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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

STUART CARSON, et al.,

Defendants.

CASE NO. SA CR-09-0077-JVS

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS COUNTS ONE, ELEVEN, TWELVE AND FOURTEEN OF THE INDICTMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 12, 2011
Time: 1:30 p.m.
Ctrm: 10C [Hon. James V. Selna]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 12, 2011 at 1:30 p.m., in the courtroom of the Honorable James V. Selna, or as soon thereafter as this matter may be heard, defendants Paul Cosgrove, Stuart Carson, Hong Carson and David Edmonds ("Defendants") will and hereby do move this Court for an order dismissing Counts One, Eleven, Twelve and Fourteen of the Indictment.

The basis for Defendants' Motion is that Counts Eleven, Twelve and Fourteen (the "Travel Act Counts") fail to state an offense. First, while the Travel Act applies domestically, the Travel Act Counts allege foreign commercial bribery. Because the Travel Act does not apply extraterritorially to the alleged facts, the Indictment fails to state an offense. Moreover, because the Travel Act does not cover the conduct at issue, there can be no conspiracy to violate the Travel Act. Accordingly, the conspiracy count (Count One) must also be dismissed to the extent it alleges a conspiracy to violate the Travel Act.

Second, the conduct alleged in the Indictment does not implicate the California commercial bribery statute, the alleged predicate for the Travel Act Counts. The applicability of the California commercial bribery statute is an essential element of a Travel Act violation, so Counts Eleven, Twelve and Fourteen fail to state an offense, and Count One must be dismissed to the extent it alleges a conspiracy to violate the Travel Act.

Third, to the extent the Travel Act and the California commercial bribery statute are deemed to apply to the alleged foreign bribery, the statutes are unconstitutionally vague and their application to Defendants violates due process. Defendants had no fair notice that the Travel Act or California commercial bribery statute would reach the conduct alleged in the Indictment. Thus, again Counts Eleven, Twelve and Fourteen fail to state an offense, and Count One must also be dismissed to the extent it alleges a conspiracy to violate the Travel Act.

Fourth, the substantive Travel Act counts fail to allege an essential element of the Travel Act – namely, an act following the alleged travel or use of interstate facilities in furtherance of the promotion of the California commercial bribery. Likewise, Counts Twelve and Fourteen fail to allege the jurisdictional element of "travel or use of a facility in interstate or foreign commerce." Therefore, the Travel Act Counts fail to state an offense.

Fifth, because the defective Travel Act Counts infect the entire conspiracy count, Count One must be dismissed in its entirety.

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities filed in support thereof, the Declaration of Ariana Seldman Hawbecker, the Indictment, the Bill of Particulars ("BOP"), and on such other and further argument and evidence as may be presented to the Court at the hearing of this matter.

DATED: June 13, 2011

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants Stuart Carson, Hong Carson, Paul Cosgrove and David Edmonds (Defendants) move to dismiss Counts One, Eleven, Twelve and Fourteen of the Indictment for failure to state an offense. Counts Eleven, Twelve and Fourteen (the "Travel Act Counts") charge substantive violations of the Travel Act against Cosgrove and Edmonds. Count One charges a conspiracy to violate the Travel Act and the Foreign Corrupt Practices Act ("FCPA") against all Defendants.

The Travel Act Counts are based on alleged bribes to employees of private companies located in China (Counts Eleven and Twelve) and Russia (Count Fourteen). As the Indictment alleges illicit payments to the employees of overseas companies, for the sale of valves used in overseas construction projects,[1] the government must rely on the extraterritorial application of the Travel Act. Since the Travel Act does not apply extraterritorially, Counts Eleven, Twelve and Fourteen do not state an offense. Count One (conspiracy) must also be dismissed to the extent it alleges a conspiracy to violate the Travel Act, as the Travel Act does not reach the charged conduct.

In *Morrison v. Nat'l Australia Bank Ltd.,* 130 S. Ct. 2869, 2878 (2010), the Supreme Court explained that unless Congress has clearly indicated that a statute applies extraterritorially, it does not. The Travel Act criminalizes "bribery . . . in violation of the law of the state in which committed," i.e., domestic bribery. Travel Act application to the foreign bribery alleged in this case violates *Morrison's* presumption against the extraterritoriality of United States ("U.S.") laws.

While the face of the Travel Act, considered with *Morrison's* presumption against extraterritoriality, shows that the Travel Act has no foreign application, the

[1] In most cases, the valves were actually manufactured by CCI's foreign affiliates outside the U.S.

statute's legislative history confirms it. Consideration of the Travel Act in conjunction with the subsequently enacted FCPA also demonstrates that Congress did not intend that the Travel Act extend to foreign bribery.

Further, the Travel Act Counts are predicated upon California's commercial bribery statute, Cal. Penal Code § 641.3 ("PC 641.3"), so the applicability of that statute to Defendants' conduct is essential to the government's case. PC 641.3 has never been applied to foreign commercial bribery and its legislative history shows its foreign application was never considered.

Application of the Travel Act and PC 641.3 would also be unconstitutionally vague. Defendants had no notice that either the Travel Act or PC 641.3 would reach the alleged conduct. The government's recent application of this fifty-year old statute against foreign commercial bribery, in the face of strong skepticism that it even applies, shows the enforcement of this statute is arbitrary.

Additionally, the Travel Act allegations are simply defective. The Travel Act prohibits travel or the use of a facility in interstate or foreign commerce with the intent to promote unlawful activity (i.e., state-law bribery), followed by an act to promote the bribery. But the Travel Act Counts fail to allege the essential element of an act following the travel or use of a facility in interstate commerce to promote the alleged bribery. So too, Counts Twelve and Fourteen fail to adequately allege the jurisdictional element of travel or use of a facility in interstate or foreign commerce. Because the Travel Act Counts omit necessary elements, they fail.

