

## Client Alert.

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February 27, 2012

# Most Severe Setback To DOJ Thus Far In FCPA Prosecutions: Judge Dismisses All Charges In Africa Sting Case

By Paul T. Friedman and Demme Doufekias

Although the government continues to secure record fines against corporations settling violations of the Foreign Corrupt Practices Act (“FCPA”),<sup>1</sup> the Department of Justice (“DOJ”) has faced significant setbacks in FCPA trials, most recently in the “Africa Sting” case.

Two years ago, in January 2010, DOJ announced that twenty-two executives and employees of companies in the military and law enforcement products industry had been indicted for conspiring to bribe foreign government officials to obtain and retain business. Using large-scale undercover law enforcement techniques, the Africa Sting case was hailed as the largest single investigation and prosecution against individuals in DOJ’s history of enforcing FCPA. At the time, Assistant Attorney General Lanny A. Breuer called the investigation a “turning point” in the FCPA playbook and warned that “would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent.”<sup>2</sup>

Last week, U.S. District Court Judge Richard Leon dismissed the indictments in the Africa Sting case, ending what he referred to as “a long and sad chapter in the annals of white collar criminal enforcement.” The government sought dismissal of the indictments after failing to convict a single defendant in two separate trials.

### DOJ FAILED TO CONVICT A SINGLE INDIVIDUAL IN LANDMARK CASE

After trying ten defendants in two separate trials lasting a total of 26 weeks, DOJ failed to obtain a single conviction. In July 2011, Judge Leon declared a mistrial in the first trial of four defendants in the Africa Sting case. DOJ initially announced that it intended to retry those defendants.

In January 2012, the government again failed to obtain convictions against six defendants in the second Africa Sting trial. Two of those six defendants were acquitted, and Judge Leon declared a mistrial when the jury failed to reach verdicts against the other four. He also dismissed conspiracy charges against all six of the defendants at the close of the prosecution’s case.<sup>3</sup>

Two of the original twenty-two defendants pled guilty to various charges before the trials. After dismissing the indictments, Judge Leon set a conference to review the status of those defendants.

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<sup>1</sup> For more information, see our recent client alert, “2011 Ends With Over \$100 Million in Penalties and Disgorgements for FCPA Violations at Insurance Company and Telecom Company,” (Jan. 5, 2012) available at <http://www.mofo.com/files/Uploads/Images/120105-2011-FCPA-Penalties.pdf>

<sup>2</sup> See DOJ Press Release, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme, (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>

<sup>3</sup> “Federal jury deals setback to large Justice Department sting operation,” Wash. Post, (Jan. 31, 2012), available at [http://www.washingtonpost.com/local/crime/federal-jury-deals-setback-to-large-justice-departments-sting-operation/2012/01/31/g1QA8HYMgQ\\_story.html](http://www.washingtonpost.com/local/crime/federal-jury-deals-setback-to-large-justice-departments-sting-operation/2012/01/31/g1QA8HYMgQ_story.html)

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## MISTRIALS REVEALED WEAKNESSES IN THE GOVERNMENT'S AGGRESSIVE FCPA ENFORCEMENT STRATEGY

The trials exposed significant weaknesses with the government's case, including discovery problems that Judge Leon described as "sharp practices that have no place in a federal courtroom."

These practices centered on the FBI's key informant, Richard Bistrong, who was central to the sting operation. Bistrong had pled guilty to bribery charges in an unrelated case in September 2010, and also admitted to numerous illegal acts during his testimony, such as drug use and frequent interactions with prostitutes. Explicit text messages between Bistrong and his FBI handlers also surfaced during the trials, damaging key witnesses' credibility and raising questions about the FBI agents' failure to establish appropriate boundaries with Bistrong.<sup>4</sup> These problems prompted the foreman of the jury in second trial to publicly comment that the jury found the government's witnesses to have little credibility.<sup>5</sup>

Jurors were also troubled by the nature of the FBI sting operation, specifically with the vague language used by agents and Bistrong during the sting, such as using the word "commission" instead of "bribe". Jurors struggled in instances where it seemed that the defendants had not sought out the deal, expressing concerns that the sting operation demonstrated overreaching by the government. Some jurors could not determine whether these defendants actually intended to violate the FCPA because they felt the defendants would never have been involved in the deal without the government's interference.<sup>6</sup>

Judge Leon also questioned the government's tactics. In dismissing the indictments, he specifically referenced the "government's very, very aggressive conspiracy theory," which, "in the second trial . . . snapped in the absence of the necessary evidence to sustain it."

