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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 OPPOSITION TO DEFENDANTS' AMENDED MOTION TO DISMISS COUNTS ONE THROUGH TEN OF THE INDICTMENT; MEMORANDUM OF POINTS AND AUTHORITIES Hearing Date & Time: May 9, 2011 3:00 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 Opposition to Defendants' Amended Motion to Dismiss Counts One through Ten of the Indictment. The government's Opposition is based upon the attached memorandum of points and authorities, the declaration of Assistant United States Attorney Douglas F. McCormick and accompanying exhibits, the declaration of FBI Special Agent Brian Smith and accompanying exhibits, the declaration of Clifton M. Johnson, the files and records in this matter, as well as any evidence or argument presented at any hearing on this matter.

DATED: April 18, 2011

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

The Indictment charges violations of the Foreign Corrupt Practices Act ("FCPA"), a statute passed by Congress with one of its purposes being to restore confidence in the integrity of the free market system. Through their motion to dismiss, defendants improperly seek to limit the FCPA's reach to a small portion of the global economy and erroneously attempt to transform a fact-based determination of whether the specific entities charged in the indictment are instrumentalities of a foreign government into an abstract legal question - whether ANY state-owned entity ("SOE") could ever be a government instrumentality – even though every court that has considered the issue has determined that the FCPA can prohibit bribes to SOEs. Defendants base their argument on the insupportable legal conclusion that an entity cannot engage in both governmental and commercial activity. For the reasons set forth below, the Court should deny the motion to dismiss.

I. FACTUAL AND LEGAL BACKGROUND

A. The Foreign Corrupt Practices Act

The FCPA was enacted as a comprehensive response to what was seen as a pervasive problem of foreign bribery and an attempt to address the negative impact that corruption has on the global economy. In explaining the need for the legislation, Congress explained:

> The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in

> terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.

H. Rep. No. 95-640 (1977) at 4-5. To address this serious economic problem, Congress was clear that the legislation was to have expansive reach. Id. at 7 ("broadly prohibits transactions that are corruptly intended to induce the recipient to use his or her influence to affect any act or decision of a foreign official, foreign government or an instrumentality of a foreign government") (emphasis supplied).

During the period surrounding the FCPA's adoption, SOEs held virtual monopolies and operated under state-controlled price-setting in many national industries around the world. See Exhibit A[1] Bureaucrats in Business: The Economics and Politics of Government Ownership, World Bank Policy Research Report at 78 (1995), Table 2.4a (indicating domestic competition in select industries and select countries).[2] While the United States was the exception to the rule that SOEs comprised a critical part of the national economy, for some of those countries with SOEs named in the indictment, the World Bank data indicate that, as measured by share of GDP, SOEs averaged over the 1978 to 1991 period approximately 10% of the economy in Korea and over 17% of the

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[1] Citations to Exhibit A to Q are citations to exhibits attached to the Declaration of Douglas F. McCormick, filed concurrently herewith.

[2] The World Bank defined SOEs as "government owned or controlled economic entities that generate the bulk of their revenue from selling goods and services." See Exhibit A Bureaucrats in Business at 263-64 (focusing on governmental control demonstrated by ownership).

economy in Malaysia. Id. at 270-71.

B. Elements of the FCPA

The defendants are charged with violations of the FCPA, the Travel Act, and conspiracy to violate the FCPA and Travel Act. To sustain its burden of proof for the offense of violating the FCPA, the Government must prove the following seven elements beyond a reasonable doubt.

First: The defendant is a domestic concern, or an officer, director, employee, or agent of a domestic concern;

Second: The defendant acted corruptly and willfully;

Third: The defendant made use of the mails or any means or instrumentality of interstate commerce in furtherance of an unlawful act under the FCPA;

Fourth: The defendant offered, paid, promised to pay, or authorized the payment of money or of anything of value;

Fifth: That the payment or gift was to a foreign 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;

Sixth: That the payment was for one of four purposes:

– to influence any act or decision of the foreign official in his official capacity;

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

– to induce that foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or

– to secure any improper advantage; and

Seventh: That the payment was made to assist the defendant in obtaining or retaining business for or with, or directing business to, any person.

See 15 U.S.C. § 78dd-1 *et seq.*; see also Exhibit B (Jury Instructions in United States v. Bourke, 1:05-CR-518 (S.D.N.Y. 2009) (RT 3363:18 - 3368:19 (July 8, 2009))); Exhibit C (Jury Instructions in United States v. Jefferson, 1:07-CR-209 (E.D. Va. 2009) (RT 77:21 - 79:13 (July 30, 2009))).

A "foreign official" is defined in the FCPA as

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality or for or on behalf of any such public international organization.

15 U.S.C. § 78dd-2(h)(2)(A).

C. The Indictment and the Relevant State Owned Entities

A federal grand jury returned a sixteen-count indictment on April 9, 2009 ("the Indictment"), charging defendants Stuart Carson ("S. Carson"), Hong "Rose" Carson ("R. Carson"), Paul Cosgrove, David Edmonds, Flavio Ricotti, and Han Yong Kim (collectively, "the defendants") with conspiring to pay bribes to officials of foreign state-owned companies and officers and employees of foreign and domestic private companies, for the purpose of assisting their employer, Controlled Components Inc. ("CCI"), to obtain and retain business related to the sale of products used in the generation and distribution of power.

