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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. STUART CARSON, et al., Defendants.	NO. SA CR 09-00077-JVS GOVERNMENT'S OBJECTIONS TO DEFENDANTS' PROPOSED FOREIGN CORRUPT PRACTICES ACT JURY INSTRUCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBITS Hearing: August 12, 2011, 1:30 p.m.

Plaintiff United States of America, by and through its attorneys of record, the United States Department of Justice, Criminal Division, Fraud Section, and the United States Attorney for the Central District of California (collectively, "the

government"), hereby files its objections to the defendants' proposed Foreign Corrupt Practices Act jury instructions (DE #383 & DE #384), which include a proposed charge regarding the term "instrumentality." The government's objections are based upon the attached memorandum of points and authorities, the attached exhibits, the files and records in this matter, as well as any evidence or argument presented at any hearing on this matter.

DATED: July 25, 2011

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On May 17, 2011, this Court ordered the parties to submit proposed jury instructions and supporting legal authority for the definition of "instrumentality" under the Foreign Corrupt Practices Act ("FCPA") and for the requisite scienter under that statute. (DE #371 ¶ 1). The parties complied with the Court's order by virtue of their June 30 submissions. (DE #382 & #384). On that same day, the defendants filed an additional proposed instruction regarding the elements of an FCPA violation. (DE #383). In their additional filing, the defendants argue that in order to establish an FCPA violation, the government must prove beyond a reasonable doubt that a defendant knew that the transaction at issue involved a "foreign official" as that term is defined in the FCPA.

As explained below, the government objects to several aspects of the defendants' proposed instructions. First, this Court should reject the defendants' proposed "instrumentality" instruction primarily because it contradicts this Court's prior ruling on the defendants' motion to dismiss the indictment. Second, many aspects of the defendants' proposed scienter instructions do not accurately reflect the law. Third, this Court should decline to adopt the defendants' proposed FCPA elements, which incorporate the defendants' contention that the government must prove that a defendant knew that the intended recipient was a "foreign official" as that term is defined in the FCPA.

II.

BACKGROUND

Count one of the indictment charges the defendants with conspiracy to violate the FCPA and the Travel Act, and counts two through ten charge substantive FCPA violations. On February 28, 2011, the defendants moved to dismiss counts one through ten, primarily asserting that as a matter of law an officer or employee of a state-owned company can never be a "foreign official" under the FCPA. (DE #317).

In response, the government maintained that depending on the nature of the entity, a state-owned entity could be an "instrumentality" of a foreign government, thereby making its officers and employees "foreign officials." (DE #332 at 23-51). The government also noted that the FCPA's mens rea or scienter requirement serves to undermine arguments that the relevant FCPA provisions are unconstitutionally vague. (Id. at 46-48).

At the end of oral argument on the defendants' motion, the Court directed the parties to submit proposed jury instructions and supporting legal authority for the definition of "instrumentality" and for scienter. (DE #371 ¶ 1). On May 18, this Court denied the defendants' motion to dismiss, holding that "state-owned companies may be considered 'instrumentalities' under the FCPA, but whether such companies qualify as 'instrumentalities' is a question of fact." (DE #373 at 13).

III.

ARGUMENT

A. This Court Should Reject the Defendants' Proposed "Instrumentality" Jury Instruction

As part of its May 18 holding that a state-owned entity can be an "instrumentality" of a foreign government, the Court identified factors that a jury should consider in determining whether the government has proven that issue. (Id. at 5). Consistent with this Court's analysis, the government incorporated the Court's holding and factors into the government's June 30 proposed jury instructions. (DE #382). By contrast, the defendants have proposed a convoluted and flawed "instrumentality" instruction that, as explained below, ignores and contradicts this Court's May 18 holding and supporting analysis.

1. The Defendants Fail to Adequately Explain Why the Jury Will Be Unable to Apply this Court's Multi-Factor Test

In the defendants' submission, they refuse to accept this Court's multi-factor test and argue that "it will not be sufficient" to "merely" provide the jury with a list of non-exclusive factors to consider in determining whether the entity at issue is an instrumentality of a foreign government. (DE #384 at 7). But the defendants fail to adequately explain why incorporating this Court's well-reasoned decision into the jury instructions will be inadequate.

Instead, the defendants simply cite to Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333 (7th Cir. 1988), and take out of context a quote from Judge Posner that they suggest supports their argument. But Empire Gas, which is a breach of

contract case that centered on a potentially ambiguous provision of the Uniform Commercial Code ("UCC"), actually supports the government's view, not the defendants' position. In Empire Gas, the district court recognized that "there may be some ambiguity" in the relevant UCC provision, but nonetheless decided to instruct the jury by just reading the statute "without amplification." Id. at 1336. The district judge reasoned that "the law is right here . . . in this statute, and I have a good deal of faith in this jury's ability to apply this statute to the facts of this case." Id. at 1337. Although the Seventh Circuit affirmed, the court explained as follows:

> It is not true that the law is what a jury might make out of statutory language. The law is the statute as interpreted. The duty of interpretation is the judge's. Having interpreted the statute he must then convey the statute's meaning, as interpreted, in words the jury can understand.