Finally, the Court cannot guess whether the Grand Jury would have even indicted Defendants for conspiracy had it known that the Travel Act did not apply to Defendants' alleged conduct. Because the defective Travel Act allegations infect the entire conspiracy count, Count One must be dismissed in its entirety.

II. LEGAL STANDARD

A pretrial motion may raise any defense "that the court can determine without a trial of the general issue." Fed. R. Crim. P. 12(b). A defense can be considered

pretrial when trial "would be of no assistance in determining [its] validity." *United States v. Covington*, 395 U.S. 57, 60 (1969). "The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling." Fed. R. Crim. P. 12(d).

In ruling on a pretrial motion to dismiss an indictment for failure to state an offense, "the court must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged. The indictment either states an offense or it doesn't." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002) (internal citations omitted). Importantly, even if an indictment alleges each offense element , it nonetheless fails when "the specific facts alleged . . . fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002).

III. PERTINENT INDICTMENT ALLEGATIONS

The Indictment alleges that: Control Components, Inc.'s ("CCI") was a Delaware corporation headquartered in Rancho Santa Margarita, California; Stuart Carson was a U.S. citizen and CEO of CCI from 1989 through 2005; Cosgrove was a U.S. citizen, Executive Vice President of CCI from 2002 through 2007 and Head of CCI's Sales Department from 1992 through 2007; Hong "Rose" Carson was a U.S. citizen and Manager of CCI's Sales in China and Taiwan from 1995 through 2000, and Director of Sales in China and Taiwan from 2000 through 2007; and, Edmonds was a U.S. citizen and Vice President of CCI's Customer Service Department from 2000 through 2007. Indictment (Ind.) at ¶¶ 3-7. The Indictment alleges that Defendants "caused CCI employees and agents to make corrupt payments to officers and employees of private companies abroad" – namely, China and Russia, (Ind. ¶¶ 4-11, 35) and committed specified overt acts in the Central District of California and elsewhere. Ind. ¶ 31. But the overt acts underlying the Travel Act Counts allege only limited conduct by the Defendants or their alleged co-conspirators in the U.S., let alone in the Central District.

Overt Acts 46-47 (related to Count Eleven) concern the sale of CCI valves in China. They allege Edmonds approved and caused a wire payment from a CCI account in California to China for a project in China. Ind. ¶ 31 at 24. The alleged recipients were "Fujian Pacific FIC(s)" (*see* BOP No. 25), employees of "a private company in China." Ind., Overt Act 46. Other than sending money from California, Count Eleven and the related overt acts do not allege any domestic conduct.

Overt Acts 48-49 (related to Count Twelve), also concern the sale of CCI valves in China and allege Edmonds' approval of a payment from Sweden to China for a project in China. *Id.* Again, the alleged recipients were "Fujian Pacific FICs" (*see* BOP No. 28), employees of a private Chinese company. Ind., Overt Act 48. There are no allegations of any domestic conduct.

Overt Acts 53-55 (related to Count Fourteen) concern the sale of CCI valves to a Russian company for a project in India. They allege that Cosgrove approved and caused wires from Sweden to New York, and Sweden to Latvia.[2] The alleged recipient was "Vladamir Batenko" (*see* BOP No. 116), an employee of "a private company headquartered in Moscow Russia." Ind., Overt Act 53. Other than the incorrect allegation that money was sent from abroad to a New York account, there are no allegations of domestic conduct underlying Count Fourteen.

Overt Act 58 alleges that Stuart Carson traveled from California to Hawaii to make a corrupt payment to an employee of a San Francisco based private "Company 2" to secure "future" business. (But this allegation is not made in connection with a substantive Travel Act count.)

The other two paragraphs relating to the Travel Act, paragraphs 16(B) and 35, refer generally to travel and use of facilities in interstate and foreign commerce. Paragraph 19 generally alleges that Defendants "participated in and arrange[d] for

[2]While Count Fourteen alleges that a $136,583.98 payment went from Sweden to New York, Overt Act 55 (and the discovery) show that this payment actually went from Sweden to Latvia.

overseas holidays to places such as Disneyland and Las Vegas for officers and employees of state-owned and private customers under the guise of training and inspection trips." Ind. ¶ 19; s*ee also* Ind. ¶¶ 22-23. It does not identify these private employees or if they were involved in transactions at issue.[3]

IV. THE ALLEGED FOREIGN COMMERCIAL BRIBERY DOES NOT STATE AN OFFENSE UNDER THE TRAVEL ACT

A. The Travel Act Has No Extraterritorial Application

1. The Presumption Against Extraterritoriality Applies To The Travel Act

The Supreme Court recently made clear that domestic laws should not be applied extraterritorially unless Congress clearly denotes foreign application. *Morrison v. Nat'l Australia Bank Ltd.,* 130 S. Ct. 2869, 2878 (2010). *Morrison* involved a suit by foreign citizens, under Section 10(b) of the Securities Exchange Act of 1934, against a Florida company for fraudulent conduct in the U.S. The fraud allegedly impacted the price of an Australian company's shares on foreign exchanges. *Id*. at 2876-77 and 2844. In upholding dismissal of the action for failure to state a claim, the Court held: (1) the question was not whether the district court had jurisdiction over the claim, but whether Section 10(b) reached the conduct at issue ("a merits question"), *id. at 2877*; (2) Section 10(b) does not reach extraterritorial conduct because Congress gave no clear indication that it does, *id.* at 2883; (3) whether a statute is improperly being applied extraterritorially turns on the statute's "focus" and the "focus" of Section 10(b) is fraud on domestic exchanges; therefore, (4) Section 10(b) does not reach fraud on a foreign exchange, even when there is significant domestic conduct to further the fraud. *Id*. at 2884.