Count One of the Indictment charges the defendants with conspiring to violate the FCPA, 15 U.S.C. § 78dd-2, and the Travel Act, 18 U.S.C. § 1952, from 1998 through 2007. Counts Two through Ten of the Indictment allege substantive FCPA violations involving corrupt payments to foreign officials at SOEs in Korea, China, United Arab Emirates, and Malaysia. The specific entities alleged in Counts Two through Ten are Korea Hydro and Nuclear

Power ("KHNP"), PetroChina, China Petroleum Materials and Equipment Corporation ("CPMEC"), China National Offshore Oil Corporation ("CNOOC"), National Petroleum Construction Company ("NPCC") (United Arab Emirates), Dongfang Electric Corporation (China), Guohua Electric Power (China), and Petronas (Malaysia). Counts Eleven through Fifteen allege substantive violations of the Travel Act involving corrupt payments to officers and employees of private companies.[3]

In related cases, two former CCI executives previously pleaded guilty to conspiring to bribe officers and employees of foreign SOEs on behalf of CCI. On January 8, 2009, Mario Covino, the former CCI director of worldwide factory sales, pleaded guilty to one count of conspiracy to violate the FCPA. Case No. SA CR 08-00336-JVS (Dkt. #11). Covino admitted that he caused CCI employees and agents to make corrupt payments to foreign officials at SOEs including, but not limited to several of the SOEs identified in the Indictment, such as CPMEC, CNOOC, PetroChina, KHNP, and Petronas. On February 3, 2009, Richard Morlok, the former CCI finance director, pleaded guilty to one count of conspiracy to violate the FCPA. Case No. SA CR 09-00005-JVS (Dkt. #17). Morlok admitted that he caused CCI employees and agents to make corrupt payments to foreign officials at SOEs including several SOEs identified in the Indictment, such as CNOOC, PetroChina, and KHNP.

On July 7, 2010, the Court ruled that at trial the Government could introduce evidence relating to the charged

[3] The sixteenth count, which charged R. Carson with obstruction of justice, has been subsequently dismissed at the Government's request.

transactions as well as an additional thirty transactions. On August 11, 2010, the Government notified the defendants of the additional thirty transactions. These additional transactions involved officials at entities in China, India, Nigeria, Saudi Arabia, Taiwan, and the United Arab Emirates. One of the additional entities was the European Agency for Reconstruction, which was an arm of the European Union.

The Government intends to prove at trial that each relevant entity was a department, agency or instrumentality of a foreign government. See Declaration of FBI Special Agent Brian Smith ("Smith Dec.") ¶¶ 13-55 (describing specific characteristics of the relevant SOEs) and ¶¶ 3-12 (providing overview of SOEs in China). For example, the Chinese Criminal Code contains two types of criminal bribery: official bribery and commercial bribery. Employees of state owned companies or enterprises who participate in bribery are covered by the Articles related to official bribery. See Smith Dec. ¶¶ 6-11. The SOE at issue in Count 6, CNOOC, was created under a Chinese government regulation that designated the company as "a state corporation with the qualification of a juridical person which has the exclusive right to explore for petroleum within the areas of cooperation and to develop, produce, and market it," and the government is able to exert strong influence on CNOOC's strategy through the appointment of board members and senior management. See Smith Dec. ¶¶ 21-22. Similarly, the SOE at issue in Count 10, Petronas, is wholly owned by the Malaysian Government, was incorporated in 1974 pursuant to the Malaysian Petroleum Development Act as the national oil company of Malaysia, and was

vested with the entire ownership and control of the petroleum resources in the country. See Smith Dec. ¶¶ 30-33. According to Malaysian domestic law, bribery includes payments to officials at any public body, including subsidiary companies over which the Government of Malaysia has a controlling interest. See Smith Dec. ¶ 33.

II. LEGAL ARGUMENT

A. Summary of Argument

The defendants argue that the FCPA counts in the Indictment must be dismissed because, as a matter of law, no employee or officer of an SOE could ever be an official under the FCPA. (Defts' Mot. at 3162).[4] The defendants' legally insupportable and limited reading of the FCPA should be rejected.

First, the defendants' argument is premature in that it is premised, despite their denials, upon a question of fact for the jury to determine - whether the named SOEs are agencies or instrumentalities of a foreign government. Despite the Government's request, the defendants will not stipulate to facts that may be in dispute regarding the relevant entities. Because there are outstanding factual disputes, it is therefore premature to address the defendants' motion pre-trial.

A full analysis of the term instrumentality clearly demonstrates that the term can include SOEs. The Court should look to a number of different factors in identifying the proper interpretation of instrumentality:

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[4] Because defendants filed both a Motion, Dkt. # 304, and an Amended Motion, Dkt. # 317, all references to defendants' motion are to Dkt. # 317, referred to as "Defts' Mot.," and the page numbers refer to the Page ID # on the upper left corner.

- Under its plain meaning, instrumentality means an entity through which a government achieves an end or purpose, which could include SOEs – as every court has found;
- Statutory language suggests that the FCPA is to be interpreted broadly and proscribe a wide variety of criminal conduct;
- Giving meaning to all parts of the statute suggests that SOEs were explicitly considered in the FCPA;
- The term instrumentality as used in other contexts, both foreign and in the United States, includes SOEs;
- An interpretation not including SOEs takes the United States out of compliance with its treaty obligations;
- An interpretation that includes SOEs is consistent with the legislative history of the FCPA;
- Defendants' reliance on absurd hypotheticals is insufficient to invalidate the factual basis for the specific allegations in the instant case.

Finally, contrary to defendants' arguments, neither the "rule of lenity" nor "void for vagueness" doctrines should be applied to this case.

B. The Defendants' Motion Is Premature

The defendants move to dismiss the FCPA counts in the Indictment for failure to state an offense. The defendants argue that, as a matter of statutory interpretation, any SOE must "fall beyond the scope of the FCPA's definition of 'instrumentality.'" (Defts' Mot. at 3161). Such a challenge is premature.

Defendants incorrectly state that the Government's position is that the charged SOEs are instrumentalities "solely by dint of being state-owned in some fashion," (Defts' Mot. at 3161), or that the Government's definition "encompass[es] any entity in which a government has a monetary investment." (Defts' Mot. at 3171). Defendants are mistaken. The Government is not asking for a legal conclusion that all SOEs are instrumentalities.