Id. at 1337.

In this case, using the government's "instrumentality" instruction would not run afoul of the above admonition in Empire Gas because this Court would not be just reading to the jury the statutory definition of "foreign official" without further explanation. Rather, by providing the jury with a multi-factor test, this Court would be doing exactly what the Seventh Circuit has said a district court should do when faced with an ambiguity in a statute or an undefined statutory term – "interpret[ing] the statute" and "convey[ing] the statute's meaning . . . in words the jury can understand." Here, the district court would be interpreting the meaning of "instrumentality" and, by virtue of

the government's proposed instruction, conveying the meaning of that term in words the jury can understand.

2. The Defendants' Proposal That the Government Be Required to Prove Four Specific Instrumentality "Elements" (And Numerous Sub-Elements) Contradicts this Court's Prior Ruling and Is Overly Restrictive

Despite their obvious reluctance to accept this Court's holding, the defendants nevertheless propose a jury instruction that does list "instrumentality" factors. (DE #384 at 9-10). But here, too, the defendants fail to comply with the Court's prior ruling.

The defendants' proposed instruction would permit the jury to find that an entity is an instrumentality of a foreign government only if all four instrumentality "elements" and all of their sub-elements have been established beyond a reasonable doubt.[1] Specifically, the defendants request that the jury be told that in order to establish that an entity is a foreign government "instrumentality," the government must prove beyond a reasonable doubt all of the following 12 elements:

(1) The foreign government owns at least a majority of the entity's shares of stock;

(2) The foreign government owns the entity's shares "directly";

(3) The foreign government "itself" controls the day-to-day operations of the entity;

(4) The foreign government "itself" has the power to appoint the entity's key officers and directors;

[1] The defendants repeatedly refer to "business enterprises." Although the Court used that term in its May 18 opinion, it also referenced "companies," "business entities," and used "entity" when it listed its own factors. (DE #373 at 5). The government believes that the generic term "entity" is most appropriate.

(5) The foreign government "itself" has the power to hire and fire the entity's employees;

(6) The foreign government "itself" has the power to finance the entity through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties;

(7) The foreign government "itself" has the power to approve contract specifications and the awarding of contracts;

(8) The entity exists for the sole and exclusive purpose of performing a public function;

(9) The above-referenced public function is one that has been traditionally carried out by the government;

(10) The above-referenced public function is one that benefits only the foreign government (and its citizens), not private shareholders;

(11) The entity exists to pursue public objectives and not to maximize profits; and

(12) The entity's employees are considered to be public employees or civil servants under the law of the foreign country.

(DE #384 at 9-10). This proposed instruction – which appears designed solely to limit as much as possible the number of entities in the world that might qualify as foreign government instrumentalities – should be rejected for several reasons.

First, the defendants cite no authority whatsoever for such an all-or-nothing approach. (See DE #384 at 22).

Second, the proposed instruction is in direct contravention of this Court's recent opinion, in which the Court expressly stated that the relevant factors to be considered by a jury "are not exclusive, and no single factor is dispositive." (DE #373 at 5). Obviously, if no one factor is dispositive then a jury should not be instructed that the failure by the government to

establish a particular factor must result in an "instrumentality" finding adverse to the government.

Third, adopting the defendants' profoundly prescriptive definition approach would lead to absurd results, even in the United States. Is the United States Postal Service not an instrumentality of the United States government merely because the Postal Service seeks to maximize profits? (See DE #373 at 9-10 ("The fact that domestic, state-owned corporations have been considered 'instrumentalities' of the United States . . . is indisputably relevant to whether foreign, state-owned companies could ever be considered 'instrumentalities' of a foreign state.")).

3. The Defendants' Inclusion of a "Part of the Foreign Government Itself" Requirement Is Unnecessary and Likely to Cause Confusion

Not content with their 12-element all-or-nothing approach, the defendants include in their proposed instruction a seemingly additional requirement that the government prove beyond a reasonable doubt that the entity is "part of the foreign government itself." (DE #384 at 9). The defendants explain, (id. at 12-14), just as they did in their reply in support of their motion to dismiss, that this "part of" phrase is required by the Ninth Circuit's decision in Hall v. American National Red Cross, 86 F.3d 919 (9th Cir. 1996). But Hall had nothing to do with the FCPA, and this Court correctly observed in its May 18 opinion that the relevant language in Hall was dicta. (DE #373 at 10 n.9).