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[3]The government's case is based upon the alleged bribery of foreign employees. With the exception of Overt Act 58 and Transaction 30 (which involves the same "Company 2"), none of the companies identified in the Indictment - or the BOP - identify employees of domestic companies as alleged bribe recipients.

Congress usually legislates with respect to domestic, not foreign matters. *Id.* at 2877. Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." *Id.* "Rather than guess anew in each case, we apply the presumption [against extraterritoriality] in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 2881. Succinctly put, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2877-78 (internal citations omitted).

The Travel Act proscribes travel in interstate or foreign commerce, or use of the facilities of such commerce, with the intent to promote certain unlawful activity (e.g., state-law bribery), and thereafter to perform an act to promote or facilitate that activity. 18 U.S.C. § 1952(a)(3) and (b)(2). The Travel Act's reference to foreign commerce does not render its application extraterritorial. *Id.* at 2878. "If we were to permit possible, or even plausible, interpretations of [commerce] language . . . to override the presumption against extraterritorial application, there would be little left of the presumption." *E.E.O.C. v. Arabian Amer. Oil Co. ("Aramco")*, 499 U.S. 244, 253 (1991) (superseded by statute on other grounds). "[W]e have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." *Morrison,* 130 S.Ct. . at 2882-2883 (citing *Aramco*, 499 U.S. at 253).

The Second Circuit applied *Morrison* in *Norex Petroleum Ltd. v. Access Industries,* 631 F.3d 29, 31 (2d Cir. 2010), and held that RICO does not apply extraterritorially. The *Norex* plaintiff, a foreign company wholly owned by a California corporation, brought a civil RICO action alleging that foreign and American defendants conspired to take "control of Yugraneft, a Russian oil company, illegally obtaining much of Norex's ownership of Yugraneft and reducing it from the controlling majority shareholder to a powerless minority shareholder." *Id.* The trial court held that the domestic conduct alleged was sufficient to state a

claim. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 304 F. Supp. 2d 570, 572 (S.D.N.Y. 2004) *vacated and remanded*, 416 F.3d 146 (2d Cir. 2005).

The Second Circuit reversed and held that the alleged domestic conduct failed to state a RICO offense and RICO has no extraterritorial application. First, although RICO applies to "any enterprise which is engaged in, or that activities of which affect, interstate or foreign commerce," *Morrison* forecloses reliance on this language as a basis for extraterritorial reach. "[W]e have repeatedly held that even statutes that contain 'broad language in [the statute's] definitions of commerce' do not apply abroad." *Norex*, 631 F.3d at 33 (quoting *Morrison*, 130 S.Ct. at 2882). Second, the fact that RICO's predicate acts possess an extraterritorial reach, does not mean RICO itself possesses an extraterritorial reach. Rather, *Morrison* held that the "presumption against extraterritoriality operates to limit that provision to its terms." *Id*. (quoting *Morrison* at 2882-83). Third, simply alleging significant domestic conduct is not a panacea. "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id*. (quoting *Morrison* at 2884)*; see also Newmarket Corp. v. Innospec, Inc.*, No. 3:10CV503, 2011 WL 1988073, *1 at *4 (E.D. Va. May 20, 2011) (Robinson-Patman Act does not apply extraterritorially to bribes of officials in Iraq and Indonesia).

The Travel Act's text plainly demonstrates its domestic focus. *See* 18 U.S.C. § 1952(b)(2) ("unlawful conduct" means "extortion, bribery, or arson *in violation of the laws of the State in which committed* or of the United States") (emphasis added). The Travel Act was not intended to punish foreign bribery.

2. The Travel Act's Legislative History Does Not Reflect A "Clear Indication" That The Statute Applies Extraterritorially

The legislative history of the 1961 Travel Act demonstrates that Congress did not intend it to have extraterritorial reach but rather passed the bill to assist states in enforcing their laws against organized crime who used state boundaries to avoid

prosecution. Attorney General Robert F. Kennedy testified before the Senate Judiciary Committee , "[t]he target clearly is organized crime. . . . [O]nly the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from local officials." S. Rep. No. 87-644, at 3 (1961).

Similarly, the House Report endorsing the Travel Act stated that the Act "will assist local law enforcement by denying interstate facilities to individuals engaged in illegal gambling, liquor, narcotics or prostitution business enterprises." H.R. Rep. No. 87-966 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2664, 2665. The Report later discussed the "need for the assistance of the Federal Government in view of the fact that [state] law enforcement authorities are limited and hindered by the interstate nature of these activities." *Id.*

That the primacy of the conduct targeted by the Travel Act is domestic was recognized by the Supreme Court in *Rewis v. United States*, 401 U.S. 808, 811 (1971). The "[l]egislative history of the Act . . . reveal[s] that Section 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." *Id.* Because of the Travel Act's domestic focus, one commentator observed:

> The validity of [Travel Act] charges [for foreign commercial bribery] may be questioned. The legislative histories of the FCPA and the Travel Act show no evidence that Congress intended to make foreign commercial bribes a federal crime; indeed, quite the opposite. The legislative histories of many state bribery statutes similarly fail to disclose any intention to reach bribery in other countries that has, at best, a limited nexus to the state. Travel Act charges predicated on bribery laws of those states thus require overlooking the intentions of both Congress and the state legislature. In the half century that the Travel Act has been in effect, moreover, only one federal court has upheld criminal

charges for foreign commercial bribery under that Travel Act, and that court's decision is a doubtful precedent.

Kenneth A. Cutshaw, et. al., *Corporate Counsel's Guide to Doing Business in China* (3rd Ed. 2009) (Ch. 13 written by Patrick M. Norton) ("Norton Chapter"), Ex. 2 to Decl. of Special Agent Brian Smith In Support of Government's Opposition to Amended Motion to Dismiss FCPA Counts (Doc. No. 334-1) at 390, attached to the Declaration of Ariana Seldman Hawbecker ("Hawbecker Dec."), Ex. 2.[4]

While the Travel Act's coverage is not limited to the activities of organized crime, *United States v. Thordarson*, 646 F.2d 1323, 1328 n.10 (9th Cir. 1981), the Travel Act's purpose of assisting state law enforcement in combating organized crime in the U.S. demonstrates that Congress did not intend for the Act to cover foreign commercial bribery.

