accordingly not serve the goal of "enforceability." *See Ortega-Rodriguez*, 507 U.S. at 239-40. Second, just as in *Hijazi*, Mr. Darin did not escape the United States or "flout the judicial process" by refusing to appear. Rather, it is undisputed that Mr. Darin was *never* in the United States at any relevant time, and, as the magistrate judge correctly found, he is not defying any order of the court by "avoiding the arrest warrant—a document that does not compel his voluntary surrender—merely by remaining in his home country." Pet. App. 38a. Disentitling Mr. Darin would accordingly not serve any of the *other* purposes of the disentitlement doctrine identified by this Court. *See Degen*, 517 U.S. at 824-25, 828; *Ortega-Rodriguez*, 507 U.S. at 239-42.

* * *

For those foreign citizens like Roger Darin who cannot lawfully be extradited to the United States, the Second Circuit decision creates a constitutional vacuum. The government can charge *any* such foreign citizen, for *any* foreign conduct—no matter how remote—and the constitutionality of its charge will be immune from scrutiny unless the de-

fendant decides to voluntarily travel to this country and submit himself to the jurisdiction of the court. Most defendants will not make the journey, particularly where, as here, their essential claim is that it is fundamentally unfair to force them to appear in this country. With foreign defendants all deemed to be fugitives and courts unwilling to hear their claims, there is no check on the government's freedom to decide for itself the extent to which U.S. criminal law extends "into the international field." *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987) (internal quotation marks omitted). Such an outcome would plainly undercut the protections afforded by the Fifth Amendment, and cannot be what the collateral order and fugitive disentitlement doctrines were designed to achieve.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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October 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee*,	
v.	15-2597
TOM ALEXANDER WILLIAM HAYES, AKA SEALED DEFENDANT 1, *Defendant*,	S.D.N.Y. No. 12-MJ-3229
ROGER DARIN, AKA SEALED DEFENDANT 2, *Defendant-Appellant*.	

IN RE ROGER DARIN, *Petitioner*.	15-3896

Appeal from the United States District Court
for the Southern District of New York
Paul A. Crotty, District Judge, Presiding

Filed: March 15, 2016

Before: Rosemary S. Pooler, Richard C. Wesley, Circuit Judges; Richard K. Eaton,* Judge.

* Judge Richard K. Eaton, of the United States Court of International Trade, sitting by designation.

In 15-2597, the Government moves to dismiss the appeal for lack of appellate jurisdiction, and, under 15-3896, Roger Darin petitions for a writ of mandamus. Upon due consideration, it is hereby ORDERED that the Government's motion to dismiss is granted because the district court's order is not immediately appealable. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). It is further ORDERED that the mandamus petition is DENIED because Darin has not demonstrated that exceptional circumstances warrant the requested relief. *See In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010).

FOR THE COURT:

s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals
Second Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. TOM ALEXANDER WILLIAM HAYES *and* ROGER DARIN, *Defendants*.	No. 12-MJ-3229

Filed: August 3, 2015

Before: Honorable Paul A. Crotty,
United States District Judge

Opinion by Judge Paul A. Crotty

ORDER PARTIALLY ADOPTING MEMORANDUM & ORDER

Defendant Roger Darin, a Swiss citizen residing in Switzerland, moves to dismiss a criminal complaint which charges him with conspiracy to manipulate the LIBOR[1] for Yen in violation of 18 U.S.C. § 1343 ("Section 1343"). Darin argues that the complaint violates his Fifth Amendment right to due process because he lacked a sufficient nexus to the United States and received insufficient notice that the alleged conduct was criminal. Darin also argues that Section 1343 cannot be applied extraterritorially to cover his acts which allegedly occurred outside the United States.

The Government responds that Darin is not entitled to Fifth Amendment protection at this time and that, in any event, the Court should decline to rule on the merits of Darin's motion under the fugitive disentitlement doctrine. If the Court were to rule on the merits, the Government contends that the criminal complaint alleges a domestic application of Section 1343 and that the Fifth Amendment nexus and notice requirements are satisfied.

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[1] The LIBOR refers to the London Interbank Offered Rate. It is the "primary global benchmark for short-term interest rates, and it is calculated by averaging the estimates from leading banks around the world of the rates they would be charged if borrowing from other banks." Compl. ¶ 7

After extensive briefing and an oral hearing, Magistrate Judge Francis issued a Memorandum and Order ("Order") on March 20, 2015. Magistrate Judge Francis determined that Darin was entitled to Fifth Amendment protection and declined to apply the fugitive disentitlement doctrine. The Order also found that the complaint alleged a domestic application of Section 1343 and satisfied the Fifth Amendment nexus and notice requirements.

Darin objected to the Order's conclusion that Section 1343 was being applied domestically and that the nexus and notice requirements were satisfied. The Government objected to the Order's failure to apply the fugitive disentitlement doctrine. Neither party objected to the Order's conclusion that Darin was protected by the Fifth Amendment; finding no clear error, the Court, therefore, adopts that section of the Order in full. *See* Order 4-9.

On June 23, 2015, the Court heard oral arguments in the matter. After considering the arguments made in court, as well as the lengthy memorandums submitted by each party, the Court determines that the fugitive disentitlement doctrine bars Darin's motion to dismiss. But even if the motion were not barred, the complaint alleges a domestic application of Section 1343 and satisfies both the nexus and notice requirements of the Fifth Amendment. Accordingly, Darin's motion to dismiss is DENIED.

BACKGROUND

On December 12, 2012, the Government filed a criminal complaint against Roger Darin,[2] alleging he conspired to commit wire fraud in violation of Section 1343 by manipulating the LIBOR for Yen. From 2006 to 2009, Darin allegedly conspired to falsify UBS's "daily Yen LIBOR submissions to the [British Bankers' Association] regarding the interest rates at which UBS could borrow reasonable sums denominated in Yen from other banks." Compl. ¶ 21(a). The complaint alleges that these submissions caused "the final Yen LIBOR fixings published by Thomson Reuters to move in directions favorable to UBS trading positions in Yen LIBOR-based derivative products." *Id.* The complaint also alleges that Darin "caused the publication of manipulated interest rate information in New York, New York." *Id.* at ¶ 2.

Pursuant to the complaint, Magistrate Judge Maas issued an arrest warrant for Darin on December 12, 2012. Darin has not yet been arrested since he is a Swiss citizen, residing in Switzerland. Nor has Darin submitted to the Court's jurisdiction—he "appears" solely through his lawyers, whom he retained to dismiss the complaint.

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[2] The Complaint also names Tom Hayes, alleging one count of wire fraud conspiracy, one substantive count of wire fraud, and one substantive count of antitrust violations. Hayes was tried and convicted on August 3, 2015 in London's Southwark Crown Court of eight counts of fraud for his role in manipulating the LIBOR.

DISCUSSION

I. *Legal Standard*

The Court construes Magistrate Judge Francis's Order as a criminal Report and Recommendation. *See* Fed. R. Crim. P. 59. Under Rule 59(b)(3), if a party objects to a Report and Recommendation for a dispositive matter, the Court must consider the matter *de novo*. Accordingly, since Darin objects to the Order's failure to dismiss the complaint and since the Government objects to the Order's failure to apply the fugitive disentitlement doctrine, the Court considers these matters *de novo*.

II. *Analysis*

A. The fugitive disentitlement doctrine applies

"Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 517 U.S. 820, 823, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)). To that end, the fugitive disentitlement doctrine is "an 'equitable doctrine' that may be applied at court discretion" barring fugitives from seeking judicial

relief. *Hanson v. Phillips*, 442 F.3d 789, 795 (2d Cir. 2006) (citation omitted).[3]

While the "paradigmatic object of the doctrine is the convicted criminal who flees while his appeal is pending," *Gao v. Gonzales*, 481 F.3d 173, 175 (2d Cir. 2007) (internal quotation marks and citation omitted), it applies to defendants that evade the authority of the justice system at any stage of the criminal process. *See, e.g., United States v. Buck*, No. 13 Cr. 282(VM), 2015 WL195872 (S.D.N.Y. Jan. 9, 2015) (denying the defendant's request for a bail hearing because he was a fugitive). When determining if the doctrine applies, the Court must consider the threshold question of whether the defendant is a "fugitive." Then, the Court must weigh the following four factors: (1) whether a decision on the merits would be enforceable; (2) whether the defendant is flouting the judicial process; (3) whether a decision on the merits would encourage similar flights from justice; and (4) whether the defendant's evasion prejudices the Government. *See Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 278, 280 (2d Cir. 1997).

The Government argues that Darin is a fugitive because he failed to surrender pursuant to the Government's arrest warrant, dated December

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[3] The fugitive disentitlement doctrine does not interfere with the Court's jurisdiction since the Court has jurisdiction over all offenses against the laws of the United States. *See* 18 U.S.C. § 3231.