Indeed, it appears that the proposed jury instruction is not grounded in existing case law, but instead reflects the

defendants' desire for a whole-scale revision of the FCPA. Despite the fact that Congress defined "foreign official" to include officers and employees of a "department, agency, or instrumentality" of a foreign government, the defendants appear to prefer a definition that covers officers and employees of an entity that is "actually part" of a foreign government. (DE #384 at 8). But contrary to the defendants' suggestion, only Congress has the power to re-write a statute.

In any event, there is no reason to provide some intermediate definition of the word "instrumentality" when the jury can be given a set of specific factors to apply in making its determination. Adding the defendants' proposed "part of" instruction can only serve to confuse the jury.

4. The Defendants' "Mere Subsidiary" Instruction Should Be Rejected

The defendants further propose an instruction that would categorically exclude from the definition of "instrumentality" any entity that is a "mere subsidiary" of a state-owned entity. (DE #384 at 23-25). The government agrees with the defendants only to the extent they mean that a "mere subsidiary" is an entity for which none of the factors identified by this Court in its recent opinion (DE #373) weighs in favor of a finding of instrumentality. But the defendants go too far when they assert that "an 'instrumentality of an instrumentality' should not count." (DE #384 at 24). Simply put, if the entity qualifies as a foreign government instrumentality, it should make no difference where in the corporate chain that entity might sit.

The defendants' reliance on Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995), is misplaced. In Gates, employees of a pork processing plant located in California sued their employer after being terminated. The company claimed that it was immune from suit under the Foreign Sovereign Immunities Act ("FSIA") because (1) it was owned by a separate pork processing plant located in Canada and (2) that plant was owned by a Canadian entity established by Canadian law to market and promote the sale of hogs produced in one of Canada's provinces. The Ninth Circuit held that although the Canadian plant was an "instrumentality" of a foreign state under the FSIA, the California plant was not. See id. at 1461-63.

The defendants cite Gates because of the Ninth Circuit's refusal in that case to extend immunity to "entities that are owned by an agency or instrumentality" of a foreign state. Id. at 1462. But the Ninth Circuit's holding in this regard was based on a "literal reading" of the FSIA's definition of "agency or instrumentality." The FCPA, by contrast, has no definition for "instrumentality," and so there is no statutory construction that would preclude subsidiaries of instrumentalities from being considered instrumentalities themselves.

The defendants are wrong to suggest that "there would be no logical stopping point" if subsidiaries could be instrumentalities under the FCPA. (DE #384 at 25). Application of the Court's factors – especially "the foreign government's control over the entity" and "the extent of the foreign government's ownership of the entity" – are likely to result in findings that subsidiaries low "in the corporate chain," Gates,

54 F.3d at 1462, are not instrumentalities. Moreover, the practical effect of adopting the defendants' "mere subsidiary" argument illustrates an additional problem with the defendants' position. If a "mere subsidiary" can never be an instrumentality, then FCPA culpability could be avoided simply by creating an additional subsidiary for receipt of bribes.

5. The Defendants Improperly Attempt to Carve out an Exception for Entities That "Operate on a Normal Commercial Basis in the Relevant Market"

Lastly, the defendants attempt to further restrict the definition of "instrumentality" by tacking on an additional exclusion for entities that "operate on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise." (DE #384 at 10-11). They maintain that such an instruction is warranted, given that (1) the government urged this Court in its opposition to the defendants' motion to dismiss to interpret "instrumentality" in a manner consistent with United States treaty obligations and (2) the commentaries to the Organization of Economic Co-Operation and Development's Convention on Combating Bribery of Foreign Officials in International Business Transactions (the "OECD Convention") exclude the above-referenced entities. (Id. at 26). But the government did not argue in its motion response that every aspect of the OECD Convention should be incorporated into the definition of "instrumentality." Rather, it simply asserted that this Court should construe "instrumentality" in a manner "so as not to conflict" with the OECD Convention. (DE #332 at 29). The government's proposed instruction contains no such tension.

B. Many Aspects of the Defendants' Proposed Scienter Instructions Do Not Accurately Reflect the Law

1. "Corruptly"

The defendants' proposed definition of "corruptly" differs slightly from that of the government: (1) instead of "connote" they use "mean" and (2) instead of "induce the recipient to misuse his or her official position" they propose "induce the foreign official to misuse an official position." (DE #383 at 20; emphasis added). The government does not formally object to these changes, but notes that the government's position tracks the instruction given in the recent FCPA trial in Los Angeles, United States v. Aguilar, Case No. 10-CR-1031-AHM (C.D. Cal.) (hereinafter "Aguilar").