3. The Subsequent Enactment Of The FCPA Provides A Clear Inference That The Travel Act Was Not Intended To Apply Extraterritorially

Congress specifically addressed the issue of foreign bribery with the 1977 FCPA. The Supreme Court has acknowledged that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). In *Brown & Williamson*, the Supreme Court held that the Food, Drug, and Cosmetic Act ("FDCA") did not give the Food and Drug Administration ("FDA") the authority to regulate tobacco products. *Id.* at 161. The Court found that while certain readings of the FDCA might suggest that cigarettes are "drugs" or "devices" subject to the FDA's regulatory authority, subsequent

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[4] The case cited by Norton as "doubtful precedent" is *United States v. Welch*, 327 F.2d 1081 (10th Cir. 2003). *Welch* involved alleged bribes to Olympic officials for the purpose of securing the Winter Games in Salt Lake City and did not actually address the extraterritorial application of the Travel Act.

legislation directly addressing tobacco's effects on public health demonstrated that Congress did not intend to grant the FDA the authority to regulate tobacco products. *Id.* at 143-59.

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. [439, 453 (1988)]. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani*, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it has not been expressly amended. 523 U.S. at 530-31 (1998)."

Id. at 143. Under the government's theory, the Travel Act is so broad that it would reach every transaction currently alleged as an FCPA violation. Conversely, the FCPA is specifically limited to bribery of foreign public officials. As in *Brown & Williamson*, the narrowly tailored FCPA should shape any interpretation of the supposedly limitless Travel Act. A comparison of both statutes demonstrates that Congress did not intend the Travel Act to apply to foreign conduct.

First, if the Travel Act is applied to foreign bribery, then the Travel Act and the FCPA actually conflict. The Indictment seeks to apply PC 641.3 through the Travel Act. PC 641.3 prohibits all corrupt offers and payments to corporate employees "in return for [the employee's] using or agreeing to use his or her position for the benefit" of the payor. But the FCPA excepts from its coverage payments made to secure "routine government action," e.g., phone service, power and water supply, loading and unloading cargo, and protecting perishable products.

15 U.S.C. § 78dd-1(b). The same payments that are excepted from the FCPA could violate the Travel Act because neither the Travel Act nor PC 641.3 exclude such payments from their coverage. This conflict suggests that Congress did not understand the Travel Act to apply to foreign bribery.

Second, because the FCPA provides an affirmative defense for conduct that was legal under foreign written law, 15 U.S.C. § 78dd-1(c), Congress obviously considered its possible conflicts with foreign law. Congress did no such thing for the Travel Act. "The probability of incompatibility with the applicable laws of the other countries is so obvious that if Congress intended such foreign application, 'it would have addressed the subject of conflicts with foreign laws and procedures.'" *Morrison*, 130 S.Ct. at 2885.

Third, the FCPA expressly provides for its extraterritorial application. *See* 15 U.S.C. §§ 78dd-1(g)(1) and 78dd-2(i)(1). Congress thus showed that it "knows how to give a statute explicit extraterritorial effect." *Id.* at 2883 n.8. The fact Congress did not do this with the Travel Act is telling.

Fourth, in passing the FCPA, Congress considered its impact on U.S. foreign policy. *See* Declaration of Professor Michael J. Koehler in Support of Motion to Dismiss FCPA Counts (Doc. No. 305), ¶¶ 140, 222, 243 and Exhibits 29, 43 & 46. Conversely, nothing in the Travel Act's legislative history reflects that Congress considered such issues.

In passing the FCPA to address foreign bribery, Congress understood that it was acting on a clean slate. *See, e.g.,* Koehler Dec., ¶ 102 (Congress aware of "[v]arious classes of recipients" of alleged improper payments, "including but not limited to government officials, commission agents and consultants paying company, and recipients of commercial bribery," yet Congress only outlawed corrupt payments to foreign officials), ¶226 (committee aware "that the [FCPA Senate] bill would not reach all corrupt overseas payments"), ¶ 247 (same for house bill). In fact, the defense has unearthed no case where the Travel Act was applied to

foreign bribery prior to passage of the FCPA. The FCPA was thus intended to occupy the field of foreign bribery. Congress never considered (let alone intended) the Travel Act to have extraterritorial application.[5]

4. The Indictment Impermissibly Asserts Extraterritorial Application Of The Travel Act

The *Morrison* Court looked to a statute's "focus" to determine its reach. The Court followed the approach it outlined in *EEOC v. Arabian American Oil Co.* (*Aramco*), 499 U.S. 244 (1991). *Aramco* involved a U.S. citizen hired in Houston, Texas, by Aramco, a Delaware corporation. After a year, he went to work for Aramco in Saudi Arabia. He was fired four years later and sued Aramco under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, alleging discrimination. *Id.* at 247. The Court upheld the dismissal of the action, finding that "neither that territorial event [Plaintiff's hiring] nor that relationship [Plaintiff was American and Aramco was a Delaware corporation] was the 'focus' of Congressional concern, but rather domestic employment." *Morrison*, 130 S.Ct. at 2884 (citing *Aramco*, 499 U.S. at 255).

The *Morrison* Court reasoned that "[a]pplying the same mode of analysis here, we think that the focus of the [1934 Securities and] Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* Accordingly, addressing fraud occurring in the U.S. that impacted a foreign exchange would have required extraterritorial application of Section 10(b). *Morrison,* 130 S.Ct. at 2877-2884.