## WHAT'S NEXT IN DOJ'S STRATEGY TO PROSECUTE INDIVIDUALS?

The dismissal of the indictments in the African Sting case represents a dramatic stumbling block in DOJ's greatly publicized efforts to prosecute individuals for FCPA violations. Since the 2010 indictments, DOJ officials showcased the Africa Sting case, asserting that it "vividly illustrates one cornerstone of [DOJ's] FCPA enforcement policy: the aggressive prosecution of individuals."<sup>7</sup>

The Africa Sting case should not be viewed in isolation. DOJ also suffered a stinging rebuke in the Lindsey Manufacturing case. In December 2011, a federal judge threw out convictions of Lindsey Manufacturing and two of its senior officers because of numerous instances of prosecutorial misconduct in that case. The company's conviction for paying bribes to two high-ranking employees of an electrical utility company wholly owned by the Mexican government was the first-ever jury conviction of a corporation for violating the FCPA.<sup>8</sup> Two months later, another federal judge dismissed charges

<sup>4</sup> "Racy, vulgar texts hurt Justice Department's largest sting operation targeting foreign bribery," Wash. Post, (Feb. 13, 2012), available at [http://www.washingtonpost.com/local/crime/racy-vulgar-texts-hurt-justice-departments-largest-sting-operation-targeting-foreign-bribery/2012/02/02/gIQAJZYtBR\\_story.html](http://www.washingtonpost.com/local/crime/racy-vulgar-texts-hurt-justice-departments-largest-sting-operation-targeting-foreign-bribery/2012/02/02/gIQAJZYtBR_story.html)

<sup>5</sup> "A Guest Post From the African Sting Jury Foreman," FCPA Professor, (Feb. 6, 2012), available at <http://www.fcprofessor.com/a-guest-post-from-the-africa-sting-jury-foreman>

<sup>6</sup> *Id.*

<sup>7</sup> Remarks by Lanny A. Breuer, Assistant Attorney General for the Criminal Division, at the American Bar Association National Institute on White Collar Crime, (Feb. 25, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/02-25-10aag-AmericanBarAssosiation.pdf>; For additional discussion of Mr. Breuer's comments, please see our client alert, "DOJ Official Proclaims 'New Era' of FCPA Enforcement," (Nov. 19, 2010), available at <http://www.mofo.com/files/Uploads/Images/101118-FCPA-Enforcement.pdf>

<sup>8</sup> For additional discussion of the Lindsey Manufacturing case, please see our client alert, "False Affidavits and Lies Doom First-Ever FCPA Jury Conviction of Corporation," (Dec. 2, 2010), available at <http://www.mofo.com/files/Uploads/Images/111202-FCPA-Corporation-Trial.pdf>

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against John O'Shea, a former manager of Swiss Engineering Company ABB Ltd., charged as part of the same conspiracy. That judge dismissed the charges against O'Shea at the close of the government's case, saying he did not believe the government's chief witness, a cooperating witness awaiting sentencing on other charges.<sup>9</sup>

DOJ also recently abandoned the prosecution of Si Chan Wooh, an employee of SSI International, a wholly-owned subsidiary of Schnitzer Steel. In October 2011, DOJ dropped charges against Wooh, who pled guilty to conspiracy to violate the FCPA in June 2007. Wooh was charged even though he had brought the improper payments at issue to the attention of in-house counsel, and he continued to deny that he knew his conduct was unlawful even after his plea. In May 2010, DOJ informed Wooh's counsel that an FBI agent assigned to the investigation had written a letter to prosecutors saying that Wooh should never have been charged in the case.<sup>10</sup> Shortly after, the government moved to dismiss the charges against him.

Taken together, DOJ's stunning setbacks in two recent marquee prosecutions, as well as the recent dismissal of charges against Wooh, signal that DOJ's aggressive FCPA strategy, particularly against individual defendants, may not be quite the turning point that DOJ envisioned two years ago.

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<sup>9</sup> "Houston Judge Tosses Foreign Bribery Case, Hands DOJ New Setback," WSJ Corruption Currents, (Jan. 17, 2012), *available at* <http://blogs.wsj.com/corruption-currents/2012/01/17/houston-judge-tosses-foreign-bribery-case-hands-doj-new-setback/>

<sup>10</sup> "DOJ Drops Bribery Charges Against Whistleblower in Schnitzer Steel Case," WSJ Corruption Currents, (Oct. 18, 2011), *available at* <http://blogs.wsj.com/corruption-currents/2011/10/18/doj-drops-bribery-charges-against-whistleblower-in-schnitzer-steel-case/>

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