2. "Willfully"

The defendants' proposed definition of "willfully" differs substantially from that of the government. First, unlike the government's proposal, the defendants' submission fails to include the important instruction that a person need not be aware of the specific law and rule that his or her conduct may be violating in order to be guilty of violating the FCPA. This standard instruction, which was given in both Aguilar and United States v. Green, Case No. 08-CR-59(B)-GW (C.D. Cal.), makes clear that ignorance of the law is no defense and that the government need not prove that an FCPA defendant knew "the terms of the statute and that [the defendant] was violating the statute." United States v. Kay, 513 F.3d 432, 448 (5th Cir. 2007) (agreeing with the Second Circuit that the FCPA does not fall within the

category of statutes for which "willfully" means knowing the specific law and rule at issue).

Second, the defendants' "willfully" definition includes a requirement that the government prove not only that the defendant knew that he or she was doing something that the law forbids, but also that the defendant knew that he or she did something the law "of the United States" forbids. The defendants, however, cite no legal authority in support of substantially raising the government's burden in this respect. Instead, they merely assert that "[d]ue to the reach of the FCPA to foreign nationals and conduct abroad, the instruction . . . clarifies that a willful intent to disobey or disregard the law means an intent to disobey or disregard United States law." (DE #383 at 22). But the defendants in this case are not "foreign nationals" and so this reasoning has no application here. More importantly, there is no territoriality aspect to willfulness. The purpose of a willfulness instruction is to determine whether the defendant acted with an evil motive or acted knowingly (but with a pure heart). Either a person acts with intent to do something unlawful or the person does not. There should be no additional requirement that the government prove that a defendant had American law in mind when he or she acted.

3. "Knowledge"

Unlike the previous two mens rea terms, "knowledge" is expressly defined in the FCPA. As a result, the government's proposed instruction tracks the statutory language, and the proposal is consistent with the instruction given in Aguilar. The defendants' proposed definition of "knowledge" differs in one

major respect – they propose a "deliberate ignorance" instruction that is at odds with the text of the FCPA.[2]

The FCPA provides in pertinent part as follows:

> When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

15 U.S.C. § 78dd-2(h)(3)(B) (emphasis added). The government's proposed instruction appropriately uses the exact language highlighted above. (See DE #382 at 3).

By contrast, the defendants ignore the statutory text (and Aguilar) and propose the following instruction:

> A person is deemed to have . . . knowledge if a person subjectively believes there is a high probability that a fact exists and takes deliberate action to avoid learning of that fact. An act is not done with "knowledge" if the defendant actually believes a circumstances does not exist, or acts through ignorance, mistake, or accident.

(DE #383 at 23; emphasis added). As is apparent, the underlined parts do not appear anywhere in Congress's FCPA definition of "knowledge," and so this Court should reject the defendants' efforts to effectively re-write the statute.

The defendants contend that the underlined portions of the first sentence above are necessary in light of Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. — , 131 S. Ct. 2060 (2011). But that case has no application here. Not only is

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[2] The defendants also use the phrase "substantially likely" instead of the FCPA's "substantially certain." This appears to be inadvertent, as the defendants then use "substantially certain" in the very same sentence.

Global-Tech a patent infringement case that had nothing to do with the FCPA, but Global-Tech dealt only with the common law "doctrine of willful blindness," id. at 2068-71, and not a statutorily defined deliberate ignorance standard. Likewise, the phrase "or acts through ignorance, mistake, or accident" is not part of the FCPA's "knowledge" definition and their inclusion is unnecessary. The defendants' reliance on the Ninth Circuit's model instruction of the term "knowingly" is wrong for the same reason. Because a definition of "knowingly" has been expressly set forth by Congress, there is no need to resort to model instructions, especially when doing so would result in an inaccurate definition.

C. This Court Should Adopt the Government's Proposed Elements of an FCPA Offense, and Reject the Defendants' Substantive Revisions

1. The Government's Proposed Instruction

Although not required by the Court to do so, the defendants filed an additional proposed jury instruction setting forth the elements of an FCPA violation. (DE #383). The government's proposed elements, which are based on 15 U.S.C. § 78dd-2(a)(1) & (3) and Aguilar, DE #511 at 32-33 (C.D. Cal. May 6, 2011) (Ex. A), are as follows:

> A defendant may be found guilty of violating the FCPA only if the government proves beyond a reasonable doubt all of the following elements:
>
> (1) The defendant is a domestic concern, or an officer, director, employee, or agent of a domestic concern, or a stockholder of a domestic concern who is acting on behalf of such domestic concern;
>
> (2) The defendant acted corruptly and willfully;

(3) The defendant made use of the mails or any means or instrumentality of interstate commerce in furtherance of conduct that violates the FCPA;

(4) The defendant offered, paid, promised to pay, or authorized the payment of money, or offered, gave, promised to give, or authorized the giving of anything of value;

(5) The payment or gift at issue was to a foreign official, or was to any person while knowing that all or a portion of such money or thing would be offered, given, or promised (directly or indirectly) to a foreign official;

(6) The payment or gift at issue was intended for at least one of four purposes:

(a) to influence any act or decision of the foreign official in his or her official capacity;

(b) to induce the foreign official to do or omit to do any act in violation of that official's lawful duty;

(c) to secure any improper advantage; or

(d) to induce that foreign official to use his or her influence with a foreign government or department, agency, or instrumentality thereof to affect or influence any act or decision of such government, department, agency, or instrumentality; and

(7) The payment or gift was intended to assist the defendant in obtaining or retaining business for or with, or directing business to, any person.