Likewise, the Travel Act punishes the use of interstate or foreign commerce, to promote an unlawful activity (here, "bribery . . . in violation of the laws of the

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[5] The *only* case to hold that the Travel Act applies extraterritorially, *United States v. Noriega*, 746 F.Supp. 1506 (S.D. FL. 1990), (i) ignored the presumption against extraterritorial application of federal statutes, (ii) concerned a different provision of the Travel Act (addressing narcotics offenses), and (iii) primarily relied on the "effects" test rejected by *Morrison*. *Id*. at 1516-1519.

state in which committed"), followed by an act to promote that unlawful activity. 18 U.S.C. § 1952(a)(3) and (b)(2). The focus of the crime is bribery, committed in one of the United States, in violation of that state's law, i.e., domestic conduct. Protecting foreign employers from the misdeeds of its foreign employees abroad, or protecting foreign employers from the misdeeds of American companies doing business abroad, is not the Travel Act's "focus." Otherwise, it would not require that the alleged bribery be a "violation of the laws of the state in which committed."

The Indictment generally alleges that Defendants acted "in the Central District of California and elsewhere" and "caused" the "use of the mail" and "facility[ies] in interstate and foreign commerce." Ind. ¶ 16. But, "[s]imply alleging that some domestic conduct occurred cannot support a claim of domestic application." *Norex,* 631 F.3d at 33. "It is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States" and "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case." *Morrison*, 130 S. Ct. at 2884.

The *Morrison* Court's approach to the question of when a statute is being applied extraterritorially is further elucidated by its treatment of *Pasquantino v. United States*, 544 U.S. 349 (2005). *Pasquantino* upheld the application of the wire fraud statute, 18 U.S.C. § 1343, to defendants who "ordered liquor over the phone from a store in Maryland with the intent to smuggle it into Canada and deprive the Canadian government of revenue." *Morrison* at 2887 (citing *Pasquantino*, 544 U.S. at 353, 371).

> Section 1343 prohibits "any scheme or artifice to defraud,"-fraud *simpliciter,* without any requirement that it be "in connection with" any particular transaction or event. The *Pasquantino* Court said that the petitioners' "offense was complete the moment they executed the scheme inside the United States," and that it was "[t]his domestic

> element of petitioners' conduct [that] the Government is punishing." Section 10(b), by contrast, punishes not all acts of deception, but only such acts "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." Not deception alone, but deception with respect to certain purchases or sales is necessary for a violation of the statute.

Morrison, 130 S.Ct. at 2887.

The *Morrison* Court's treatment of *Pasquantino* is instructive. First, *Morrison's* presumption against extraterritoriality applies to criminal statutes (otherwise the Court would have simply deemed *Pasquantino* irrelevant). Second, simple domestic fraud (as alleged in *Pasquantino)* is punishable in the U.S., even if its effects are felt abroad, because the crime is complete upon the hatching of the scheme (followed by a wire communication in furtherance of the scheme).

Here, the Indictment does not allege simple fraud, it alleges a Travel Act offense predicated on PC 641.3. Thus, the government must prove, *inter alia*: (1) travel or the use of a facility in interstate or foreign commerce; (2) with the intent to violate PC 641.3 in California; followed by, (3) an act to promote the PC 641.3 violation. 18 U.S.C. § 1952(a)(3) and (b)(2). PC 641.3, in turn, criminalizes corrupt offers and payments to corporate employees "in return for [the employee's] using or agreeing to use his or her position for the benefit" of the payor, without the employer's consent. Essentially, PC 641.3 criminalizes honest services fraud.

Unlike *Pasquantino*, this is not "fraud simpliciter." To paraphrase the *Morrison* Court, the Travel Act allegations charge a crime "in connection with [a] particular transaction or event," i.e., use of a wire with the intent to deprive a foreign corporation of the undivided loyalty of its employees.[6] This case is controlled by

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[6]A Travel Act violation requires proof of additional facts that show the government is alleging more than simple fraud: travel or use of commerce facilities; with an

Morrison because in both cases a crime is alleged in connection with a specific harm --in *Morrison* it was fraud on a securities exchange, here it is fraud on a corporate employer. In both cases the specific harm necessarily occurred overseas. But in both cases the charging statute envisioned that the specific harm would occur in the U.S. Thus, here as in *Morrison*, the charging statute is improperly being applied extraterritorially.

Morrison is a sea change--four circuit courts, including the Ninth, had incorrectly held that the 1934 Exchange Act applied extraterritorially. *Morrison,* 130 S.Ct. at 2880. But even pre-*Morrison* cases have found the government overreached in applying U.S. law to foreign conduct. Most notable is *United States v. Giffen*, 326 F.Supp.2d 497 (S.D.N.Y. 2004), where the government charged the defendant with making unlawful payments to the former Prime Minister and Oil Minister of the Republic of Kazakhstan in violation of the FCPA, mail and wire fraud statutes, and other federal laws. The government alleged that the defendant violated 18 U.S.C. § 1346 (honest services fraud) by depriving the citizens of Kazakhstan of the honest services of their government officials. *Id*. at 499, 504. But the court concluded that in enacting Section 1346, Congress did not permit the prosecution of U.S. citizens for depriving foreign nationals of the honest services of their own government officials. *Id*. at 506. "There is no reason to think that Congress sought to grant carte blanche to federal prosecutors, judges and juries to define 'honest services' from case to case for themselves." *Id*. at 505 (citation omitted).

As in *Giffen,* the government is stretching the Travel Act to protect foreign companies. But there is no precedent for applying U.S. law to protect foreign

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intent to commit bribery in California and in violation of California law; and, a subsequent act to promote the bribery.

corporations from foreign commercial bribery. *Cf. Morrison*, 130 S.Ct. at 2874; *Aramco*, 499 U.S. at 255-56.