Rather, the Government intends to prove at trial the nature and characteristics that demonstrate that these particular SOEs are agencies or instrumentalities. See Smith Dec. ¶¶ 13-55. The Court should deny their motion because, as discussed infra, the defendants are appropriately informed of the elements of the offenses and are sufficiently apprised of the essential facts to be protected from double jeopardy.

The defendants' motion to dismiss is instead a challenge to the sufficiency of the evidence. When the Government requested that the defendants stipulate to certain facts so that there would be no disputed issues for purposes of this motion, the defendants demurred. Specifically, the Government proposed a stipulation that the named SOEs were entities through which a foreign government achieved an end or purpose. See Exhibit D (relevant correspondence regarding request for a stipulation). Defendants have thus far declined to enter into such a stipulation. Based on that refusal alone, questions of fact exist, and, thus, the Court should deny defendants' motion. In addition, for the reasons set forth infra, defendants fail to meet the legal standards necessary in a motion to dismiss for a failure to state an offense.

1. Legal Standard for a Motion to Dismiss

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). It is a long-established matter of law that:

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain,

> but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for similar offenses, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Hagner v. United States, 285 U.S. 427, 431 (1932).

This well-known rule is simple to apply. An indictment is sufficient if it: (1) states the elements of the offense sufficiently to apprise the defendant of the charges against which he or she must defend, and (2) provides a sufficient basis for the defendant to make a claim of double jeopardy. See Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Vroman, 975 F.2d 669, 670-71 (9th Cir. 1992). Nothing more is required.

A district court cannot grant a motion to dismiss an indictment pursuant to Rule 12(b)(2) if the motion is "substantially founded upon and intertwined with evidence concerning the alleged offense." United States v. Lunstedt, 997 F.2d 665, 667 (9th Cir. 1993) (quoting United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986)). Rather, a district court can only grant such a dismissal if it is "entirely segregable" from the evidence to be presented at trial. Id. Otherwise, "the motion falls within the province of the ultimate finder of fact and must be deferred [to the jury]." Id. "[A] motion requiring factual determinations may be decided before 'trial [only] if trial of facts surrounding the commission of an alleged offense would be of no assistance in determining the validity of the defense.'" Id. (quoting United States v. Covington, 395 U.S. 57, 60 (1969)). As is most often the case, when the sufficiency of an indictment turns on questions of fact,

motions premised on Rule 12(b)(2)(B) for failure to state a claim are routinely denied. See, e.g., United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996) (reversing a district court's 12(b)(2)(B) dismissal because "[b]y basing its decision on evidence that should only have been presented at trial, the district court in effect granted summary judgment for the defendants. This it may not do.").

2. The Foreign Officials Are Properly Alleged

The Indictment clearly states every element of the offense, and the step-by-step description in the overt acts makes it impossible for the defendants to credibly claim either that they do not know the offense against which they must defend or that they would later be unable to assert a claim of double jeopardy. The Indictment states:

> Each of these state-owned entities was a department, agency, and instrumentality of a foreign government, within the meaning of the FCPA. The officers and employees of these entities, including the Vice-Presidents, Engineering Managers, General Managers, Procurement Managers, and Purchasing Officers, were "foreign officials" within the meaning of the FCPA.

Dkt. # 298-1 at 2710-11. Applying the Hagner test, the Indictment properly alleges that the FCPA conspiracy and substantive FCPA charges involved "foreign officials" of the relevant agencies or instrumentalities of a foreign government.

Moreover, even though the indictment clearly identifies that each of the SOEs was a "department, agency or instrumentality," defendants' entire motion focuses only on the definition of "instrumentality." Yet, one of the relevant entities is clearly an "agency" - the European Agency for Reconstruction. See Smith Dec. ¶¶ 50-51. Defendants' choice to ignore whether the relevant

entities are "agencies" demonstrates a fundamental misunderstanding of the legal basis for a motion to dismiss for failure to state a claim.

The defendants fail to address the basic premise of criminal procedure - whether the Indictment fails on either prong of the Hagner test. Instead, they seek to circumvent the trial process and have the Court determine, before the presentation of any evidence, that the Government has not met its factual burden. Taken as true, given the clear and binding precedent in this Circuit, the Indictment is more than sufficient to meet the Hagner standard, and, consequently, the defendants' motion should be denied on this basis alone.

3. The Determination Of What Qualifies As an Agency Or Instrumentality Is a Fact-Specific Question

Whether any given SOE is an agency or instrumentality is a question of fact for the jury. In contrast to defendants' characterizations, the Government's position is not that all SOEs are, as a matter of law, agencies and instrumentalities. Some SOEs may be instrumentalities - depending on the facts related to the entity, but the terms are not coextensive.[5] Indeed, the Government has long opined that what makes up an instrumentality is a factual question. See, e.g., Exhibit E (U.S. Response to OECD Questions Concerning Phase I, at Section A.1.1 (p. 4)) ("state-owned businesses may, in appropriate circumstances, be considered instrumentalities)." (emphasis supplied).

[5] The possibility that SOEs and instrumentalities are not identical undercuts defendants' argument, Defts' Mot. at 3188, that the inclusion of both instrumentality and SOEs in specific legislation demonstrates that an instrumentality could never include SOEs.

If the defendants are arguing that no matter the facts surrounding the SOE, the simple corporate form automatically moves the entity outside the definition of instrumentality, then the argument should be quickly rejected. In examining the definition of instrumentality in a domestic context, the Supreme Court has disregarded the entity's corporate form: "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is...." Lebron v. Nat'l Railroad Passenger Corp., 513 U.S. 374, 393 (1995) (quoting Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1946)). In Lebron, the Supreme Court made clear that the corporate form is not sufficient to determine the actual governmental nature of the entity. In finding that Amtrak was a governmental entity, the Supreme Court dismissed the corporate form, and instead relied upon Amtrak's origins, the governmental purpose of the entity, and governmental direction and control of the entity. 513 U.S. at 394-400. Consequently, if defendants are basing their motion to dismiss only on the corporate form of the SOEs, then the Court should deny it.