The defendants' proposed instruction on the FCPA elements substantively differs from the government's submission in three respects. First, the defendants merge elements (4) and (5) into one element in a way that alters the requirements contained therein. Second, the defendants seek to relocate "while knowing" in element (5) so that it applies to the term "foreign official." Third, the defendants' proposal contains only three improper

purposes, not four. Each of these differences are addressed below.

2. None of the Elements Should Be Merged

As noted above, the defendants propose that elements (4) and (5) be collapsed into one element, as follows (emphasis added):

Government's proposal	Defendants' proposal
(4) The defendant offered, paid, promised to pay, or authorized the payment of money, or offered, gave, promised to give, or authorized the giving of anything of value; (5) The payment or gift at issue was to a foreign official, or was to any person while knowing that all or a portion of such money or thing would be offered, given, or promised (directly or indirectly) to a foreign official;	(4) The defendant either paid, or offered, promised, or authorized the payment of, money or anything of value (directly or indirectly) to a person the defendant knew to be a foreign official.

The defendants claim that their version is "substantially similar" to the fourth element in Aguilar and is "simplified . . . to eliminate any ambiguity about the knowledge requirement of the FCPA." (DE #383 at 19). But by trying to make the instructions more concise, the defendants have sacrificed accuracy and created potential confusion.

First, the defendants omit from their instruction Congress's careful use of the word "gave" (and related terms) for non-monetary things "of value," instead of "paid." Second, the defendants eliminate the phrase "all or a portion of such money or thing," thereby inappropriately limiting the statute's reach. Third, the defendants improperly move the phrase "directly or indirectly," making it less clear that this relates to payments

or gifts made by an intermediary (or "any person") to a foreign official. Fourth, as discussed further below, by collapsing the two elements the defendants impermissibly move the phrase "while knowing."

By contrast, the government's version of this portion of the FCPA more clearly instructs the jury on what the government must prove at trial.[3]

3. The Defendants Improperly Include a Requirement That the Defendant Know That the Intended Recipient Is a "Foreign Official" as That Term Is Defined in the FCPA

The defendants argue that in order to establish an FCPA violation, the government must prove beyond a reasonable doubt that the defendant knew that the transaction at issue involved a "foreign official" as that term is defined in the FCPA. Consistent with that view, the defendants propose moving "while knowing" in element (5) so that it applies to the term "foreign official." As explained below, this Court should reject this modification because the FCPA does not require that level of proof.[4]

The defendants contend that such a requirement is needed to avoid "criminaliz[ing] instances where a defendant held a completely good-faith belief – or merely unreasonable but genuine

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[3] The defendants incorrectly claim that the district court in United States v. Jefferson, 07-CR-209 (TSE) (E.D. Va. 2009), "approv[ed] language similar to Defendant's elements 1, 3, 4, and 6." (DE #383 at 19). The defendant's fourth element was not used in Jefferson. (See 7/30/09 transcript; Ex. B).

[4] The defendants misleadingly assert that the government "acknowledged" this requirement in its opposition to the defendants' motion to dismiss by citing out of context the "while knowing" aspect of the FCPA elements. (DE #383 at 7; DE #332 at 12).

belief – that a recipient was not a foreign official or that [the defendant's] conduct was lawful." (DE #383 at 12; internal quotations omitted). This concern, however, is adequately addressed by the requirement that the government prove that a defendant acted "corruptly." As noted above, the parties essentially agree on the definition of corruptly, which is intended to connote (or mean) that the offer, payment, or promise was intended to induce the recipient to misuse his or her "official" position. Therefore, a jury properly instructed on "corruptly" in the FCPA context will be in no danger of convicting on the basis of transactions involving individuals who possess no "official" position to misuse.[5]

Indeed, the definition of "corruptly" is the appropriate place for a mens rea requirement regarding the official recipient in the FCPA for two primary reasons. First, a close examination of the structure of the statute reveals that application of the term "knowing" is limited. The FCPA addresses three different kinds of bribery:

- Payments or gifts made directly to a foreign official (§ 78dd-2(a)(1));
- Payments or gifts made directly to a party or political candidate (§ 78dd-2(a)(2)); and
- Payments or gifts made indirectly through intermediaries (§ 78dd-2(a)(3)).