Likewise, in *United States v. Lopez-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), the defendants were convicted of conspiring to possess with the intent to distribute cocaine. *Id.* at 1307. The evidence showed several meetings in Florida relating to the transport of cocaine from Venezuela to France. *Id.* at 1308-10. The appellate court vacated the convictions, reasoning "Congress has not stated its intent to reach discussions held in the United States in furtherance of a conspiracy to *possess* controlled substances *outside* the territorial jurisdiction of the United States, with the intent to *distribute* those controlled substances *outside* of the territorial jurisdiction of the United States." *Id.* at 1313 (emphasis in original).

Here, the Indictment alleges a scheme to bribe foreign citizens, employed by foreign companies, in connection with the sale of valves overseas, for foreign construction projects. The domestic conduct alleged is even less than that alleged in *Lopez-Vanegas.* But isolated domestic conduct cannot support the charged violations of the Travel Act. *See Philip Morris USA, Inc.*, No. 99-2496, 2011 WL 1113270, *1 at *5 (D.D.C. Mar. 28, 2011) (holding that isolated domestic conduct – that the defendant's scientists and officials attending meetings with other defendants in the U.S. – was not the basis for its RICO liability and did not permit RICO to apply to what is essentially foreign activity); *Norex,* 631 F.3d at 31 (holding that conduct alleged in the U.S. – that the defendants were U.S. citizens, conducted domestic business and directed the conspiracy from the U.S. – was insufficient to state a civil RICO offense).

Importantly, these objections apply to both the substantive Travel Act counts and Count One (conspiracy). "There can be no violation of § [371] if the object of the conspiracy is not a violation of the substantive offense." *Lopez-Vanegas*, 493 F.3d at 1312; *see also United States v. Jack*, 2010 WL 4718613, *12 (E.D. Cal. 2010) ("If the object of the conspiracy is not a violation due to the lack of domestic

conduct or extraterritorial application of the statute at issue, there can be no criminal conspiracy.").

The Travel Act must be narrowly construed. *See Rewis*, 401 at 811-12 (rejecting a broad interpretation of the Travel Act); *United States v. Hathaway*, 534 F.2d 386, 397 n.10 ("In contrast to the broad interpretation given to the Hobbs Act, the Supreme Court has indicated that the Travel Act is to be read in a narrower and more restricted fashion."). Any ambiguity concerning the scope of the Travel Act should be resolved in favor of lenity. *Rewis*, 401 U.S. at 812. Although it is clear that the Travel Act does not reach the conduct alleged, these canons of construction further support the point. Accordingly, Counts Eleven, Twelve and Fourteen, and Count One to the extent it alleges a conspiracy to violate the Travel Act, must be dismissed.

5. *Bowman* Does Not Permit Extraterritorial Application Of The Travel Act

In *United States v. Bowman*, 260 U.S. 94, 98 (1922), the Court recognized that where a crime is committed (i.e., the "locus") is key: the crime must be committed within the "territorial jurisdiction of the government where it may properly exercise it." But this rule does not apply to criminal statutes that are **not "logically dependent upon their locality for the government's jurisdiction**, but are enacted because of the **right of the government to defend itself against obstruction, or fraud** wherever perpetrated, especially if committed by its own citizens, officers, or agents." *Id*. at 98 (emphasis added).

Bowman involved a conspiracy to defraud the government-owned "Emergency Fleet Corporation," which operated vessels on the high seas and in foreign ports. *Id.* at 101. The criminal statute at issue was amended to cover fraud against such government owned corporations. "We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the government was in private and public vessels of the United

States on the high seas and in foreign ports." *Id.* Similar statutes involve: a "consul" who knowingly certifies a false invoice; "forging or altering ship's papers"; "enticing desertions from the naval service"; "bribing a United States officer of the civil, military, or naval service"; "willfully doing . . . any act relating to . . . disposition of property captured as prize"; and, theft of military or naval ordinance, arms, ammunition or clothing. *Id.* at 98-100. In each case, the law involved protected the government from harm that would naturally occur at sea or abroad.

It is unclear whether *Bowman* survives *Morrison*; regardless, it is inapplicable. The Travel Act was not intended to protect the federal government, but to aid state law enforcement. And the alleged foreign commercial bribery would not have directly victimize the U.S., but private, foreign companies. Further, the crime charged must be "illegal in the state in which committed," so the government's jurisdiction would be "logically dependent upon" where the crime was allegedly committed. Accordingly, *Bowman* is not applicable. *Cf. Philip Morris USA, Inc.*, 2011 WL 1113270 at *1, n. 6 ("As the Defendants' criminal enterprise does not implicate 'the right of the government to defend itself,' *Bowman* poses no obstacle to the proper application of *Morrison* here.") (internal citation omitted).

B. The Indictment Does Not State A Travel Act Offense Because The Alleged Conduct Does Not Violate California's Commercial Bribery Statute

"When the unlawful activity charged in the indictment is the violation of state law, the commission of or the intent to commit such a violation is an element of the federal offense." *United States v. Bertman*, 686 F.2d 772, 774 (9th Cir. 1982). As part of a Travel Act charge, the government must prove that defendant "has or could have violated the underlying state law". *Id.*

But PC 641.3 has never been used to criminally prosecute foreign commercial bribery. Nothing in the legislative history of PC 641.3 suggests application to commercial bribery of an employee of a foreign company in exchange for a foreign

sale. *See* Hawbecker Dec., ¶¶ 4-6. Rather, PC 641.3 is focused on protecting employers domiciled in California and California consumers. *Id.*