Defendants' argument appears instead to be that what constitutes an instrumentality is "indecipherable." (Defts' Mot. at 3164). Lurking behind the defendants' arguments about a failure to state an offense, (Defts' Mot. at 3162-66), is actually the claim that defendants do not know the precise technical definition of which entities could be agencies or instrumentalities under the FCPA. Such a challenge, however, is not the primary challenge posed in their motion – that the indictment fails to state an offense. If the defendants wish to

challenge the indictment on the basis that they did not know the precise technical contours of what is illegal, the appropriate challenge is only an as-applied, vagueness challenge, which should be rejected for the reasons stated in Section II.D.2.

C. Interpretations of Instrumentality May Include SOEs

The bulk of the defendants' motion focuses on suggesting that, based on the FCPA's legislative history, the Court must adopt an insupportably narrow interpretation of government instrumentality, and that the term instrumentality could never include SOEs.[6] Not only does defendants' argument turn the ordinary canons of statutory construction on their head by starting with the legislative history rather than the language of the statute, but defendants' proposed limitation of instrumentality is incorrect based on: (1) the plain meaning of the term instrumentality, including the understanding of every court that has faced the issue; (2) the FCPA's broad construction; (3) the necessity of giving full definition to all parts of the statute, including routine governmental action; (4) the inclusion of SOEs in instrumentalities in both the foreign and domestic contexts; (5) the requirement that the statute be interpreted in light of the United States's treaty obligations; (6) the legislative history, which includes references to SOEs; and (7) the inapplicability of defendants' absurd hypotheticals. Consequently, for the reasons identified infra, the Court should deny defendants' motion to dismiss.

[6] As noted supra, defendants' failure to even address whether the entities could be agencies, as alleged in the Indictment, is fatal to their argument.

1. Statutory Construction Begins With the Plain Meaning

Statutory interpretation starts with the text, and turns to legislative history only where the text is ambiguous. As stated in Barnhart v. Sigmon Coal Co.:

> As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

534 U.S. 438, 450 (2002) (internal citations omitted). Where the language of a statute is clear, the Ninth Circuit has held that courts should "look no further than that language in determining the statute's meaning." Oregon Natural Resources Council, Inc. v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996).

In so analyzing, "[p]articular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme." United States v. Lewis, 67 F.3d 225, 228-29 (9th Cir. 1995). In rejecting a claim that the FCPA's statutory terms were ambiguous, the Fifth Circuit held: "When construing a criminal statute, we must follow the plain and unambiguous meaning of the statutory language. Terms not defined in the statute are interpreted according to their ordinary and natural meaning ... as well as the overall policies and objectives of the statute." United States v. Kay, 359 F.3d 738, 742 (5th Cir. 2004). (hereinafter "Kay I"). Moreover, "[w]hen we look to the plain language of a statute in order to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." Carpenters Health & Welfare

Trust Funds v. Robertson (In re Rufener Constr.), 53 F.3d 1064, 1067 (9th Cir. 1995).

Defendants summarily conclude that the dictionary definition of instrumentality cannot assist the Court in determining whether an SOE could be an instrumentality. (Defts' Mot. at 3168). Yet, instrumentality is not an uncommon word in the law. See United States Code (2009) (using the term instrumentality 1,492 times). As such, it has an accepted legal definition. Black's Law Dictionary (9th ed. 2009) (defining instrumentality as "[a] thing used to achieve an end or purpose"); Merriam-Webster's Dictionary of Law (1996 ed.) (defining instrumentality as "something through which an end is achieved or occurs"). As the defendants note, an instrumentality can also include "a means or agency through which a function of another entity is accomplished, such as a branch of a governing body" or "a subsidiary branch, as of a government, by means of which functions or policies are carried out." (Defts' Mot. at 3168).

Therefore, using the various dictionary definitions in the context of the FCPA, a government instrumentality is an entity through which a government achieves an end or purpose or carries out the functions or policies of the government. Government purposes and policies can be myriad – from providing national defense and education, to developing infrastructure and delivering necessary utilities, or even returning corporate assets to the government and redistributing wealth through welfare systems. Of particular relevance to this case is the fact that the generation and distribution of power is still controlled, at least in part, by the government in many

countries,[7] including the United States, with state-owned corporations like the Tennessee Valley Authority ("TVA").[8] Therefore, the governmental function and purpose of the generation and delivery of power obviously can include SOEs. If instrumentality's plain meaning is achieving a government end or purpose, then instrumentalities can include SOEs.

Indeed, while obviously not controlling, the Court can and should consider that every court that has confronted the issue and examined the meaning of instrumentality in the FCPA has determined that it can include SOEs.

To date, three similar motions to dismiss for failure to state an offense have been decided by district courts, all of which denied the motions. See Exhibit H.1-H.3. Most recently, in United States v. Aguilar, et al., CR l0-1031-AHM (C.D. Cal), the district court, after extensive briefing, determined that the relevant SOE, a Mexican electrical utility, was an instrumentality. See Exhibit H.1 (RT 16:20-31:1 (April 1, 2011)). In that case, even though the defendants relied on many of the same arguments as these defendants, including hefty reliance on Professor Michael Koehler's affidavit regarding portions of the legislative history, the Court found that the meaning of instrumentality is plain. See id. at 29:21-24 ("I

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[7] "Power utilities in nearly 85 developing countries are still owned and operated by the state." Exhibit F (Sunita Kikeri and Aishetu Kolo, The World Bank Group, State Enterprises at 3 (Feb. 2006)).