The word "knowing" appears in only this last section – indirect bribery – and is clearly designed to provide a mens rea requirement concerning the intermediary's use of the payment or

[5] Similarly, if a defendant truly believed that his or her "conduct was lawful," then he would not be acting "willfully" or "with the intent to do something that the law forbids."

gift (whether it will be used to bribe or not used to bribe). If the defendants' argument were correct and "knowing" applied also to "foreign official," the result would be absurd: in indirect bribery cases, the government would have to prove that the defendant knew that the recipient was a "foreign official," but in direct bribery cases the government would not. Such a position is untenable.[6]

The defendants' reliance on Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009), is misplaced because the statute in that case is not parallel to the FCPA. See United States v. Barnett, 09-CR-091, 2009 WL 3517568, *1-*2 (E.D. Wash. Oct. 27, 2009) (distinguishing Flores-Figueroa on a similar basis). But even if Flores-Figueroa was somehow comparable, its holding does not compel a different conclusion. In that case, the Supreme Court interpreted the knowledge requirement of 18 U.S.C. § 1028A(a)(1), which requires a mandatory consecutive two-year sentence if, during the commission of other crimes, the defendant "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." Relying primarily on "ordinary English grammar," the Supreme Court ruled that the knowledge requirement applied to all aspects of the provision. See id. at 1894.

[6] Congress's definition of "knowing" to include the concept of deliberate ignorance supports the government's interpretation because that concept most naturally applies – in the FCPA context – to situations where the person uses an intermediary in an attempt to insulate himself or herself from criminal culpability.

The Supreme Court in Flores-Figueroa recognized, however, that "the inquiry into a sentence's meaning is a contextual one," id. at 1891, a point emphasized by Justice Alito. See id. at 1895-96 (Alito, J., concurring). Notably, he cited with apparent approval Ninth Circuit and other decisions ruling that 18 U.S.C. § 2423(a), which makes it unlawful to "knowingly transpor[t] an individual under the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution" does not require knowledge that the victim was not 18. See id. at 1895-96 (citing United States v. Taylor, 239 F.3d 994, 997 (9th Cir. 2001)).

Taylor is analogous to the instant case. Despite the fact that "knowingly" appears just before "an individual under the age of 18 years" in § 2423(a), the Ninth Circuit in Taylor explained that a defendant need not know of the underage status of the person being transported because the statute is not intended to protect "transporters who remain ignorant of the age of those they transport." 239 F.3d at 996. The court reasoned that "[i]f someone knowingly transports a person for the purposes of prostitution or another sex offense, the transporter assumes the risk that the victim is a minor, regardless of what the victim says or how the victim appears." Id. at 997. Similarly, the FCPA is not intended to protect individuals who bribe but who "remain ignorant" of the exact status of the bribe recipient. If someone chooses to bribe in exchange for business, that person "assumes the risk" that the recipient is a foreign official,

"regardless of what the [recipient] says or how the [recipient] appears."[7]

Justice Alito also cited with apparent approval Ninth Circuit and other cases holding that 8 U.S.C. § 1327, which prescribes punishment for any person who "knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) . . . to enter the United States," does not require knowledge that the assisted alien had been convicted of an aggravated felony. See id. at 1896 (citing United States v. Flores-Garcia, 198 F.3d 1119, 1121-23 (9th Cir. 2000)).

Second, it would be illogical to conclude that the law requires proof that a defendant knew the legal intricacies defining the status of a particular entity as a "department, agency, or instrumentality" of a foreign government, thereby making the employee or officer at issue a "foreign official." Although the government must prove that the intended recipient was, in fact, a "foreign official," it cannot be the law that the government must prove that the defendant knew the official qualifies as a "foreign official" as that term is defined under the FCPA or — as the defendants in this case would require — show

[7] Just as a § 2423(a) defendant is constitutionally protected by the requirement that the government prove he or she acted "with intent that the [victim] engage in prostitution," so too is the FCPA defendant by the requirement that the government prove he or she acted "corruptly" and "willfully."

that there was an "aware[ness] of the facts later deemed necessary to violate the FCPA." (DE #383 at 15).[8]

In United States v. Jennings, 471 F.2d 1310 (2nd Cir. 1973), the Second Circuit was faced with an argument similar to that now made by the defendants in this case. In Jennings, the defendant was arrested after he offered to bribe two undercover federal agents in exchange for "protection" for illegal gambling activities. The defendant was charged with violating 18 U.S.C. § 201(b)(1), which prohibits an individual from "corruptly" paying any "public official" (defined to include federal agents) for certain improper purposes. At trial, the defendant asserted that he believed the agents were merely "cops" and therefore requested a jury instruction requiring the government to "prove beyond a reasonable doubt that that defendant knew that the agents in question were acting for and on behalf of the United States." Id. at 1311. The district court denied the request and the defendant was convicted. On appeal, the Second Circuit held that it was sufficient for the government to prove that the defendant was acting corruptly:

> We decline to import into the statute . . . an additional requirement that a defendant who seeks corruptly to influence a federal official must know by which sovereign the official is employed at the time the bribe is offered. The conduct prohibited by the statute is the corrupt offer of "anything of value to any public official . . . with intent to influence any official act."