12, 2012. The Government also argues that the doctrine's four factors require disentitlement. Darin argues that since he never fled from the United States, he is not a fugitive. And even if he were a fugitive, Darin argues that the doctrine's four factors weigh against disentitlement. Magistrate Judge Francis agreed with Darin, concluding that because the four factors weighed against disentitlement, he need not reach the "thorny" question of whether Darin is a fugitive. Order 9-11. Considering the matter *de novo,* the Court rules that Darin is a fugitive and that, upon a full consideration of the four factors, the fugitive disentitlement doctrine applies.

(i) Darin is a fugitive

Under the common law, a "fugitive" was defined as one who "flees or escapes" from custody. BLACK'S LAW DICTIONARY (10th ed. 2014). Indeed, the quintessential image of a fugitive is fresh in the public mind in light of the recent prison break at the Clinton Correctional Facility in Dannemora, New York, and the subsequent 22-day manhunt for the two fugitives.

But defendants need not affirmatively flee to be labeled fugitives. *In re Grand Jury Subpoenas dated March 9, 2001*, 179 F. Supp. 2d 270, 287 (S.D.N.Y. 2001) ("[A] person can be a fugitive even when he does not 'flee' but is simply found outside the jurisdiction" (internal quotation marks and citation omitted)). Rather, defendants "constructively flee" when they were present in the jurisdiction at the time of the alleged crime, they

subsequently leave the jurisdiction, and they decide not to return upon learning they are wanted by the authorities. *See Buck*, 2015 WL 195872, at *2 ("The concept of 'constructive flight' has been clearly adopted in the Second Circuit and applies where a defendant evades prosecution by remaining outside of the Court's jurisdiction after learning of the charges against him.").

The connection between "flight" and "fugitive status" is best understood when one considers that most federal crimes are committed by defendants who are physically located in the United States. Hence, defendants flee the jurisdiction either before, during, or after the prosecution commences, becoming fugitives. But a limited, though still significant, number of crimes can be committed by defendants who never set foot in the United States. For example, a defendant can conspire to commit wire fraud—as the Government alleges Darin did here—based entirely on actions taken abroad that use United States wires. Defendants who have allegedly violated United States law from afar neither have the capacity nor incentive to flee the United States. Are such defendants not appropriately classified as fugitives, simply because they allegedly committed their crimes remotely?

Consider the following hypothetical example: A defendant works at a bank in New York and allegedly conspires to manipulate financial data using United States wires. The Government files a criminal complaint alleging a conspiracy to violate Section 1343 and obtains an

arrest warrant. The Government fails to arrest the defendant because he flees the jurisdiction. Certainly, the defendant is a fugitive.

Now consider the Government's allegations against Darin: Darin worked at a bank in Switzerland and allegedly conspired to manipulate the LIBOR using United States wires. The Government filed a criminal complaint alleging a conspiracy to violate Section 1343 and obtained an arrest warrant. The Government failed to arrest Darin because he remains in Switzerland, a nation which does not extradite its citizens for financial crimes. Is Darin not also a fugitive?

Both the hypothetical defendant and Darin are charged with the same criminal conduct. Both have valid arrest warrants. And both have avoided arrest. The sole difference is that the hypothetical defendant allegedly committed the crime while physically located in the United States; therefore, he had to fee the jurisdiction to avoid prosecution. But Darin allegedly committed the crime while physically located outside the United States and asserts that he can avoid, prosecution by simply remaining outside the jurisdiction.

In the civil forfeiture context, Congress avoids this anomaly by explicitly extending the fugitive disentitlement doctrine beyond common-law fugitives:

> A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related

> civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person—
>
> (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution—
>
> (A) purposely leaves the jurisdiction of the United States;
>
> (B) declines to *enter or reenter* the United States to submit to its jurisdiction; or
>
> (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person.

28 U.S.C. § 2466(a) (emphasis added); *see also Collazos v. United States*, 368 F.3d 190, 199-200 (2d Cir. 2004) ("Congress's use of 'enter' as well as 'reenter' in subpart B extends disentitlement authority beyond common-law fugitives, who may have been in the United States at the time they committed the charged crimes and who refuse to return, to persons who, although they may have never set foot within the territorial jurisdiction of the United States, know that warrants are outstanding for them and, as a result, refuse to enter the country"). Courts, too, have expanded the definition of "fugitive" outside of the civil forfeiture setting. *See*

United States v. Chung Cheng Yeh, No. CR 10-00231 (WHA), 2013 WL 2146572 (N.D. Cal. May 15, 2013) (applying the fugitive disentitlement doctrine to a defendant who was never physically present in the United States); *see also Buck*, 2015 WL 195872 (applying the fugitive disentitlement doctrine to a Swiss defendant who was only briefly in the United States and allegedly committed most of acts while living in Switzerland).

In line with these developments, the definition of a "fugitive" should take account of the realities of modern criminal prosecutions, coping with the strains of globalization. The Court cannot be bound by the semantics that limit fugitive status to fleeing or failing to return when dealing with an international criminal defendant who allegedly violated United States law from abroad. Instead, the Court considers the real-world implication of the Government's allegations: Darin allegedly violated United States law; a warrant for Darin's arrest was issued by Magistrate Judge Maas; Darin would be arrested if he entered the United States (or if he left Switzerland); and Darin has avoided arrest by remaining in Switzerland. That Darin did not flee the United States should not preclude him from being labeled a fugitive as a matter of law.

(ii) The fugitive disentitlement doctrine applies

The Court has no hesitation in applying the fugitive disentitlement doctrine. Indeed, the doctrine exists precisely to guard against defendants, like Darin, that "attempt[] to invoke from a safe distance only so much of a United States court's jurisdiction

as might secure him [a dismissal] while carefully shielding himself from the possibility of a penal sanction." *Collazos*, 368 F.3d at 200. Each of the following factors weighs in favor of disentitlement.

First, the Court's decision will not be enforceable in Darin's absence. *See Smith v. United States*, 94 U.S. 97, 97, 24 L. Ed. 32 (1876) ("It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party . . . is where he can be made to respond to any judgment we may render"). Often termed "mutuality," this factor weighs in favor of disentitlement when a favorable decision benefits a defendant but an adverse decision has no effect. Here, mutuality is clearly lacking. If the Court dismisses the complaint, Darin benefits. But if the Court affirms the complaint, Darin will continue to ignore the complaint and arrest warrant. *See* Tr. 10:6-16 (counsel for Darin acknowledging that "under no circumstances" will Darin come to the United States). The Magistrate Judge reaches a different result, concluding that the Court's order and arrest warrant remain enforceable in Darin's absence. Order 12-13. This begs the question of how the Court can enforce an order against a defendant who has not submitted to the Court's jurisdiction. Darin will continue to ignore any order made by this court by simply remaining in Switzerland, his home country. The Order also concludes that Darin would be bound by an adverse result since it would impose "significant burdens," forcing him to remain in Switzerland and hampering his ability to find a job. *Id.* at 13-14. But such "burdens" are typical for fugitives and cannot outweigh the competing benefit

of being able to live freely in Switzerland, The Order concludes by noting that "a decision denying Mr. Darin's motion will exacerbate the situation somewhat by imposing on him a choice either to live under these disabilities for an indeterminate length of time or submit to apprehension and extradition." *Id.* at 14. Said differently, Darin's "choice" is: compliance with a valid arrest warrant or continued evasion of United States authorities. Equitable doctrines cannot assist such decision-makers. Accordingly, since Darin will ignore any unfavorable order, mutuality is lacking.

Second, Darin is flouting the judicial process. He does so not merely by being absent, as the Order suggests, but rather by being absent, appearing through his lawyers, and openly stating that he will not comply with any unfavorable result—while at the same time asking the Court to rule in his favor. This is the very essence of flouting the judicial process. *See Buck*, 2015 WL 195872, at *3 ("Buck is not entitled to receive any potentially favorable rulings from this Court if he is unwilling to stand for and face the consequences of any potentially unfavorable rulings.").

Third, ruling on the merits of Darin's motion would encourage similarly situated defendants to remain outside the United States. If the Court were to permit Darin to move to dismiss the complaint without submitting to the Court's jurisdiction, it would enable any defendant located outside the United States to do likewise. This would eradicate any incentive for a foreign defendant to comply with an arrest warrant, submit to a court's jurisdiction,

and respond to the Government's allegations while enjoying the constitutional protections afforded to criminal defendants. Moreover, the Government points to specific examples of criminal defendants, similarly situated to Darin, who would likely engage in similar conduct if the Court entertained Darin's motion on the merits. *See* Mem. in Opp. 28.

Fourth, Darin's evasion prejudices the Government. If Darin continues to evade the Court's jurisdiction, the Government cannot prosecute what is already a very complex case, likely involving documents and witnesses located worldwide.

Accordingly, because Darin is a fugitive and because each factor favors disentitlement, the Court exercises its discretion under the fugitive disentitlement doctrine and declines to consider the merits of Darin's motion.

B. Even if the fugitive disentitlement doctrine did not apply, Darin's motion would be denied on the merits[4]

If the Court were to consider the merits of Darin's motion, the Court, reviewing the contested issues *de novo,* would fully adopt the Order's conclusions and deny the motion.