States have the power to enforce their laws against out-of-state conduct where the defendant intentionally causes harm within the state. *Strassheim v. Daily*, 221 U.S. 280, 284 (1911). But California could not have been harmed by the offering of bribes to foreign employees of foreign companies in exchange for sales abroad. *Cf. United States v. Perrin,* 444 U.S. 37, 40 (1979) (upholding Travel Act convictions premised on use of facilities in interstate commerce to promote a commercial bribery scheme in violation of the laws of Louisiana by offering money to an employee of a Louisiana-based company in exchange for his misappropriation of confidential information); *United States v. Lee*, 359 F.3d 194, 206 (3d Cir. 2004) (upholding Travel Act convictions predicated on New Jersey commercial bribery statute where bribes paid to officials of International Boxing Federation headquartered in New Jersey caused the IBF to alter its boxing ratings resulting in consequences within that state); *United States v. Woodward*, 149 F.3d 46, 67 (1st Cir. 1998) (Travel Act conviction predicated on Massachusetts gratuity statute appropriate where defendant, an elected Massachusetts official, accepted gratuities from a company doing business in Massachusetts to influence legislation in that state). *Perrin*, *Lee*, and *Woodward* established harm to residents of the state from which the Travel Act state bribery predicate was drawn. That is not the case here.

Courts have recognized that the Travel Act is not violated where, as here, a Travel Act charge is predicated on a state law violation, but the state itself does not intend its criminal laws to reach the charged conduct. In *United States v. Ferber*, 966 F. Supp. 90 (D. Mass. 1997), the court dismissed several Travel Act counts predicated on the Massachusetts gratuity statute. The court reasoned that because Massachusetts had never criminally prosecuted the predicate offense, it could not serve as a predicate for the Travel Act. *Id.* at 106. The court noted that "it would be contrary to the [Travel Act's] purpose for the federal government to attempt to aid

Massachusetts in the enforcement of a law which Massachusetts has chosen not to enforce." *Id.*; *see also United States v. Tonry*, 837 F.2d 1281 (5th Cir. 1988) (Louisiana commercial bribery statute does not reach bribery of non-Louisiana public officials so defendant not guilty of violating Travel Act for bribing chairman of Indian tribe).

Because there is no indication that California could or would prosecute the foreign commercial bribery alleged, the Travel Act Counts do not state an offense. *See United States v. Genova*, 333 F.3d 750, 759 (7th Cir. 2003) (overturning RICO conviction where government conceded that no Illinois decision supported its view that defendant's conduct fell within that state's bribery statute).

C. Alternatively, Application Of The Travel Act And PC 641.3 To Defendants' Foreign Conduct Is Unconstitutionally Vague And Violates Due Process

"The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1953). "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266-67 (1997); *see also Smith v. Goguen*, 415 U.S. 566, 577-78 (1974) (due process violated where a statute does not have an "ascertainable standard for inclusion and exclusion"). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Harriss,* 347 U.S. at 617.

As applied, the Travel Act and PC 641.3 are unconstitutionally vague. Nothing in the text or legislative history of the Travel Act or PC 641.3 suggests that the statutes reach the conduct alleged here. Nor is there case law that would give such notice.

Likewise, application of the Travel Act is an arbitrary enforcement of the law. The government recently ramped up application of this fifty-year-old statute to foreign commercial bribery. *See* Norton Chapter, Ex. 2 to Hawbecker Dec. The government is pressing this interpretation despite grave doubts as to the Travel Act's applicability to foreign commercial bribery, and the applicability of the state law predicates upon which the government relies. *Id.* The government's ability to pick up, dust off and apply old statutes to new and unforeseen situations demonstrates arbitrary enforcement.

Accordingly, as applied to Defendants, the Travel Act and PC 641.3 are unconstitutionally vague. *See Giffen*, 326 F.Supp.2d at 506 (holding that the government's application of the honest services theory to the defendant's alleged scheme to bribe foreign officials was unconstitutionally vague because the wire fraud statute and its legislative history do not mention bribery of foreign officials and there are no published decisions addressing the honest services theory the government espoused in the case).

D. Assuming, *Arguendo*, That The Travel Act Applies To The Foreign Commercial Bribery Alleged, The Travel Act Counts Still Fail To Allege Essential Elements

1. The Indictment Fails To Allege An Act In Furtherance Of Bribery *After* The Alleged Use Of Interstate Or Foreign Commerce

Federal Rule of Criminal Procedure 7(c) requires that an indictment contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." "An indictment which tracks the offense in the words of the statute is sufficient if those words fully, directly, and expressly set forth all the

elements necessary to constitute the offense intended to be proved." *United States v. Tavelman*, 650 F.2d 1133, 1137 (9th Cir. 1981) (indictments containing dates of alleged criminal violations, statutes, and brief descriptions were sufficient). But, "[i]t is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species — it must descend to particulars." *Russell v. United States*, 369 U.S. 749, 765 (1962) (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)) (internal quotation marks omitted).

A Travel Act violation requires, at a minimum, that a defendant: (1) travel or use a facility in interstate or foreign commerce (2) with the intent to promote, manage, establish, or carry on California commercial bribery and (3) thereafter perform or attempt to perform an act in furtherance of the bribery. *United States v. Winslow*, 962 F.2d 845, 852 (9th Cir. 1992); *see also* Ninth Cir. Model Criminal Jury Ins. 8.144.

The Travel Act requires the government to prove travel or use of a facility in interstate or foreign commerce followed by a subsequent event. 18 U.S.C. §1952(a). The Travel Act is not violated where the only alleged conduct is travel or use of the facility in interstate commerce. *See United States v. Zemater,* 501 F.2d 540, 544-45 (7th Cir. 1974) (defendants' Travel Act convictions overturned because unlawful activities performed prior to defendants' travel).