[8] Indeed, TVA operates in the same industries as the SOEs identified in the Indictment. See Exhibit G. See also 16 U.S.C. § 831 et seq.; McCarthy v. Middle Tenn. Elec. Membership Corp., 466 F.3d 399, 411 (6th Cir. 2006) ("[T]here is no question that TVA is an agency and instrumentality of the United States.").

think that the language itself, and the very definition of instrumentality that you proposed in your briefs, makes it unnecessary to even engage in a legislative history or statutory analysis....").

Similarly, in United States v. Esquenazi, a case involving Haiti's state-owned telecommunications company, "Haiti Teleco," the district court rejected the defendants' argument that SOEs were not included in the FCPA's definition of government instrumentality:

> The Court also disagrees that Haiti Teleco cannot be an instrumentality under the FCPA's definition of foreign official. The plain language of this statute and the plain meaning of this term show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government.

Exhibit H.2 (Order Denying Motion to Dismiss in United States v. Esquenazi, et al., 09-CR-21010 (S.D. Fl. 2010)). Likewise, the district court in United States v. Nguyen denied a motion based on the same premise. Exhibit H.3 (Order Denying Motion to Dismiss in United States v. Nguyen, et al., 08-CR-522 (E.D. Pa. 2009)). While these decisions are not binding on this Court, they are persuasive to rebut defendants' argument that SOEs could never be an instrumentality of a foreign government.

Additionally, district courts have accepted more than 35 guilty pleas by individuals who have admitted to violating the FCPA by bribing officials of SOEs. See Exhibit I (listing enforcement actions based on foreign officials of SOEs). For a court to accept a plea of guilty, a district court must have a factual basis to believe that a crime has been committed. Fed. R. Crim. Proc. 11(b)(3). This precedent is further evidence that

the plain meaning of instrumentality under the FCPA includes SOEs.

2. Courts Should Interpret the FCPA Broadly

This Court also should interpret instrumentality to include SOEs because Congress intended the FCPA to be interpreted broadly. The FCPA "broadly prohibits transactions that are corruptly intended to induce the recipient to use his or her influence to affect any act or decision of a foreign official, foreign government or an instrumentality of a foreign government." H. Rep. No. 95-640 (1977) at 7 (emphasis supplied). See Kay I, 359 F.3d at 751 (finding that "the FCPA uses broad, general language in prohibiting payments....").

Also, the FCPA's section prohibiting corrupt payments by domestic concerns uses the word "any" twenty-seven times. 15 U.S.C. § 78dd-2(a). The FCPA's definition of "foreign official" includes the term "any" an additional five times. 15 U.S.C. § 78dd-2(h)(2)(A) ("The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.") (emphasis added).

"The term 'any' is generally used to indicate lack of restrictions or limitations on the term modified." U.S. ex rel. Barajas v. United States, 258 F.3d 1004, 1011 (9th Cir. 2001); see Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 (9th Cir. 1999) (observing that a dictionary defines "any" as "one, no

matter what one" and that the term's "broad meaning" has been recognized by the Ninth Circuit). Consistent with Congress's use of the term "any," this Court should give a broad construction to the FCPA generally and, specifically, interpret the phrase "any department, agency or instrumentality" to include a variety of entities, such as SOEs, that fall into those categories.

3. Courts Interpret Statutes to Give Meaning to All Parts

Defendants argue that the other provisions of the FCPA lead to the conclusion that SOEs could never be an instrumentality. (Defts' Mot. at 3173-75). The opposite is true - reading all parts of the statute makes clear that foreign government instrumentalities could include SOEs. A basic principle of statutory construction is that courts should not interpret a statute in such a way that portions of the statute have no effect. See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1978) (explaining that "[in] construing a statute we are obliged to give effect, if possible, to every word Congress used"). See also Kay I, 359 F.3d at 742 ("Furthermore, a statute must, if possible, be construed in such fashion that every word has some operative effect.") (citations and quotations omitted) (analyzing statutory language of FCPA in reversing and remanding District Court's dismissal of FCPA charges based on a motion to dismiss for failure to state an offense).

The FCPA prohibits corrupt payments to foreign officials, but it also provides an exception to its prohibitions for "routine governmental action." 15 U.S.C. § 78dd-2(b) (emphasis supplied). This provision provides

> (b) Exception for routine governmental action
> Subsections (a) and (i) of this section [prohibiting

> payments to foreign officials, political parties, and party officials] shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

Id. The FCPA goes on to provide examples of what "routine governmental action" is:

> (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in–
>
> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> (ii) processing governmental papers, such as visas and work orders;
>
> (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
>
> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
>
> (v) actions of a similar nature.
>
> (B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

15 U.S.C. § 78dd-2(h)(4) (emphases added). The "routine governmental action" exception thus describes actions that individuals and companies can pay foreign officials to perform without running afoul of the FCPA. Defendants argue that this provision supports their position that SOEs could not be included because the exception must be "governmental" action. (Defts' Mot. at 3174). But their argument fails because it is based on

the false dichotomy that there cannot be both "governmental" and "commercial" action. Yet, one of the express exceptions for routine action is providing "power" – which can be both governmental and commercial action, as demonstrated by a domestic SOE like TVA or a foreign SOE power utility. See Exhibit H-1 (RT 16:20-31:1 (April 1, 2011)) (describing traits of Mexican SOE electric utility and finding that it was an instrumentality).

Indeed, for all of the provisions of the "routine governmental action" exception to have meaning, the definition of foreign official must include officials at governmental entities that actually do provide phone service, electricity, water, and mail service; otherwise there would be no need for Congress to provide an exception for those actions. While commercial entities may provide those services, governmental entities do in certain countries. Because of the "routine governmental action" exception, Congress must have considered that some routine functions, like delivering power, were governmental functions.