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[4] Though the Court declines to consider the merits of Darin's motion since he is a fugitive, in light of Magistrate Judge Francis's thorough and comprehensive Order, the Court includes its alternative holding. This will give any reviewing court a complete judicial record of the proceeding.

(i) Section 1343 is not being applied extraterritorially

The complaint alleges that Darin conspired to manipulate the LIBOR for Yen using United States wires. Compl. ¶ 1. Accordingly, there is no extraterritoriality here; the complaint alleges a domestic application because Congress's legislative concern was "to prevent the use of [United States wires] in furtherance of fraudulent enterprises." *United States v. Kim*, 246 F.3d 186, 191 (2d Cir. 2001) (citation omitted); *see also United States v. Gilboe*, 684 F.2d 235, 238 (2d Cir. 1982) ("[J]urisdiction under § 1343 is satisfied by defendant's use of the wires to obtain the proceeds of his fraudulent scheme"); *see also United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) ("[W]hat is proscribed is use of the telecommunication systems of the United States in furtherance of a scheme"). Neither *Morrison v. Nat. Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010), nor *European Community v. RJR Nabisco, Inc.*, 783 F.3d 123 (2d Cir. 2015) (en banc), alter this conclusion. Darin's argument that the location of the wires is "ancillary" to the location of the scheme to defraud must, therefore, be rejected because the location of the wires is the Court's primary concern.[5]

[5] Since the Court determines that this is a domestic application of the wire fraud statute, the Court need not adopt the Order's conclusion that Section 1343 cannot be applied extraterritorially.

(ii) A sufficient nexus exists

Darin argues that his alleged actions lack a sufficient nexus to the United States based on the standards imposed by specific jurisdiction in the civil context, whereby courts only have jurisdiction over foreign defendants that engage in conduct with a direct and foreseeable effect in the United States. *See Goldberg v. UBS AG*, 690 F. Supp. 2d 92 (E.D.N.Y. 2010). Darin contends that while his alleged conduct may have had a foreseeable effect in the United States, the conduct was never directed at the United States. *See Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419 (GBD), 2015 WL 1515358 (S.D.N.Y. Mar. 31, 2015) (dismissing a civil LIBOR claim for lack of personal jurisdiction); *see also 7 West 57th Street Realty Co., LLC v. Citigroup, Inc.*, No. 13 Civ. 981 (PGG), 2015 WL 1514539 (S.D.N.Y. Mar. 31, 2015) (dismissing a civil LIBOR claim against foreign banks for lack of personal jurisdiction). Moreover, Darin argues that conduct directed at global banking as a whole is insufficient to establish a nexus with the United States. *See Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) (dismissing worldwide reliance as a basis for personal jurisdiction), *abrogated on other grounds by Morrison*, 561 U.S. 247, 130 S. Ct. 2869.

But courts faced with a territorial offense—*i.e.,* a domestic application of Section 1343—do not need to conduct a "nexus" inquiry. *See United States v. Remire*, 400 F. Supp. 2d 627, 630-31 (S.D.N.Y. 2005) ("Given the limited information that is before the Court, it is not possible to undertake the detailed factual analysis required to assess whether the

government will be able to meet its jurisdictional burden."). Instead, at this stage the Fifth Amendment merely requires an inquiry into the "fundamental fairness" of the criminal complaint. *See United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011). Since Darin allegedly conspired to manipulate the LIBOR using United States wires, and since Darin was likely aware that this conduct would affect financial markets in the United States, his prosecution by United States authorities is not fundamentally unfair.

Even if the Court were to conduct a "nexus" inquiry, the complaint alleges a sufficient connection to the United States. The complaint alleges that Darin, using United States wires, "caused the publication of the manipulated interest rate information in New York, New York." Compl. ¶ 2(c). And the complaint alleges that Darin's co-conspirator, Tom Hayes, had ample connections to the United States. *See, e.g., id.* at ¶ 22 (alleging that Hayes traded with a counter party based in Purchase, New York). While Darin argues that his connections to the United States must be assessed independently from Hayes's, *see United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006), under general conspiracy principles actions taken by co-conspirators can be imputed to other co-conspirators. *See United States v. Manuel*, 371 F. Supp. 2d 404, 410 (S.D.N.Y. 2005) (actions taken by a co-conspirator in the United States brought the entire conspiracy "under American jurisdiction"); *see also Ford v. United States*, 273 U.S. 593, 622, 47 S. Ct. 531, 71 L. Ed. 793 (1927) ("[J]urisdiction exists to try one who is a conspirator[] whenever the conspiracy is

in whole or in part carried on in the country whose laws are conspired against"). Accordingly, based on Darin's own connection to the United States, and based on his alleged co-conspirator's connection to the United States, the Fifth Amendment nexus requirement is satisfied.

(iii) Sufficient notice exists

Darin argues that since he allegedly manipulated the LIBOR—which is based on providing hypothetical opinions to the British Bankers' Association—he had no notice that his conduct was criminal. Instead, he argues that he understood his conduct may have led to professional sanctions, such as the British Bankers' Association banning UBS from the LIBOR panel. But this concession, coupled with his alleged warnings to Hayes not to stray "too far from the 'truth,'" Compl. ¶ 21(d)(ii), demonstrates that he knew his opinions were false. Moreover, Darin would have known that these hypothetical opinions would benefit UBS at the financial expense of other banks. Based on these allegations, the Court is satisfied that Darin had sufficient notice under the Fifth Amendment that the alleged conduct was criminal. *See Al Kassar*, 660 F.3d at 119 ("Fair warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.").

CONCLUSION

For the reasons stated above, Darin is a fugitive and cannot challenge the complaint until he submits to the Court's jurisdiction. And even if Darin could challenge the complaint, the Court concludes that the complaint alleges a domestic application of Section 1343 and satisfies the Fifth Amendment nexus and notice requirements. Accordingly, Darin's motion to dismiss is DENIED.

Dated: New York, New York
August 3, 2015

SO ORDERED

s/ Paul A. Crotty
PAUL A. CROTTY
United States
District Judge

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. TOM ALEXANDER WILLIAM HAYES *and* ROGER DARIN, *Defendants*.	No. 12-MJ-3229

Filed: March 20, 2015

Before: James C. Francis IV,
United States Magistrate Judge

Memorandum and Order by
Magistrate Judge James C. Francis IV

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV, United States Magistrate Judge.

Roger Darin seeks to dismiss the criminal complaint filed against him by the United States of America (the "Government"), which alleges that he conspired with codefendant Tom Alexander William Hayes to commit wire fraud by manipulating the London Interbank Offered Rate ("LIBOR") for Yen. The motion is denied.

BACKGROUND

LIBOR is "the primary global benchmark for short-term interest rates." (Complaint, attached as Exh. A to Declaration of Bruce A. Baird dated Oct. 2, 2014, ¶ 7). During the relevant time period (roughly 2006-2009), the British Bankers' Association ("BBA") administered the LIBOR for Yen through its agent Thomson Reuters, which solicited each day from sixteen member banks "the rate at which members of the bank's staff primarily responsible for management of the bank's cash perceive that the bank can borrow unsecured funds from another bank in the designated currency over the specified maturity." (Complaint, ¶¶ 7-9; Memorandum of Law in Support of Defendant Roger Darin's Motion to Dismiss the Criminal Complaint ("Def. Memo.") at 1). After excluding the highest and 1 lowest four rates, Thomson Reuters averaged the remaining eight to derive the Yen LIBOR figure for the day. (Complaint, ¶ 10; Def. Memo. at 1-2). The resulting

rate was widely published, including in New York. (Complaint, ¶ 10).

Member banks of the Yen LIBOR panel such as UBS AG ("UBS") trade Yen LIBOR-based derivative products. (Complaint, ¶¶ 12, 17). One such product, an "interest rate swap," is an arrangement between two parties in which

> each party agrees to pay either a fixed or floating rate dominated in a particular currency to the other party. The fixed or floating rate is multiplied by a notional principal amount to calculate the cash flows which must be exchanged at settlement. The notional amount generally does not change hands.

(Complaint, ¶ 17). An interest rate swap is "effectively [a] wager[] on the direction in which Yen LIBOR [will] move." (Complaint, ¶ 18). Traders are compensated, in part, based on the profitability of their trading positions. (Complaint, ¶ 18).

