

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

v.

CONCORD MANAGEMENT AND
CONSULTING LLC

Defendant.

CRIMINAL NUMBER:

1:18-cr-00032-2-DLF

**DEFENDANT CONCORD MANAGEMENT AND CONSULTING LLC’S RENEWED
MOTION FOR DISCOVERY REGARDING SELECTIVE PROSECUTION**

Defendant Concord Management and Consulting LLC (“Defendant” or “Concord”), by and through undersigned counsel, respectfully submits this renewed motion and memorandum of points of law and authorities seeking discovery on the issue of selective prosecution.

I. Introduction

On October 15, 2018, the Court denied Concord’s Motion for Discovery Regarding Selective Prosecution. Transcript of Oct. 15, 2018 Hearing (Dkt. 67) at 71. As part of this denial the Court stated in relevant part, “I don’t see how you can say newspaper articles are some evidence at this point.” *Id.* at 68:15-16. Now there is evidence beyond newspaper articles, specifically a declination letter dated January 15, 2019, from the United States Department of Justice (“DOJ”) National Security Division to Skadden, Arps, Slate, Meagher & Flom (“Skadden”), indicating that Skadden admitted that it made “false and misleading oral and written statements” to DOJ’s Foreign Agent Registration Act Unit (“FARA Unit”) causing the FARA Unit to conclude incorrectly that Skadden did not have to register as an agent of the Government of Ukraine (“GoU”). Exhibit 1, Letter from U.S. Dep’t of Justice to Skadden

(“Declination Letter”).¹ According to Skadden’s website, it is a law firm with offices in 22 locations globally, including in Moscow, and over 1,700 attorneys that “advises businesses, financial institutions and government entities around the world on their most complex, high-profile matters, providing the guidance they need to compete in today’s businesses environment.” <https://www.skadden.com/about/overview>. At least one Skadden partner is a former Associate General Counsel for the Federal Election Commission who counsels clients on FARA registration matters. <https://www.skadden.com/professionals/g/gross-kenneth-a>.

Contrast Concord, a Russian catering company with no locations or business activity in the United States. According to the proffered theory of liability in this case, it appears that at a minimum Skadden violated 18 U.S.C. § 371 (by conspiring to defraud DOJ), and may also have violated 18 U.S.C. § 1001 (by making material false statements to DOJ). And the difference is that Skadden agreed to pay over \$4.6 million dollars to the United States so as not to be prosecuted (which is no penalty at all because it simply deprives the firm of its allegedly unlawfully earned revenue), and Concord stands accused of a crime having not been offered the purchase declination option.²

II. Law

To obtain discovery on a selective-prosecution claim, a defendant must put forth some evidence tending to show the existence of the essential elements of a selective prosecution claim, namely, that (1) the defendant was singled out for prosecution from others similarly situated, and (2) the prosecution was motivated by a discriminatory purpose. *See United States v. Armstrong*, 517 U.S. 456, 465, 468-470 (1996); *United States v. Palfrey*, 499 F. Supp. 2d 34, 39 (D.D.C.

¹ Curiously, the Declination Letter does not cite to any legal provision in any law or statute through which Skadden is paying a penalty the U.S. Treasury. FARA provides only for criminal penalties and only upon conviction. *See* 22 U.S.C. § 618(e).

² The prosecutor who signed this agreement with Skadden is the Firewall Counsel in this case.

2007). To make out such a claim sufficient to warrant discovery, the defendant must provide something more than mere speculation or personal conclusions based on anecdotal evidence, “but the standard necessarily is lower than the ‘clear evidence’ standard required for dismissal of the indictment.” *United States v. Hsia*, 24 F. Supp. 2d 33, 49 (D.D.C. 1998), *reversed in part and appeal dismissed*, 176 F.3d 517 (D.C. Cir. 1999) (citing *Armstrong*, 517 U.S. at 470).

With respect to the first prong, “[a] similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced.” *United States v. Khanu*, 664 F. Supp. 2d 28, 32 (D.D.C. 2009) (internal quotation marks omitted); *see also Armstrong*, 517 U.S. at 469. With respect to the second prong, “[d]iscriminatory purpose implies more than intent as awareness of consequences. It implies that the decisionmaker [sic] selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.” *Wayte v. United States*, 470 U.S. 598, 610 (1985) (internal quotation marks and alterations omitted). Notably, a party seeking discovery on a selective prosecution claim is not required to produce direct evidence of intent. *See United States v. Washington*, 705 F.2d 489, 494-95 (D.C. Cir. 1983) (recognizing that the district court had ordered discovery on discriminatory intent based on indirect evidence of statistics uniquely in the government’s possession regarding “how many passport frauds were detected since 1975, how many detected frauds were prosecuted and how many frauds detected or prosecuted involved [a particular group]”).

III. Argument

The Appendix to the Declination states that Skadden made numerous material false statements or omissions orally and in writing to the FARA Unit, including by not limited to, (1) failing to disclose interactions between Skadden and lobbying and public relations firms working

for the GoU (Ex. 3, ¶ 51); falsely stating that Skadden would be paid \$12,000 for its work (as opposed to the actual figure in excess of \$4 million) (*id.* ¶¶ 52, 60); falsely stating when and for what purpose Skadden disclosed its work product to the media (*id.* ¶¶ 56, 67); and falsely stating when Skadden stopped working for the GoU (*id.* ¶ 69). DOJ explicitly relied on these and other false statements and omissions to determine that Skadden did not have to register under FARA. *See id.* ¶¶ 56, 67-68. According to the Declination, Skadden was aware of the requirements of FARA. *See id.* ¶ 16. Skadden's work in fact influenced global media reporting on an issue that was of primary importance to GoU. *See id.* ¶ 45. Though the underlying activity occurred in the 2012 to 2014 time period, even if DOJ had not obtained a tolling agreement there would have been no statute of limitations bar to prosecution because FARA explicitly provides that failure to register is a continuing violation. *See* 22 U.S.C. § 618(e).

Concord is criminally accused, in part, of defrauding the same DOJ FARA Unit by allegedly paying for Russian nationals to pretend to be Americans on social media who then made statements on social media about U.S. social and political issues. *See* Indictment (Dkt. 1) at ¶¶ 4, 7, 26, 28, 48. The government says that this play-acting potentially interfered with the ability of the DOJ FARA to determine whether some unknown person or entity should have registered under FARA. *See* Government's Opposition to Defendant's Motion to Dismiss (Dkt. 56) at 11-12. Unlike Skadden, Concord *is not* accused of (1) making material false statements to the FARA Unit, or (2) making material omissions in communications with the FARA Unit. Nor does the Indictment contain with any specificity an allegation that Concord was aware of the existence of FARA or the FARA Unit. As such, Skadden's admitted conduct is far more direct, obvious, and egregious than the allegations against Concord—yet Skadden was not prosecuted.

IV. Conclusion

The disparate treatment by the government of these two matters should compel the Court to require the government to provide information as to why in two cases—neither of which involved a voluntary disclosure—one case was indicted and one case was declined, including but not limited to: (1) whether DOJ considered indicting Skadden; (2) whether Skadden’s status as a U.S. based legal entity as opposed to a Russian legal entity influenced the decision to decline to prosecute Skadden; and (3) why Skadden was permitted to purchase a declination.

Dated: January 22, 2019

Respectfully submitted,

CONCORD MANAGEMENT AND
CONSULTING LLC

By Counsel

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