If those are government functions, it defies logic for the FCPA to except payments to foreign governments or foreign departments and agencies that provide those services, but not to address state-owned telecommunications companies, state-owned electric and water utilities, and state-owned mail services that perform the exact same function. Defendants' argument fails because they rely again on the false premise that there cannot be both a governmental and commercial function. The "routine governmental action" exception demonstrates that there are functions, like delivery of power, that can be both governmental and commercial. Therefore, analyzing the FCPA's full statutory

scheme including the "routine governmental action" exception, the FCPA's terms of "agency and instrumentality" can include SOEs, which can have both commercial and governmental functions.

In their motion, the defendants also discuss how the "routine governmental action" provision was an amendment to the FCPA and that when this provision was added, part of the definition of "foreign official" was deleted. (Defts' Mot. at 3184-85).[9] This substitution of routine governmental action provision for part of the definition of "foreign official" only strengthens the Government's argument that the term "foreign official" was intended to apply to employees of SOEs.[10] Indeed, in examining the FCPA's legislative history, the Fifth Circuit found that the addition of the routine governmental exception in 1988 "replicates the equally capacious language of prohibition in the 1977 legislative history." Kay I, 359 F.3d at 751.

4. Agency and Instrumentality Should Be Defined Similarly In Similar Contexts

Instrumentality is not an uncommon word, but defendants seek to invent a new definition untethered from other definitions of instrumentality. Congress's use of instrumentality of a foreign government in two other statutes, the Foreign Sovereign Immunities Act ("FSIA") and the Economic Espionage Act ("EEA"),

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[9] The original definition of "foreign official" excluded "an employee of a foreign government or any department, agency or instrumentality whose duties are essentially ministerial or clerical." Foreign Corrupt Practices Act of 1997, Pub. L. No. 95-213 §104(d)(2), 91 Stat. 1494,

[10] Defendants argue, Defts' Mot. at 3175, that the absence of instrumentality in 78dd-2(c)(2) illustrates that SOEs are excluded. Yet, there is also no mention of "department." Logic suggests "contracting with the foreign government" also includes departments and instrumentalities.

supports the conclusion that "agency or instrumentality" in those contexts could include SOEs. Additionally, Congress's use of instrumentality in describing U.S. entities makes clear that "agency or instrumentality" could include SOEs.

(a) FSIA and EEA's definition of Foreign Government Agency and Instrumentality Includes SOEs

Defendants point to the fact that instrumentality is defined in the FSIA and EEA to demonstrate that Congress did not intend to include SOEs in the FCPA. (Defts' Mot. at 3186-89). The defendants cite no cases supporting this position, and it is unclear why, as a logical matter, this should be true. Indeed, in most cases, including a definition of a term limits that term's meaning, rather than expanding the meaning. Importantly, a relevant canon of statutory construction is that courts should interpret the same term in at least two similar statutes to have the same or similar meanings. See Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (plurality opinion) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

An examination of the FSIA and EEA make clear that an SOE could be an agency or instrumentality of a foreign government. For example, the FSIA, which Congress passed the year before the FCPA, defines agency or instrumentality in a manner that would include SOEs:

> An "agency or instrumentality of a foreign state" means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares

> or other ownership interest is owned by a foreign state or political subdivision thereof. . . .

28 U.S.C. § 1603(b)(2) (emphasis added). Accordingly, an agency or instrumentality pursuant to the FSIA can include SOEs. In addition, besides majority ownership, the FSIA looks to many other factors to determine whether an entity is an agency or instrumentality, including purpose and government control. See, e.g., Patrickson v. Dole Food Co., 251 F.3d 795, 807 (9th Cir. 2001)(examining six factors to be considered under the FSIA "organ" prong). See also USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 208 (3d Cir. 2003).

Similarly, the Court can look to the EEA definition of instrumentality of a foreign government to see if instrumentality under the FCPA could ever include SOEs. Although the words used are slightly different, the EEA, passed in 1996, conceptually defines "instrumentality of a foreign government" much the same way as "agency or instrumentality" was defined by the FSIA. Like the FSIA, the EEA looks at both ownership and other elements, like control and management, to determine what constitutes an instrumentality. The EEA defines instrumentality to mean:

> any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government.

18 U.S.C. § 1839(1). Therefore, under the EEA, an SOE could be a foreign instrumentality.[11]

The Government is not suggesting that the analysis used to determine what is an "agency and instrumentality" under the FSIA

[11] To date, no court has specifically interpreted "foreign instrumentality" under the EEA.

or EEA is identical to the analysis used in the FCPA, but only that "instrumentality" under both FSIA and EEA can include SOES. If the term instrumentality of a foreign government in the FCPA, FSIA and the EEA are to be given similar interpretations, an agency and instrumentality of a foreign government pursuant to the FCPA could include SOEs.

(b) U.S. Instrumentalities Demonstrate That Foreign Agencies and Instrumentalities Could Include SOEs

Importantly, Congress did not use the term instrumentality exclusively when discussing the activities of foreign governments. The U.S. government has created numerous SOEs in order to pursue governmental functions with a wide variety of organizational structures, and some of them are identified as agencies and instrumentalities. Thus, the facts of a particular entity are examined to determine if U.S. government entities, including SOEs, are instrumentalities of the U.S. government.