The Complaint alleges that both Mr. Darin and Mr. Hayes worked at UBS and traded in short-term interest rates. Mr. Hayes was a senior Yen swaps trader at UBS in Tokyo; Mr. Darin traded in short-term interest rates at UBS in Singapore, Tokyo, and Zurich, and was responsible, either as principal or as supervisor, for the bank's Yen LIBOR submissions to the BBA. (Complaint, ¶¶ 15-16). According to the Complaint, Mr. Hayes conspired with Mr. Darin to manipulate the Yen LIBOR by presenting false and misleading submissions to the

BBA on behalf of UBS in order to increase the profitability of UBS' trading positions to the detriment of its counterparties, at least one of which was located in New York. (Complaint, ¶¶ 2, 19, 22). Mr. Hayes would ask Mr. Darin or Mr. Darin's subordinates (who had been instructed to heed the requests of Mr. Hayes and other UBS traders) that UBS' submission be raised or reduced—depending on Mr. Hayes' trading positions—from the rate that Mr. Darin would otherwise have submitted. Mr. Darin complied, resulting in considerable yield to Mr. Hayes' positions. (Complaint, ¶ 21(b)-(h)). For example, in one such communication, Mr. Hayes requested a low Yen LIBOR submission from UBS. (Complaint, ¶ 21(d)(i)). Mr. Darin informed him that the "'unbiased' 3-month Yen LIBOR submission would be 0.69 percent and that he could not set too far away from the 'truth' or he would risk getting UBS 'banned' from the Yen LIBOR panel." (Complaint, ¶ 21(d)(ii)). UBS' submission that day was 0.67 percent, resulting in a "3-month Yen LIBOR fix [] 1/8 of a basis point lower than it otherwise would have been." (Complaint, ¶ 21(d)(iv)). Such requests were made by Mr. Hayes or at his direction on approximately 335 out of 738 trading days between November 2006 and August 2009. (Complaint, ¶ 21(h)). The manipulated LIBOR was published to servers in New York. (Complaint, ¶ 10). Moreover, confirmations for certain trades with a New York counterparty affected by those manipulated rates were electronically routed from

UBS' overseas offices to servers located in this district.[1] (Complaint, ¶ 22).

The Government filed the Complaint in December 2012. It charges Mr. Darin with conspiracy to commit wire fraud, pursuant to 18 U.S.C. § 1349, by engaging in the activities outlined above. Mr. Darin, a Swiss citizen living in Switzerland, now seeks to dismiss the Complaint, arguing that it violates his Fifth Amendment right to due process. Specifically, he contends that, as "a foreign national[] [charged] with conspiring to manipulate a foreign financial benchmark, for a foreign currency, while working for a foreign bank, in a foreign country," he lacks a sufficient nexus to the United States and did not have constitutionally adequate notice that his alleged conduct was criminal. (Def. Memo. at 1-2). In addition, he argues that prosecuting him under these circumstances would violate the presumption against extraterritorial application of American law.

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[1] The Government represented in its papers and at oral argument that Mr. Darin himself also traded Yen LIBOR swaps with counterparties in the United States and that the alleged manipulation impacted these trades. (Opposition to Defendant Roger Darin's Motion to Dismiss the Criminal Complaint ("Gov't Memo.") at 6 n.4, 23 n.16; Transcript of Oral Argument dated Jan. 12, 2015 ("Tr.") at 43). However, I am evaluating the sufficiency of the Complaint, which does not include any such allegations.

DISCUSSION

The Government opposes Mr. Darin's substantive arguments but also contends that the Fifth Amendment is inapplicable at this juncture and that the fugitive disentitlement doctrine counsels against addressing the constitutional and statutory arguments presented. I will address these two threshold questions first.

A. *Applicability of the Fifth Amendment*

Relying primarily on *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), the Government contends that Mr. Darin *"currently* cannot assert claims under the Fifth Amendment" because he is a foreign national at liberty on foreign soil. (Gov't Memo. at 8-10). This argument is not legally sound.

Eisentrager concerned the post-World War II conviction by a United States military tribunal in China of a number of German nationals for "violating the laws of war[] by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan." 339 U.S. at 765-66, 70 S. Ct. 936. The prisoners petitioned for writs of habeas corpus, arguing that "their trial, conviction and imprisonment violate[d]" various constitutional provisions including the Fifth Amendment. *Id.* at 767, 70 S. Ct. 936. The Supreme Court denied the writ, holding that constitutional protections did not extend to enemy aliens, and noting that the "prisoners at no relevant time were within any territory over which the United States is sovereign,

and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-78, 70 S. Ct. 936. The Government appears to contend that *Eisentrager* announces a rule that Fifth Amendment protections can never apply to non-citizens who are not "presen[t] in the United States (or U.S.-controlled) territory." (Gov't Memo. at 10).

That is too facile a reading. *Boumediene v. Bush* warned against a "formalis[tic]" application of *Eisentrager* because the extraterritorial application of constitutional principles "turn[s] on objective factors and practical concerns." 553 U.S. 723, 764, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008). And the types of objective circumstances and practical considerations with which the *Eisentrager* Court was concerned—for example, the fact that affording the enemy alien petitioners the Fifth Amendment rights they sought would "put [] them in a more protected position than our own soldiers," *Eisentrager,* 339 U.S. at 784, 70 S. Ct. 936—are not present here. *See also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 201 (2d Cir. 2008) ("[T]he Court's rejection of the Fifth Amendment claim in *Eisentrager* cannot be unmoored from the salient facts of the case: an overseas conviction of 'nonresident enemy aliens,' following the cessation of hostilities, by a duly-constituted military court.").

To be sure, the Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990), characterizes *Eisentrager* as "reject[ing][] extraterritorial

application of the Fifth Amendment [] emphatic[ally]," but that dictum must also be construed in context. In that case, Mexican officials apprehended Rene Martin Verdugo-Urquidez, a Mexican citizen and resident, pursuant to a United States arrest warrant and transported him to United States territory to be arrested. *Id.* at 262, 110 S. Ct. 1056. In concert with Mexican law enforcement personnel and without a search warrant, the Drug Enforcement Agency then searched the defendant's Mexican properties and seized certain documents. *Id.* at 262, 110 S. Ct. 1056. The Supreme Court held that the Fourth Amendment did not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." *Id.* at 261, 110 S. Ct. 1056. At the outset of its analysis, the Court stated that the Fourth Amendment "operates in a different manner than the Fifth Amendment," offering the example that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." *Id.* at 264, 110 S. Ct. 1056. Thus, the Court's later reference to *Eisentrager's* "emphatic" holding is consistent with the proposition that the applicability of Fifth Amendment protections depends on the venue and the tribunal: while such protections apply in United States civilian courts, they may not always pertain in military proceedings. *See Eisentrager,* 339 U.S. at 785, 70 S. Ct. 936 (holding that Fifth Amendment does not confer immunity from military trial on enemy aliens "engaged in the hostile service of a government at war with the United States"); *In re Terrorist Bombings*, 552 F.3d at 198-205 (holding that Fifth Amendment and *Miranda v. Arizona*, 384

U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), apply to admission in federal court of statements made by foreign nationals in foreign custody to United States law enforcement officers).

In his concurring opinion in *Verdugo-Urquidez*, Justice Kennedy reasoned that constitutional protections must be interpreted "in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad," and he concluded that, where "[t]he United States is prosecuting a foreign national in a court established under Article III, [] all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant." *Verdugo-Urquidez*, 494 U.S. at 277-78, 110 S. Ct. 1056 (Kennedy, J. concurring). Justice Kennedy recognized, of course, that "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory," *id.* at 275, 110 S. Ct. 1056 (Kennedy, J. concurring); however, a criminal complaint certainly creates a cognizable "juridical relation" between the defendant and the court in which the complaint is filed.

Other cases bear this out. For example, the defendant in *In re Hijazi* was a Lebanese citizen residing in Kuwait, indicted in an Illinois federal court. 589 F.3d 401, 403 (7th Cir. 2009). He sought to dismiss the indictment based, among other things, on violation of his right to due process, but "[t]he district court refuse[d] to rule on his motions . . .

[unless] he appear[ed] in person and [was] arraigned." *Id.* The Seventh Circuit issued a writ of mandamus directing the district court to rule on the defendant's motions, suggesting that he had a sufficient relationship with the United States to trigger due process protections. *Id.* at 406-12; *see also United States v. Noriega*, 683 F. Supp. 1373, 1374-75 (S.D. Fla. 1988) (allowing indicted "*de facto* head of a foreign government" to file motion attacking indictment, and citing "basic notions of due process"). By contrast, the Government cites no case standing for the proposition that limits on the extraterritorial reach of the Constitution bar a court from addressing a motion to dismiss a criminal complaint or indictment on constitutional grounds on account of the defendant's status as a non-resident alien outside United States territory. I therefore reject the Government's contention that Fifth Amendment protections are inapplicable to the defendant here.

B. *Fugitive Disentitlement Doctrine*

The Government next argues that I should decline to address Mr. Darin's motion pursuant to the fugitive disentitlement doctrine. This discretionary doctrine allows a court to refrain from expending its resources on an application presented by a fugitive. *In re Grand Jury Subpoenas dated March 9, 2001*, 179 F. Supp. 2d 270, 285-86 (S.D.N.Y. 2001). The Second Circuit has

> articulated four rationales for applying the fugitive disentitlement doctrine: 1) assuring the enforceability of any decision that may be rendered

> against the fugitive; 2) imposing a penalty for flouting the judicial process; 3) discouraging flights from justice and promoting the efficient operation of the courts; and 4) avoiding prejudice to the other side caused by the defendant's escape.