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[8] Following this logic, the government would be unreasonably required to prove that the defendants knew the details supporting a later finding of instrumentality, such as "the circumstances surrounding the entity's creation" and "the entity's obligations and privileges under the foreign country's law."

> Though the official must be a federal official to establish the federal offense, nothing in the statute requires knowledge of this fact, which we perceive as a jurisdictional prerequisite rather than as a scienter requirement. Nor does the legislative history support appellant's contention as to knowledge. If anything, it suggests that the sole scienter required is knowledge of the corrupt nature of the offer and an "intent to influence [an] official act." We see no reason to add by judicial fiat what Congress has not sought to require.

Id. at 1312 (internal citations omitted); see also United States v. Feola, 420 U.S. 671, 678-79, 684 (1975) (assault on federal officer statute does not require proof that defendant knew of victim's status); United States v. Howey, 427 F.2d 1017, 1018 (9th Cir. 1970) (holding that the government need not prove under 18 U.S.C. § 641 that the defendant knew the property stolen belonged to the United States). The Second Circuit in Jennings summarized that "culpability [under § 201] turns upon the defendant's knowledge or belief that the person whom he attempts to bribe is an official having authority to act in a certain manner and not on whether the official possess federal rather than state authority." 471 F.2d at 1313 (emphasis added).

In this case, as in Jennings, the conduct prohibited by the statute is, generally speaking, the corrupt offer of money or anything of value with intent to influence any official act. Though the official must be a "foreign official" in order for the case to fall within the purview of the FCPA, nothing in the statutory language requires proof that the defendant knew that fact. The FCPA requires – and the government's proposed elements make clear – that the government must prove, among other things, that (1) it was the defendant's intent to offer, promise, or pay

a bribe and (2) the intended recipient was a "foreign official" as that term is defined under the FCPA. To require further proof would be inconsistent with the statute and otherwise unworkable.

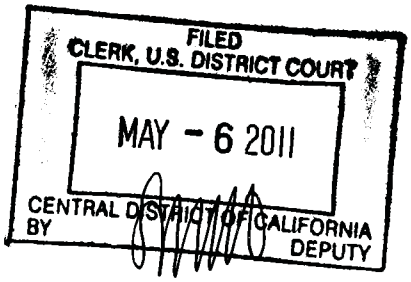
4. The Defendants Fail to Identify All Four Improper "Purposes"

Element (6) of the government's proposed instruction contains the list of improper purposes set forth in 15 U.S.C. § 78dd-2(a)(1)(A)-(B) & (3)(A)-(B). The defendants fail to include in their proposed elements the improper purpose of "to secure any improper advantage." In this case, the government intends to prove at trial that the defendants' purpose in making corrupt payments included a host of improper business advantages they sought to obtain. Therefore, this purpose – to secure an improper advantage – should be included in the instructions.

IV.

CONCLUSION

For the foregoing reasons, this Court should adopt the government's jury instructions, and not those of the defendants.



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

Plaintiff,

v.

ENRIQUE FAUSTINO AGUILAR NORIEGA, ANGELA MARIA GOMEZ AGUILAR, KEITH E. LINDSEY, STEVE K. LEE, AND LINDSEY MANUFACTURING COMPANY,

Defendants.

CASE NO. CR 10-1031 AHM

JURY INSTRUCTIONS

COURT'S INSTRUCTION NO. 30

FOREIGN CORRUPT PRACTICES ACT – ELEMENTS (GENERALLY)

Defendants LINDSEY MANUFACTURING COMPANY, KEITH E. LINDSEY, and STEVE K. LEE are charged in Counts Two, Three, Four, Five, and Six with violations of the Foreign Corrupt Practices Act ("FCPA"). The FCPA makes it a federal crime to offer to pay, pay, promise to pay, or authorize the payment of money or anything of value to a foreign official for purposes of influencing any act or decision of that foreign official in his official capacity, or for purposes of securing any improper advantage in order to obtain or retain business.

A defendant may be found guilty of this crime only if the government proves all of the following six elements beyond a reasonable doubt:

(1) The defendant is a "domestic concern," or an officer, director, employee, or agent of a "domestic concern," or a stockholder of a domestic concern who is acting on behalf of such domestic concern.