The Government Corporation Control Act, 59 Stat. 597, as amended, 31 U.S.C. § 9101 et seq., identifies a number of different U.S. SOEs, which are wholly or partially owned by the United States. Indeed, the Government Accountability Office describes why these types of government corporations are used:

> corporate form of organization ... is generally appropriate for administering government programs that:
> - are predominantly of a business nature
> - produce revenue and are potentially self-sustaining
> - involve a large number of business type transactions and
> - require greater flexibility than the appropriations process ordinarily permits

Exhibit J (Federally Created Entities An Overview of the Key Attributes, United States Government Accountability Office, GAO 10-97, October 2009) at 14. See also id. at 13-24 (identifying

numerous types of governmental organizations). U.S. government corporations include entities that generate and distribute power, like TVA[12] or even those that manufacture products for sale, like Federal Prison Industries, Inc.[13] See also Optiperu, S.A. v. Overseas Private Inv. Corp., 640 F. Supp. 420, 424 (D.D.C. 1986) (concluding that the Overseas Private Investment Corporation ("OPIC") is an instrumentality because "although OPIC is authorized by Congress to carry out commercial activities that can be characterized as private in nature, OPIC's transactions must further the policy interests of the federal government.").

Defendants fail to include any discussion of domestic instrumentalities, although they discuss U.S. departments and agencies. (Defts' Mot. at 3171). Instead, defendants rely on the principle of noscitur a sociis for the proposition that because the FCPA lists three items ("department, agency and instrumentality"), instrumentality must be defined in relation to the other two. The Government does not disagree that instrumentality can be defined in relation to the other two terms, but defendants' argument fails because it is based on the insupportable assumption that infects their entire motion:

> business enterprises, regardless of any investment by a foreign government, cannot fairly be said to be carrying out governmental (rather than commercial) functions.

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[12] TVA is a federal corporation, set up by Congress in 1933, with numerous missions, including to reduce flood damage, improve navigation on the Tennessee River, provide electric power and promote "agricultural and industrial development" in the region. See Exhibit G (TVA Key Facts).

[13] Federal Prison Industries Inc., also known as UNICOR, is a government corporation established by the Congress in 1934. UNICOR provides job skills training to inmates as well as selling quality products and services. See Exhibit K (Unicor Key Facts).

(Defts' Mot. at 3171). Nowhere do the defendants provide any support for such a distinction or the conclusion that an entity cannot have both a governmental and commercial function.

SOEs, like departments and agencies, often carry out government policies and functions, are governed by public laws, and draw from and contribute to the public fisc. SOEs often function as strategic tools that governments use in the pursuit of national policy objectives and supplement or provide alternatives to privatization or regulation. See Exhibit L (Corporate Governance of State Owned Enterprise: A Survey of OECD Countries (2005) at 20-21 (describing the history and rationale leading to SOES, including "[t]he combination of regulatory deficiencies, political economy issues and social goals [that] led to state ownership of many 'strategic' enterprises...."). SOEs can be instruments for governments to create revenues or distribute subsidies, often "substituting for under developed welfare systems." Id. Consequently, SOEs can act commercially, but at the same time be instrumentalities to achieve a governmental end or purpose.

5. Agency and Instrumentality Should Be Interpreted To Comport with U.S. Treaty Obligations

The United States would be in violation of its treaty obligations if the Court interprets "agency and instrumentality" to exclude SOEs. Indeed, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains...." Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18 (1804). Known as the "Charming Betsy" rule of statutory construction, the canon provides, "[w]here fairly possible, a United States statute is to be

construed so as not to conflict with international law or with an international agreement of the United States." Restatement of Foreign Relations Law (Third) § 114. The rationale behind the canon is straightforward:

> If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995).

With respect to the instant matter, the Charming Betsy canon is easy to apply because the treaty obligations require the United States to criminalize bribes made to officials of SOEs. On December 17, 1997, the members of the Organization of Economic Co-Operation and Development adopted the Convention on Combating Bribery of Foreign Officials in International Business Transactions (the "OECD Convention"). Exhibit M (the OECD Convention). The Senate ratified the OECD Convention on July 31, 1998, 144 Cong. Rec. 18509 (1998), and Congress implemented it through various amendments to the FCPA. See The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, S. Res. 2375, 105th Cong. (1998). Congress was explicit in its intentions: "This Act amends the FCPA to conform it to the requirements of and to implement the OECD Convention." S. Rep. No. 105-2177 (1998) at 2.[14] Indeed, the State Department's first annual report to Congress on implementation of the OECD

[14] See also Exhibit N (Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998) ("This Act makes certain changes in existing law to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.")

Convention, which was required by the Senate's resolution of advice and consent, "found that 1998 amendments to the FCPA "conform[ed] it to the requirements of and...implement[ed] the OECD Convention."). See Exhibit 0 (Dept. of State, Bureau of Econ. & Bus. Affairs, Battling International Bribery: 1999 Report, Chapter 2 at p. 3).

With regard to the definition of "foreign official," only one unrelated amendment to the FCPA was necessary in Congress's view to bring the statute into compliance with the OECD Convention.[15] Otherwise, Congress considered the FCPA's definition of "foreign official" to be inclusive of the definition in the OECD Convention. In other words, Congress intended that bribes to any official that was prohibited under the OECD Convention was also prohibited under the FCPA as originally passed. As the Fifth Circuit found in reviewing the legislative history of the FCPA, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Kay I, 359 F.3d at 752.

Importantly for purposes of this motion, the OECD Convention, Exhibit M, contains an explicit prohibition against the bribery of officials of SOEs. The OECD Convention requires OECD parties to make it a criminal offense under their law for:

> any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or

[15] Congress expanded the definition to include officials of public international organizations. S. Rep. No. 105-2177 (1998) at 2.

> other improper advantage in the conduct of international business.