Bano v. Union Carbide Corp., 273 F.3d 120, 125 (2d Cir. 2001) (internal quotation marks omitted); *accord Hanson v. Phillips*, 442 F.3d 789, 795 (2d Cir. 2006). The doctrine thus presents two questions: whether the applicant is a fugitive and, if so, whether, in light of the factors underlying the doctrine, a court should abstain from addressing his application. *In re Grand Jury Subpoenas*, 179 F. Supp. 2d at 287.

1. Fugitive Status

The first question is a thorny one. *See, e.g., United States v. Bokhari*, 757 F.3d 664, 672 (7th Cir. 2014) ("Identifying fugitives for purposes of the disentitlement doctrine can present complicated legal and factual questions . . . . [T]he term 'fugitive' may take on subtly different meanings as it is used in a variety of legal contexts."); *United States v. Baccollo*, 725 F.2d 170, 172 (2d Cir. 1983) (noting difficulty of determining fugitive status of defendant who both absconded and was returned before district court entered judgment). Although the word "fugitive" conventionally indicates flight, *see* Black's Law Dictionary 786 (10th ed. 2014), "[i]t is unnecessary for a court to find that a defendant physically fled to decide he is a fugitive. Rather, . . . 'the intent to flee' can be inferred when a person

'fail[s] to surrender to authorities once he learns that charges against him are pending.'" *United States v. Buck,* No. 13 Cr. 282, 2015 WL 195872, at *1 (S.D.N.Y. Jan. 9, 2015) (third alteration in original) (quoting *United States v. Catino*, 735 F.2d 718, 722 (2d Cir. 1984)). It is unclear, however, whether a "fail[ure] to surrender" imposes fugitive status on a defendant who was not present in the United States during the alleged crime, at the time of charging, or at any time since he became aware of the charges. *Compare In re Hijazi*, 589 F.3d at 412-13 (non-resident alien not fugitive where only presence in United States was unrelated to case), *and In re Grand Jury Subpeonas*, 179 F. Supp. 2d at 287 ("One [who has 'constructively fled'] cannot be a fugitive . . . unless (i) he was present in the jurisdiction at the time of the alleged crime, (ii) he learns, while he is outside the jurisdiction, that he is wanted by the authorities, and (iii) he then fails to return to the jurisdiction to face the charges."), *with* 28 U.S.C. § 2466(a) (allowing application of disentitlement doctrine in civil forfeiture actions to persons who, after notice that process has been issued for apprehension, "decline[] to enter or reenter the United States to submit to its jurisdiction" in order to avoid criminal prosecution), *and United States v. Hernandez*, No. 09 CR 625, 2010 WL 2652495, at *5 (S.D.N.Y. June 30, 2010) ("[H]ow the person became a 'fugitive' is not necessarily relevant because the focus is on the intent to return and appear before the court.").

Here, Mr. Darin's intent to avoid prosecution is clear. His counsel asserts that the Complaint "has effectively confined Mr. Darin to Switzerland" and

that "if the court upholds the Government's [C]omplaint, the restrictions under which he has been living will become permanent." (Declaration of Bruce A. Baird dated Dec. 3, 2014 ("Baird 12/3/14 Decl."), ¶¶ 5, 7). On the other hand, the record before me does not indicate that Mr. Darin has ever even entered the United States. Nor has he hidden his whereabouts from United States authorities. He has merely remained in his home country. In any case, I need not decide the question of his status because, even assuming Mr. Darin is a fugitive, I would not apply the disentitlement doctrine in this case.

2. *Rationales for Doctrine*

a. *Mutuality*

A primary ground for applying the fugitive disentitlement doctrine is the absence of "mutuality," which occurs when a decision in favor of an applicant would benefit him, but a decision against him would not be enforceable or would not operate to his disadvantage. *See, e.g., In re Hijazi*, 589 F.3d at 412-13 ("[I]f [a defendant] wants the United States to be bound by a decision dismissing the indictment, he should be similarly willing to bear the consequences of a decision upholding it."); *United States v. Eng*, 951 F.2d 461, 465 (2d Cir. 1991) (noting "the impropriety of permitting a fugitive to pursue a claim in federal court where he might accrue a benefit, while at the same time avoiding an action of the same court that might sanction him"), *abrogated on other grounds by Degen v. United States*, 517 U.S. 820, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996). The textbook example of this occurs where a person who

has appealed his conviction absconds. *See, e.g.*, *Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S. Ct. 498, 24 L. Ed. 2d 586 (1970) (per curiam) ("No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction."); *United States v. Awadalla*, 357 F.3d 243, 246 (2d Cir. 2004) ("Because Awadalla absconded after challenging his judgment of conviction in this Court, there is no doubt that we have the authority to dismiss his appeal.").

The Government contends that "if the Court decides against [Mr.] Darin, the decision will not be enforceable: [Mr.] Darin will not submit to the Court's jurisdiction if the Court denies his motion on the merits." (Gov't Memo. at 36). I assume that the factual statement is correct; Mr. Darin seems to ratify it. (Baird 12/3/14 Decl., ¶ 7). I disagree, however, with the legal premise. The effect of a decision upholding the validity of the complaint will be to allow the charges, and the arrest warrant issued pursuant to those charges, to stand. That decision, like the arrest warrant, is enforceable even in Mr. Darin's absence.[2] Likewise, the arrest warrant will still be enforceable. That is precisely the point made in *United States v. Finkielstain*, No. 89 Cr. 0009, 1999 WL 1267467 (S.D.N.Y. Dec. 29, 1999). In

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[2] It is worth noting that an arrest warrant—unlike a judgment of conviction, for example—imposes no duty on a defendant; it creates a duty in an "authorized officer" to arrest the accused. (Warrant for Arrest of Roger Darin dated Dec. 12, 2012).

that case, the defendant, who resided in "his native Argentina" after he was voluntarily deported, sought a declaration that a warrant issued for his arrest was "a nullity." *Id.* at *1. Rejecting the argument that mutuality was lacking, the court noted that the defendant would "be bound by any decision denying relief just as much as he would be bound by one granting it. A decision denying relief would simply leave matters where they were before, with an outstanding warrant in place." *Id.* at *2. There is no merit to the argument that a decision denying Mr. Darin's motion is not binding upon him.

Moreover, affirming the validity of the complaint will entail significant burdens for Mr. Darin. In *In re Hijazi,* a case with remarkably similar relevant facts, the court found "adverse consequences" sufficient to establish mutuality. These consequences included restrictions on travel imposed by the indictment—the petitioner was effectively forced to stay in Kuwait or hazard apprehension and extradition—and the risk that, if a federal court upheld the indictment, Kuwait might exercise its discretion to cooperate with the United States and extradite him. 589 F.3d at 413. Here, similar consequences attach to Mr. Darin. He is "effectively confined . . . to Switzerland," unable to visit family even in neighboring Austria. (Baird 12/3/14 Decl., ¶ 5). Because of the substance of the complaint, he is "unable to find any job in the Swiss financial sector—the line of work for which he is professionally qualified." (Baird Decl., ¶ 3). And, indeed, a decision denying Mr. Darin's motion will exacerbate the situation somewhat by imposing on him a choice either to live under these disabilities for

an indeterminate length of time or submit to apprehension and extradition. *See In re Hijazi*, 589 F.3d at 413 ("[A] decision [denying the motion to dismiss] would . . . make it very risky for [the defendant] to ever leave Kuwait.").

b. *Flouting the Judicial Process*

According to the Government, Mr. Darin "is 'flouting the judicial process' by refusing to appear in this Court." (Gov't Memo. at 36). That argument is unpersuasive in part because *every* fugitive has refused to appear in court—it is the *sine qua non* of fugitive status. If mere absence from court constituted "flouting the judicial process," this factor would always favor the prosecution, and no further analysis would be necessary. The Government has not explained what constitutes "flouting" in Mr. Darin's circumstances in particular. The record does not show, for example, that Mr. Darin fled from the United States after learning he had been or was to be charged; as far as I can tell, there is no indication here that he ever set foot in this jurisdiction. He is avoiding the arrest warrant—a document that does not compel his voluntary surrender—merely by remaining in his home country.

c. *Discouraging Flights from Justice*

The Government worries that "ruling on [this] motion would encourage others in [Mr.] Darin's position—including potentially other defendants in LIBOR-related cases residing abroad—to take flight from justice." (Gov't Memo. at 36). This contention suffers from a similar flaw as the previous one in that it would apply to every case in which the

fugitive disentitlement doctrine might apply. I cannot see how addressing Mr. Darin's application, in particular, would make other defendants more likely to engage in conduct similar to his. There is no indication in the papers that other defendants or potential defendants in LIBOR-related cases are similarly situated to Mr. Darin—that is, able to avoid prosecution by residing in home countries that have extradition arrangements with the United States similar to Switzerland's—so that they might be inspired by his example.

d. *Prejudice*

The final purpose of the fugitive disentitlement doctrine is "avoiding prejudice to the other side caused by the defendant's escape." *Bano*, 273 F.3d at 125. As articulated, this factor seems to assume that the applicant was once in custody and has absconded. That is not the case here. The Government notes, however, that "witnesses' memories fade and the criminal events become more remote in time," (Gov't Memo. at 36-37), and that, of course, is true whether the defendant has escaped or is merely avoiding prosecution.