(2) The defendant acted corruptly and willfully.

(3) The defendant made use of the mails or of any means or instrumentality of interstate commerce in furtherance of conduct that violates this statute.

(4)(a) The defendant knowingly either paid, or offered, promised, or authorized the payment of, money or anything of value to a foreign official.

OR

(b) The defendant knowingly either paid, or offered, promised, or authorized the payment of, money or anything of value to a recipient other than a foreign official while knowing that all or a portion of the payment or gift would be offered, given, or promised (directly or indirectly), to a foreign official.

COURT'S INSTRUCTION NO. 30 (CONT'D)

(5) The payment was intended for at least one of the following purposes:

(a) to influence any act or decision of the foreign official in his official capacity;

(b) to induce the foreign official to use his influence with a foreign government (or a department, agency, or instrumentality of such government) to affect or influence any act or decision of such government, department, agency, or instrumentality; or

(c) to secure any improper advantage.

AND

(6) The payment was made to assist the defendant in obtaining business for any person or company, retaining business with any person or company, or directing business to any person or company.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CRIMINAL ACTION
	)	
WILLIAM J. JEFFERSON,	)	1:07 CR 209
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT

JURY TRIAL

Thursday, July 30, 2009

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: OFFICE OF THE UNITED STATES ATTORNEY
BY: MARK LYTLE, AUSA
REBECCA BELLOWS, AUSA
CHARLES DUROSS, SAUSA

For the Government

TROUT CACHERIS, PLLC
BY: ROBERT P. TROUT, ESQ.
AMY B. JACKSON, ESQ.
GLORIA B. SOLOMON, ESQ.

For the Defendant

MICHAEL A. RODRIQUEZ, RPR/CM/RMR
Official Court Reporter
USDC, Eastern District of Virginia
Alexandria, Virginia

Arlington, Virginia, in the Eastern District of Virginia, to Washington, DC, and on the same day drove his car from Alexandria, Virginia, in the Eastern District of Virginia, to the Rayburn Office -- House Office Building in Washington, DC, to prepare a package to be delivered to the then-Vice-President Abubakar.

Now, Section 78(dd)(2)(A) of Title 15, which codifies the Foreign Corrupt Practices violation, prohibits payments to any foreign official for purposes of influencing any act or decision of such foreign official in his official capacity, number one; number two, inducing such foreign official for do or omit to do any act in violation of the lawful duty of such official, or -- it's in the disjunctive -- or securing any proper advantage; or B, inducing such foreign official to use his influence with a foreign government or instrumentality thereof to effect or influence any act or decision of such government or instrumentality in order to assist the person or company making the payment or obtaining business for or with, or directing business to any person.

So in order to sustain its burden of proof for this offense, that is, the offense of violating the Foreign Corrupt Practices Act as charged in the indictment, the government has to prove the following seven elements beyond a reasonable doubt:

First, the government has to prove that the defendant is a domestic concern; that is, or an officer, director, employee or agent of a domestic concern, or a stockholder thereof, acting on behalf of such domestic concern -- all of these comments -- or concepts I'll define for you shortly;

Second, that the defendant acted corruptly and willfully, as I have previously defined these terms for you;

Third, that the defendant made use of the mails or any means or instrumentality of interstate commerce in furtherance of an unlawful act under this statute;

Fourth, that the defendant offered, paid, promises to pay or authorized the payment of money or anything of value;

Five, that the payment or gift was to a foreign official or any person while knowing that all or a portion of the payment or gift would be offered, given, promised, directly or indirectly, to a foreign public official -- let me read that one again.

That the payment or gift was to a foreign public official, or to any person, while knowing that all or a portion of the payment or gift would be offered, given or promised, directly or indirectly, to a foreign official -- foreign public official;

Six, that the payment was for one of four

purposes: To influence any act or decision of the foreign public official in his official capacity; second, to influence the foreign public official to do any act in violation of that official's public duty; or three, to induce that foreign public -- that foreign official to use his influence with a foreign government or instrumentality thereof to effect or influence any act or decision of such government or instrumentality, or to secure any improper advantage.

The seventh element that the government must prove beyond a reasonable doubt is that the payment was made to assist the defendant in obtaining or retaining business for or with or directing business to any person.

If the government fails to prove any of these essential elements beyond a reasonable doubt, then you must find the defendant not guilty of Count 11.

Now, for purposes of the Foreign Corrupt Practices Act, a domestic concern is any individual who is a citizen or national resident of the United States, and any corporation, partnership, association, joint stock company, business, trust, unincorporated organization sole proprietorship which has its principal place of business in the United States or which is organized under the laws of a state of the United States or a territory, possession or commonwealth of the United States.