Paragraph 35 of the Indictment, which enumerates the substantive Travel Act Counts, alleges in relevant part:

> On the dates set forth below, in the Central District of California and elsewhere, defendants COSGROVE, EDMONDS, and RICOTTI did travel in interstate and foreign commerce and use and cause to be used, and aided, abetted, and cause other to make use of, the mail and any facility in interstate and foreign commerce **as described below**, with the

> intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, commercial bribery in violation of California Penal Code Section 641.3, and thereafter performed and attempted to perform and cause the performance of an act to promote, manage, establish and carry on, and to facilitate the promotion, management, establishment and carrying on of such unlawful activity **as follows**…
>
> Count 11: Wire transfer of approximately $10,000 from California to China
>
> Count 12: Wire transfer of approximately $69,420 from Sweden to China
>
> Count 14: Wire transfer of approximately $136,584.98 from Sweden to New York [rather, Latvia. *See* footnote 2].

Ind. ¶35 (emphasis added).

The "as described below" and "as follows" language highlighted above make clear that the government is alleging that the wire transfers identified in the Travel Act Counts are the alleged bases for both the first and third elements of the charged Travel Act offenses. That is, for each Travel Act count, a single wire is alleged to be both (1) the use of a facility in interstate or foreign commerce to carry out the California commercial bribery violation and (2) an act in furtherance of such bribery. No other acts, including travel, are alleged. Because the Indictment does not allege any act *done to* further the alleged bribery *following* the use of a facility in interstate or foreign commerce, the Travel Act Counts fail.

2. The Indictment Fails To Adequately Allege The Jurisdictional Element Of "Travel Or Use Of A Facility In Interstate Or Foreign Commerce" For Counts Twelve And Fourteen

Counts Twelve and Fourteen fail to show "travel or use of a facility in interstate or foreign commerce" as required for Travel Act jurisdiction. "When a federally created crime involves an area traditionally left to the domain of the states, the jurisdictional authority of the United States becomes a crucial part of the proof. It

has been uniformly held that the basis for federal jurisdiction is an essential element of the offense. Hence, a violation of the Travel Act [] requires travel in interstate or foreign commerce or use of a facility in interstate or foreign commerce." *United States v. Montford*, 27 F.3d 137, 138 (5th Cir. 1994) (internal citations omitted).

Section 10 of Title 18 defines "foreign commerce" as "commerce with a foreign country" and requires an act between the U.S. and a foreign country. *See United States v. Weingarten*, 632 F.3d 60, 70 (2d. Cir. 2011) (when defining "foreign commerce" for the purpose of statutory provisions subject to § 10's general definition, the common interpretation generally limits such commerce to that involving some nexus to the United States.") (citing Leonard B. Sand et al., *Modern Federal Jury Instructions* 50A-8 (2005) ("The term [] 'foreign commerce' means commerce . . . *between the United States and a foreign country*.") (emphasis in original).

For Count Twelve, the Indictment alleges a single wire transfer from Sweden to China as the travel or use of interstate or foreign commerce underlying that count. Ind. ¶ 35. For Count Fourteen, the Indictment alleges a single wire transfer from Sweden to Latvia. *Id.* Because the wire transfers in Counts Twelve and Fourteen are each between two foreign countries, they do not state the requisite jurisdictional element of "travel or use of interstate or foreign commerce". *See Weingarten*, 632 F.3d at 69 ("one does not travel in foreign commerce simply by traveling between foreign countries, absent some territorial nexus to the United States.") (internal quotations omitted); *Montford*, 27 F.3d at 139 ("cruise to nowhere" departing from a Mississippi port, where the vessel has no contact with a foreign country or waters within the jurisdiction of a foreign country, and where no such contact is intended, does not involve foreign commerce under the Travel Act). Accordingly, Counts Twelve and Fourteen fail to state an offense and must be dismissed.

E. Count One (Conspiracy) Must Be Dismissed In Its Entirety

Count One must be dismissed to the extent it alleges a conspiracy to violate

the Travel Act because the Travel Act Counts are legally defective. *See United States v. Galardi*, 476 F.2d 1072, 1079 (9th Cir. 1973) ("It should require no citation of authority to say that a person cannot conspire to commit a crime against the United States when the facts reveal there could be no violation of the statute under which the conspiracy is charged."). Additionally, because the defective Travel Act allegations infect the entire conspiracy count, Count One must be dismissed in its entirety. A court may identify the flaws in the indictment, but correcting the flaws is beyond the court's power; the court "can neither act for a grand jury, nor speculate whether a grand jury would have indicted the named defendants had it realized that the indictment as written was overbroad." *United States v. Camiel,* 689 F.2d 31, 39 (3d Cir. 1982); *see also Carney v. United States,* 163 F.2d 784, 790 (9th Cir. 1947) ("neither the trial court nor this court can speculate on the intent of the grand jury"). Where, as here, there is a reasonable possibility that the inclusion of an improper rule of law infected a count in an indictment, the Court must dismiss the count in its entirety. *See, e.g., United States v. D'Alessio*, 822 F.Supp. 1134, 1145-46 (D.N.J. 1993).

V. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court dismiss Counts One, Eleven, Twelve and Fourteen .

DATED: June 13, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Janine Philips, declare,

That I am a citizen of the United States and am a resident or employed in Orange County, California; that my business address is 903 Calle Amanecer, San Clemente, California 92673; that I am over the age of 18 and not a party to the above-entitled action.

That I am employed by a member of the United States District Court for the Central District of California and at whose direction I caused service of: **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS COUNTS ONE, ELEVEN, TWELVE AND FOURTEEN OF THE INDICTMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF ARIANA SELDMAN HAWBECKER** on the interested parties as follows:

X BY ELECTRONIC MAIL: by electronically filing the foregoing with the Clerk of the District Court using its ECF System pursuant to the Electronic Case Filing provision of the United States District Court General Order and the E-Government Act of 2002, which electronically notifies said parties in this case:

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This certificate was executed on June 13, 2011, at San Clemente, California.

I certify under penalty of perjury that the foregoing is true and correct.

*S/Janine Philips*_____
Janine Philips