The fading of witnesses' memories is a cognizable prejudice to the Government. But the Government itself does not seem particularly keen to move this action forward. Despite its attestations that it "has an interest in prosecuting this case in a timely manner," the Government has not yet indicted Mr. Darin, which is a precondition to prosecuting a felony. Fed. R. Crim. P. 7(a)(1)(B); (Tr. at 53). In light of the circumstances here, including the other

findings discussed above, I will not exercise my discretion to apply the fugitive disentitlement doctrine.

C. *Presumption Against Extraterritoriality*

Mr. Darin argues that the Complaint against him "should be dismissed because it involves an unauthorized extraterritorial application of the conspiracy and wire fraud statutes." (Def. Memo. at 17).

1. Legal Standard

The "presumption against extraterritoriality" is a canon of statutory construction that assumes that Congress intends its enactments, whether civil or criminal, to apply only domestically unless it clearly expresses a contrary intention. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010); *United States v. Vilar*, 729 F.3d 62, 72 (2d Cir. 2013). Because the presumption "is a method of interpreting a statute," it "is not a rule to be applied to the specific facts of each case"; rather "[a] statute either applies extraterritorially or it does not, and once it is determined that a statute does not apply extraterritorially, the only question [to be] answer[ed] in the individual case is whether the relevant conduct occurred in the territory of a foreign sovereign." *Vilar*, 729 F.3d at 74.

Morrison provides the Supreme Court's most recent guidance on the presumption. In that case, the Court addressed whether Section 10(b) of the Securities Exchange Act of 1934 "provides a cause of

action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." *Morrison,* 561 U.S. at 250-51, 130 S. Ct. 2869. The complaint alleged that an Australian bank had purchased a United States company, manipulated that company's financial data, and published some of that manipulated data in the Australian bank's financial statements, annual reports, and other documents. *Id.* at 251-52, 130 S. Ct. 2869. Ultimately, the value of the United States company's assets had to be written down, prompting certain Australian shareholders to sue for violations of Section 10(b) and Securities and Exchange Commission Rule 10(b)(5). *Id.* at 252-53, 130 S. Ct. 2869. Examining the statute, the Supreme Court first held that a "general reference to foreign commerce" in a statute "does not defeat the presumption against extraterritoriality." *Id.* at 263, 130 S. Ct. 2869. Rather, to determine whether a statute is intended to apply extraterritorially (absent a clear indication in the text), a court must look at the " 'focus' of congressional concern." *Id.* at 266, 130 S. Ct. 2869 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 255, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (hereinafter "*Aramco*"), *superseded by statute as recognized in Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 n. 8, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)). The focus of Section 10(b), the Court held, "is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," which are "the objects of the statute's solicitude" and the "transactions that the statute seeks to regulate." *Id.* at 266-67, 130 S. Ct. 2869 (internal quotation marks

omitted); *see also Aramco*, 499 U.S. at 255, 111 S. Ct. 1227 (finding that elements of Title VII of Civil Rights Act of 1964 "suggest[] a purely domestic focus").

2. Application to Wire Fraud Statute

The wire fraud statute punishes anyone who,

> having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice . . . .

18 U.S.C. § 1343. Mr. Darin has been charged with conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. That section does not set out separate elements of conspiracy (and, indeed, has been held not to contain an "overt act" requirement, *see, e.g.*, *United States v. Huff*, No. 12 Cr. 750, 2015 WL 463770, at *2 (S.D.N.Y. Feb. 4, 2015) (collecting cases)), but subjects those conspiring or attempting to commit wire fraud to "the same penalties as those prescribed for the offense." 18 U.S.C. § 1349.

Prior to 1956, the wire fraud statute referred only to interstate communications, punishing those who executed a fraudulent scheme "'by means of

interstate wire, radio, or television communications.'" *Wentz v. United States*, 244 F.2d 172, 174 (9th Cir. 1957) (quoting pre-1956 version of 18 U.S.C. § 1343). The 1956 amendment added the reference to "foreign commerce." *United States v. Kim* describes the legislative history of the 18 amendment:

> The amendment was prompted by the failed prosecution of an individual who made a fraudulent telephone call from Mexico to the United States and successfully argued that § 1343 did not cover such a foreign communication. *See* S.Rep. No. 1873, 84th Cong., 2d Sess. 2 (1956). With this case in mind, Congress acted to "close [the] loophole" that limited prosecution to cases in which the fraudulent transmission occurred between two states, and explicitly extended the coverage of § 1343 to foreign communications. *See* H.R. Rep. No. 2385, 84th Cong., 2d Sess. 1 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3091, 3092.

United States v. Kim, 246 F.3d 186, 189 (2d Cir. 2001) (alteration in original). According to *Kim*, this reference to foreign commerce established that Congress intended "to reach fraud schemes furthered by foreign wires." *Id.* However, as *Kim* was decided before *Morrison* ruled that such a reference does not indicate congressional focus on extraterritorial application, the legislative history is ripe for

reinterpretation. In the case inspiring the amendment, the wire transmission entered the United States; that is, it used domestic wires. Congress thus seemed to be clarifying that frauds originating in foreign territory that use wires touching the United States can be prosecuted under the statute. Recognizing this, *U.S. v. Hijazi* held that the statute did not apply extraterritorially, but was focused on the use of domestic wires. 845 F. Supp. 2d 874, 906 (C.D .Ill. 2011).

A number of courts, in applying the wire fraud statute to frauds in which some of the alleged conduct occurred on foreign soil, have likewise indicated that the statute targets the use of domestic wires. *See, e.g.*, *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) ("[W]hat is proscribed [by the wire fraud statute] is the use of the telecommunication systems of the United States in furtherance of a scheme whereby one intends to defraud another of property." (emphasis omitted) (footnote omitted)); *United States v. Approximately $25,829,681.80 in Funds (Plus Interest) in the Court Registry Investment System*, No. 98 Civ. 2682, 1999 WL 1080370, at *3 (S.D.N.Y. Nov. 30, 1999) ("[T]he use of wires in the United States to transfer the funds would clearly allow this Court to exercise jurisdiction over the underlying wire fraud claim."); *United States v. Golitschek (Heinz)*, No. CR-85-181, 1986 WL 2603, at *2 (W.D.N.Y. Feb. 25, 1986) ("[T]he law in this circuit premises jurisdiction under 18 U.S.C. § 1343 on a defendant's use of the wires to accomplish his fraudulent scheme.").

Most convincingly, the Second Circuit has recently stated categorically that the wire fraud statute "doe[s] not overcome *Morrison*'s presumption against extraterritoriality." *European Community v. RJR Nabisco*, 764 F.3d 129, 139 (2d Cir. 2014); *but see United States v. Georgiou*, 777 F.3d 125, 137-38 (3d Cir. 2015) (holding that wire fraud statute "applies extraterritorially"); *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014) (holding that Wire Act, which prohibits using "wire communication facility" to transmit bets or wagers "in interstate or foreign commerce" applies extraterritorially because it "explicitly applies to transmissions between the United States and a foreign country"). Although the Court of Appeals did not explicitly discuss the "focus of congressional concern" and may have dealt with the extraterritoriality question in a "cursory" manner (Gov't Memo. at 31), there is, as discussed above, significant support for its conclusion.

3. Application to the Facts

The conclusion that the wire fraud statute has only domestic application is not fatal to the Government's case against Mr. Darin, however, because the statute is not being applied extraterritorially here. *See Vilar*, 729 F.3d at 74 ("[O]nce it is determined that a statute does not apply extraterritorially, the only question [to be] answer[ed] in the individual case is whether the relevant conduct occurred in the territory of a foreign sovereign.").

The allegation that a defendant who is charged with violation of the fraud statute used

domestic wires to carry out the fraudulent scheme is "clearly sufficient to sustain jurisdiction." *United States v. Gilboe*, 684 F.2d 235, 237 (2d Cir. 1982); *see also Trapilo*, 130 F.3d at 552 ("[W]hat is proscribed is the use of the telecommunications systems of the United States in furtherance of a scheme whereby one intends to defraud another of property. Nothing more is required. The identity and location of the victim, and the success of the scheme, are irrelevant." (emphasis omitted) (footnote omitted)); *cf. United States v. Hoskins*, 73 F. Supp. 3d 154, 167-68, 2014 WL 7385131, at *9 (D. Conn. 2014) (under Foreign Corrupt Practices Act ("FCPA"), indictment charged domestic conduct where it alleged use of mails and means of interstate commerce in furtherance of payment to foreign official notwithstanding fact that accused alien never entered United States in connection with corrupt scheme). In *Gilboe*, a non-resident alien was accused of arranging for grain to be shipped to a corporation in China, obtaining the ships through "telex and telephone communication channels" in and out of the United States, and then pocketing proceeds received from the Chinese company without paying the shipowner. *Id.* The defendant appealed his conviction, arguing "that the district court did not have jurisdiction over the offenses charged because he was a nonresident alien whose acts occurred outside the United States and had no detrimental effect within the United States." *Id.* The Second Circuit affirmed, holding that the use of telephone and telex communications systems in negotiating for

the ships conferred jurisdiction under the wire fraud statute.[3] *Id.* at 237-38.

In *Pasquantino v. United States*, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005), the Supreme Court confirmed that prosecuting frauds that allege use of domestic wires does not constitute extraterritorial application of the wire fraud statute. In that case, two of the defendants, "while in New York, ordered liquor over the telephone from discount package stores in Maryland. They employed [the third defendant] to drive the liquor over the Canadian border, without paying the required excise taxes." 544 U.S. at 353, 125 S. Ct. 1766 (internal citation omitted). The majority reasoned that applying the wire fraud statute in such a situation did not give it extraterritorial effect merely because

> [the defendants] used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States . . . . This domestic element of [the defendants'] conduct is what the Government is punishing in this prosecution.

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[3] *Gilboe*, as well as other cited cases, discusses the question of whether a statute is applied extraterritorially in terms of the court's jurisdiction. *Morrison* held that the issue of extraterritoriality was not one of jurisdiction, but of statutory interpretation. 561 U.S. at 253-54, 130 S. Ct. 2869. This nuance does not alter the analysis here.

Id. at 371, 125 S. Ct. 1766 (internal citation omitted); *accord Morrison*, 561 U.S. at 271-72, 130 S. Ct. 2869. That is, the Court found that by using United States interstate wires, the defendants executed their scheme inside the United States. *See United States v. Coffman*, 771 F. Supp. 2d 735, 738 (E.D. Ky. 2011) (denying motion to dismiss indictment charging scheme to defraud which occurred in Canada between Canadian sales office and Canadian investors but used interstate wires), *aff'd*, 574 Fed. Appx. 541, 557-58 (6th Cir. 2014) ("[W]ire fraud occurs in the United States when defendants use interstate wires as part of their scheme."); *see also United States v. Ayesh*, 762 F. Supp. 2d 832, 837 (E.D. Va. 2011) (noting that territorial jurisdiction is appropriate over wire fraud cases involving "the misuse of domestic wires").

The complaint here alleges use of interstate wires in furtherance of the fraudulent scheme that underlies the charge of conspiracy against Mr. Darin: the co-conspirators purportedly caused the manipulated LIBOR to be published to servers in the United States and used United States wires to memorialize trades affected by that rate. The culpable conduct underlying the substantive count therefore occurred in the United States. The presumption against extraterritoriality is thus irrelevant to both the wire fraud and the conspiracy. *See Kim*, 246 F.3d at 189-91 & n.2 (where statute covers conduct alleged in substantive count, conspiracy count also covered); *United States v. Ivanov*, 175 F. Supp. 2d 367, 372 (D. Conn. 2001) (same).

D. *Nexus*

Courts, including the Second Circuit, have held that a court may apply a statute extraterritorially provided that (a) Congress intended its reach to extend beyond the territorial boundaries of the United States and (b) there is a " 'sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.' " *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (quoting *United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003)); *see also United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990) ("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary or fundamentally unfair." (internal citation omitted)); *United States v. Mohammad-Omar*, 323 Fed. Appx. 259, 261 (4th Cir. 2009) (same); *United States v. Mostafa*, 965 F. Supp. 2d 451, 458 (S.D.N.Y. 2013) (same). The Government asserts that, because this is a territorial application of the statute, no nexus inquiry is necessary. (Gov't Memo. at 20-21).

While it may be correct that courts typically do not engage in an analysis of a defendant's nexus with the United States where the crime charged is not extraterritorial, this may simply be a function of the nexus being obvious. While the extraterritoriality inquiry addresses the reach of a statute, the nexus analysis considers the validity of the court's exercise of jurisdiction over the particular defendant. The Fifth Amendment requires *all* prosecutions to be

reasonable and fundamentally fair. *See Al Kassar*, 660 F.3d at 118. The statutory interpretation involved in determining if a statute is or is not extraterritorial reveals nothing (or, at best, very little) about whether a particular prosecution comports with the Fifth Amendment. Thus, in a situation like this, where a criminal statute is applied domestically but the defendant claims insufficient connections with the United States, a court should evaluate whether the prosecution is fundamentally fair.

The nexus analysis does not get Mr. Darin very far, however, because the Complaint alleges a nexus between him and the United States sufficient to satisfy due process concerns. As the District of Columbia Circuit notes, cases in which even the extraterritorial application of a federal criminal statute has been "actually deemed a due process violation" are exceedingly rare, and a defendant's burden "is a heavy one." *United States v. Ali,* 718 F.3d 929, 944 n.7 (D.C. Cir. 2013). This is particularly true where the prosecution is challenged at the pleading stage. *Cf. United States v. Ahmed*, No. 10 Cr. 131, 2011 WL 5041456, at *3 (S.D.N.Y. Oct. 21, 2011) ("[W]hether the government can adequately prove an effect of interstate and foreign commerce should not be resolved prior to trial as long as the indictment itself is sufficient on its face."); *United States v. Remire*, 400 F. Supp. 2d 627, 630-31 (S.D.N.Y. 2005) ("Given the limited information that is before the Court, it is not possible to undertake the detailed factual analysis required to assess whether the government will be able to meet its jurisdictional burden."). Here, Mr. Hayes and Mr.

Darin allegedly conspired to manipulate the LIBOR for Yen to benefit Mr. Hayes at the expense of his counterparties, at least one of whom was in the United States. Mr. Darin was aware that the Yen LIBOR was published in the United States, and it is a reasonable inference from the Complaint that, as a trader in short-term interest rates (like the Yen LIBOR), he was aware that such trades would likely have counterparties in the United States and particularly in a center of international finance like New York. In these circumstances, and at this point in the case, Mr. Darin has not shown that it is arbitrary or fundamentally unfair to subject him to prosecution under United States criminal law.

Mr. Darin contends that the Fifth Amendment's guarantee of due process is not satisfied because the "aim of [his] activity [was not] to cause harm inside the United States or to U.S. citizens or interests." (Def. Memo. at 4 (quoting *Al Kassar*, 660 F.3d at 118)). There are a number of problems with this argument. First, that is not the proper standard. As the Government argues, "a substantial intended effect in or on the United States is sufficient but not necessary" to satisfy the Fifth Amendment. *United States v. Yousef*, No. 08 Cr. 1213, 2010 WL 3377499, at *4 (S.D.N.Y. Aug. 23, 2010) (internal quotation marks omitted); *see also Ali*, 718 F.3d at 945-46 ("[A]ssuming *Al Kassar's* characterization is right, the decision only tells us when such a nexus *exists,* not when it is absent."); *Mostafa,* 965 F. Supp. 2d at 459 ("[S]pecific intent to harm Americans is not what the law requires.").

Second, Mr. Darin contends that the Court must evaluate the Complaint's allegations regarding his connections to the United States isolated from the allegations regarding Mr. Hayes or the conspiracy as a whole. (Def. Memo. at 5). I disagree.[4]

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[4] Mr. Darin analogizes to the law of personal jurisdiction developed in civil cases, but it is not relevant. To be sure, "*greater* due process protection is required in the criminal context than in the civil context" (Reply at 12 (internal quotation marks omitted)), but criminal law and civil law serve different purposes and have different sources and constraints. Positing that doctrines of personal jurisdiction in civil cases should serve as a foundation for the question presented here is attractive, but ultimately inappropriate. *See Ali*, 718 F.3d at 944 ("It is true courts have periodically borrowed the language of personal jurisdiction in discussing the due process constraints on extraterritoriality. But Ali's flawed analogies do not establish actual standards for judicial inquiry; the law of personal jurisdiction is simply inapposite."); *Hijazi*, 845 F. Supp. 2d at 882 n.8 (rejecting reliance on civil cases regarding minimum contacts, finding them "inapposite"). One of the casualties of this observation is Mr. Darin's argument, derived from *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), that his knowledge that the LIBOR figures were published globally is an insufficient connection to the United States because "worldwide reliance" cannot provide a sufficiently targeted basis for personal jurisdiction. (Def. Memo. at 7-8). But if I were to address this contention, I would reject it in part because if it were true, it would work to insulate from prosecution those accused of wide-ranging frauds merely because of their expansive scope. As the Government notes, one who enters in a conspiracy with a global scale "risk[s] being held to account for his illegal actions where[ever] his [] manipulation efforts had effects." (Gov't Memo. at 22-23).

The defendant relies on the Ninth Circuit's decision in *United States v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006). The defendants in that case had been apprehended in the Eastern Pacific Ocean off the coasts of Colombia, Ecuador, and Peru after throwing a number of bales of cocaine overboard as their small speedboat sank, and they were prosecuted under the Maritime Drug Law Enforcement Act ("MDLEA"). *Id.* at 1154-56. The district court found that the craft was stateless, and therefore exercised jurisdiction over those defendants without engaging in a nexus inquiry. *Id.* at 1160-61. It also found that the crew of another, larger ship flying the Colombian flag, which was allegedly used for refueling the smaller craft, had aided and abetted the crew of the small craft, and found a sufficient nexus on that basis alone to exercise jurisdiction over that crew. *Id.* at 1161. That is, the district court, finding that it had jurisdiction over the crew members of the smaller craft without addressing their connection to the United States, imputed that jurisdiction to the crew of the Colombian vessel under the theory that aider and abetters "stand in the shoes of the principals ... for jurisdictional purposes." *Id.* (internal quotation marks omitted). The Ninth Circuit reversed the convictions, first holding that the question of the smaller craft's statelessness was a "disputed factual question" to be decided by the jury, not the court. *Id.* at 1165. Turning to the convictions of the crew of the larger vessel, the court reasoned as follows:

> Relying on the theory of aiding and abetting does not vitiate the need to consider the underlying bases for

> jurisdiction. In *[United States v.] Klimavicius-Viloria*, [144 F.3d 1249 (9th Cir. 1998),] we noted that criminal liability under the MDLEA could be predicated on an aider-and-abettor theory, but we conducted a nexus analysis nevertheless. *See Klimavicius-Viloria*, 144 F.3d at 1257. Aiding and abetting is a substantive area of criminal law that allows courts to punish vicariously a defendant who, in some way, associates himself with an illegal venture, participates in it as in something he wishes to bring about, and seeks by his actions to make it succeed. *Id.* at 1263 (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1949)). The ability of a United States court to exercise jurisdiction over that particular defendant, however, is a preliminary determination totally distinct from the crime itself and must be considered before any United States court or jury may determine whether the defendant acted as a principal or an aider and abettor. *See id.* at 1257.

Perlaza, 439 F.3d at 1168-69 (parallel citation omitted).

The defendant overreads this passage as stating a rule that, when analyzing whether the exercise of jurisdiction over a criminal defendant

charged with conspiracy comports with due process, only facts alleged as to the specific defendant at issue (but not as to the conspiracy as a whole) can be taken into account. However, in the context of the case, the Ninth Circuit merely required a nexus analysis for each defendant. Imputing jurisdiction for an aider-and-abetter or co-conspirator based only on a jurisdictional decision made for a principal—particularly one made without an evaluation of whether those facts were adequate to confer jurisdiction over the principals—is insufficient. Mr. Darin points to the (rather gnomic) last sentence in the citation above, which states that the question of jurisdiction over a criminal defendant is "preliminary" to and "totally distinct from" the crime itself. But the court cannot have meant that the facts of the charged crime are not to be considered in deciding the jurisdictional question: the facts of the crime, as set out in the statute and as alleged, guide the nexus analysis (especially at this early stage, where the only facts to be evaluated are those in the Complaint). Perhaps most damaging to the defendant's theory is that fact that in *Klimavicius-Viloria*, the case *Perlaza* cites as support for this proposition, there is no indication that each conspirator's conduct was evaluated in isolation from the actions of others. Indeed, it appears to analyze the alleged conspirators' contacts as a group. *See Klimavicius-Viloria*, 144 F.3d at 1257-59.

Other cases confirm this point. In *Ford v. United States*, the defendants were charged with conspiracy to violate federal law "by introducing into and transporting in the United States intoxicating liquor," but they argued that "they were corporeally

at all times during the alleged conspiracy out of the jurisdiction of the United States, and so could commit no offense against it." 273 U.S. 593, 601, 619-20, 47 S. Ct. 531, 71 L. Ed. 793 (1927). The Supreme Court recognized that "jurisdiction exists to try one who is a conspirator, whenever the conspiracy is in whole or in part carried on in the country whose laws are conspired against." *Id.* at 621-22, 47 S. Ct. 531. Further, it held that, because the indictment charged acts within the jurisdiction of the United States, the United States had jurisdiction over those conspirators who were not within its territory. *Id.* at 624, 47 S. Ct. 531. The obvious implication is that the acts of co-conspirators may be taken into account in deciding whether United States courts may prosecute an alleged conspirator. *See United States v. Manuel*, 371 F. Supp. 2d 404, 409 (S.D.N.Y. 2005) ("The Supreme Court has specifically upheld the exercise of jurisdiction over conspirators who have never entered the United States, where the conspiracy was 'directed to violation of the United States law within the United States.'" (quoting *Ford*, 273 U.S. at 620, 47 S. Ct. 531)). Relying on *Ford*, the district court in *Hijazi* held that a co-conspirator's "actions in furtherance of the scheme to defraud can [] be attributed" to another conspirator, "even [one who] is a foreign national." *Hijazi*, 845 F. Supp. 2d at 886. Therefore, allegations as to Mr. Hayes' conduct in the charged conspiracy may be evaluated in determining whether there is a "sufficient nexus" between Mr. Darin and the United States. At this stage of the litigation, the allegations of the

Complaint satisfy the nexus requirements of the Fifth Amendment.[5]

E. *Notice*

Finally, Mr. Darin contends that he did not have fair notice that his conduct could subject him to criminal liability. Holding an accused criminally responsible for conduct he could not reasonably know was illegal violates the Fifth Amendment. *Al Kassar*, 660 F.3d at 119. "Fair warning does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they could reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." *Id.* (emphasis omitted). That standard is easily met here.

Mr. Darin argues that his Yen LIBOR submissions were "opinions in response to a hypothetical question, not representations of fact or even statements of opinion *about* a concrete fact." (Def. Memo. at 15). But the Complaint alleges that Mr. Darin submitted opinions that were not *bona fide:* he worried to Mr. Hayes, for example, that his submission could not stray too far from the "truth"—that is, an "unbiased" and legitimate opinion of the

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[5] Because I have found that the Due Process Clause of the Fifth Amendment is satisfied by this nexus I need not address the defendant's arguments about international law or comity. *Ali*, 718 F.3d at 945 ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law." (internal quotation marks omitted)); *Yousef*, 327 F.3d at 91.

appropriate interest rate.[6] (Complaint, ¶ 21(d)(ii)). Mr. Darin knew that submission of a biased opinion would likely have real-world consequences: he himself traded short-term interest rate swaps; Mr. Hayes instructed him regarding how the submissions should differ from the unbiased rate; and Mr. Hayes repeatedly made such requests. (Complaint, ¶ 21). The obvious inference is that Mr. Darin's false submissions benefitted Mr. Hayes at the expense of his counterparties.[7] As the Government argues, Mr. Darin "had ample notice that intentionally attempting to manipulate a global benchmark interest rate like LIBOR . . . was the type of crime that would 'subject [him] to prosecution

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[6] Indeed, Mr. Darin knew that such manipulation was improper, as he fretted that being found out might get UBS banned from the Yen LIBOR panel. (Complaint, ¶ 21(d)(ii)). Mr. Darin suggests that this statement supports his position that he had no idea that such manipulation was illegal, because if he had, he would have been more concerned about possible prosecution than about UBS' position on the Yen LIBOR panel (Def. Memo. at 16; Tr. at 27). This argument is unconvincing. There are any number of reasons why Mr. Darin would refrain from calling attention to possible criminal liability in a conversation with his alleged co-conspirator.

[7] Mr. Hayes is also being prosecuted in the United Kingdom for his role in this scheme. The Government notes that the court in that proceeding has found that the LIBOR can be the subject of fraudulent misrepresentation. (Transcript of Proceedings in *Regina v. Hayes* dated Dec. 5, 2014, attached as Exhibit to Letter of Thomas B.W. Hall dated Jan. 2, 2015).

somewhere.'"[8] (Gov't Memo. at 26 (quoting *Al Kassar*, 660 F.3d at 119)).

CONCLUSION

For these reasons, defendant Roger Darin's motion to dismiss the Complaint (Docket no. 6) is denied.[9]

SO ORDERED.

s/ James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES
MAGISTRATE JUDGE

Dated: New York, New York
March 20, 2015

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[8] The fact that the European Commission moved to "clearly prohibit" benchmark manipulation in 2012, *see* European Commission Press Release, "LIBOR scandal: Commission proposes EU-wide action to fight rate-fixing," *available at* http://europa.eu/rapid/press-release_IP-12-846_en.htm (last visited March 2, 2015), does not indicate, as the defendant would have it, that LIBOR manipulation did not constitute fraud under previously-enacted laws in the United States, United Kingdom, or elsewhere.

[9] The Clerk of Court is respectfully directed to close as moot the Government's motion for leave to file excess pages (Docket no. 22).

Copies transmitted this date to:

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee*,	
v.	15-2597
TOM ALEXANDER WILLIAM HAYES, AKA SEALED DEFENDANT 1, *Defendant*,	S.D.N.Y. No. 12-MJ-3229
ROGER DARIN, AKA SEALED DEFENDANT 2, *Defendant-Appellant*.	

Appeal from the United States District Court
for the Southern District of New York
Paul A. Crotty, District Judge, Presiding

Filed: June 28, 2016

ORDER

Appellant, Roger Darin, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals
Second Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE ROGER DARIN, *Petitioner*.	15-3896

ROGER DARIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Filed: June 28, 2016

ORDER

Petitioner, Roger Darin, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals
Second Circuit

APPENDIX F

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.