Id. at art. 1.1 (emphasis added). The Convention further provides that a

> "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

Id. at art. 1.4.a (emphasis added). Finally, the OECD Convention's Commentaries further elaborate on the OECD Convention's definitions:

> 12. A "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.
>
> 13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.
>
> 14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

Id. at cmt. on art. 1.4 (emphasis added). Therefore, the OECD Convention is clear that in the case of public enterprises when the government exercises a "dominant influence," directly or indirectly, the OECD Convention is intended to prohibit bribes to those enterprises. A fair reading would suggest that many, but not all, SOEs fall squarely within the definition of "public enterprise." Importantly, Congress understood that "t]he legal definition given to the term 'foreign public official' by each Party will be pivotal in ensuring that the obligations of the

Convention have an impact on current practices." Exhibit P at p.6 (S. Exec. Rep. 105-19 (1998)). After reciting the OECD definition, the Senate explicitly sought to ensure that the Executive would not interpret the OECD definition of "foreign public official" narrowly, and stated: "the Committee expects that the Executive will ensure this broad understanding is shared by other Parties to the Convention." Id. (emphasis supplied). See also Section II.B.3, supra, discussing broad interpretation of the FCPA.

In light of such a clear requirement by the OECD Convention to criminalize bribes paid to "public enterprises" and Congress's clear intent to comport the FCPA with the OECD Convention, the defendants' arguments, (Defts' Mot. at 3185-86), that the 1998 amendments illustrate Congress's clear intent to "exclude" SOEs is nonsensical. Indeed, if this Court were to interpret the FCPA in such a way that officials of SOEs could not be foreign officials, the United States State Department has declared that the United States would be out of compliance with its treaty obligations under the OECD Convention, which requires the FCPA to prohibit payments to officials at SOEs. See Declaration of Clifton Johnson, Assistant Legal Adviser of the United States Department of State. "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S.176, 184 (1982). See also Abbott v. Abbott, 130 S.Ct. 1983, 1986 (2010) ("The Court owes deference to the Executive Branch's treaty interpretations.").

In addition, it is worth noting that before the 1998 amendments to the FCPA, from 1977 to 1997, over a dozen FCPA guilty pleas were accepted by U.S. District Courts involving bribery of officials of SOEs. See, e.g., Exhibit I (listing FCPA enforcement actions related to SOEs). These enforcement actions put Congress, as well as businesses and the general public, on notice that SOEs were agencies or instrumentalities of foreign governments under the FCPA. Had Congress believed that this was an inappropriate interpretation of the FCPA by the enforcement agencies, it could have narrowed the definition when it amended the FCPA in 1998, but it did not.

6. The FCPA's Legislative History Supports the Interpretation That Officers and Employees of SOEs Are Foreign Officials

The defendants' primary argument is that an employee of an SOE could never be a foreign official because the legislative history of the FCPA "confirms that Congress did not intend the statute to encompass payments made to employees of state owned business enterprises." (Defts' Mot. at 3178). The defendants are mistaken. Indeed, review of Professor Koehler's lengthy legislative history of the FCPA is chiefly revealing for what it does not contain. In spite of 150 hours and 448 paragraphs in over 140 pages that attempt to distill his exhaustive research, Professor Koehler is unable to find even one reference in any part of the legislative history that Congress intended to exclude SOEs from the definition of instrumentality. Defendants' entire legislative history argument basically boils down to the premise that because an SOE is not specifically enumerated in the text of the statute, it could not possible be included in the broad term

"instrumentality." Again, the defendants rely on the faulty premise that an entity could not have both a governmental and commercial purpose.

(a) A Review of the Legislative History Is Not Necessary Because the Meaning is Plain

The Government first submits that a review of legislative history is not necessary because the meaning of instrumentality is clear and unambiguous. As discussed supra at II.C.1, the Court should look first at the language of the statute before addressing the legislative history. Carter v. United States, 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by examining the text ... not by psychoanalyzing those who enacted it...."). Most recently, in United States v. Aguilar, et al., CR lO-1031-AHM (C.D. Cal), the court determined that it was unnecessary to examine the FCPA legislative history to find that the SOE was an instrumentality. See Exhibit H-1 at 29:21-24 ("I think that the language itself, and the very definition of instrumentality that you proposed in your briefs, makes it unnecessary to even engage in a legislative history or statutory analysis....").

(b) Legislative History Includes References to SOEs

An actual review of the legislative history illustrates the narrow slice of the legislative history the defendants chose to provide to the Court.[16] Defendants choose portions of the substantial legislative debate to support their novel proposition

[16] Two important pieces of legislative history, the addition of the "routine governmental action" exception and Congress's intent to conform with the OECD Convention are addressed above in discussing the statutory construction. See supra at II.C.3 and II.C.5.

that an employee of an SOE could never be a foreign official under the FCPA. Certainly, the legislative history refers on a number of occasions to the impact of corruption of senior government officials, but nowhere in the vast review of legislative history can the defendants point to a single quote that supports the position that the FCPA should not apply to employees of SOEs. That absence is striking. Simply because some legislators mentioned that the FCPA should cover high-level public officials does not mean that others, or even those same legislators, were not considering that the FCPA should also cover officials of SOEs. See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897) ("[I]t is impossible to determine with certainty what construction was put upon an act by members of the legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other....").

Indeed, the defendants' analysis of the legislative debate avoids identifying portions of the legislative history that discuss bribery of employees of SOEs, which obviously would imply that SOEs were considered by the FCPA. Cf. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993)(Scalia, J. concurring) (criticizing the use of legislative history and describing it "as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends").

While the defendants argue that there is "no express statement or information" supporting the conclusion that the FCPA covers SOEs, Defts' Mot. at 3179, the full legislative history of

the FCPA contains references regarding the problems of bribes paid to SOEs. See Smith Dec. ¶ 56 (discussing payments "for orders received from government-owned businesses and agencies"); ¶ 57 (referencing money being channeled through "the government-owned" electrical utility); ¶ 58 (describing payments "for assistance in purchasing oil from the government owned oil company" and bribe demands from officials of "a state enterprise of a [L]atin American country"); ¶ 59 (testimony describing problems arising in "the interface between [] business organizations and [] Government and quasi-Government industrial establishments"); ¶ 60 (identifying sales to "quasi-government organizations"). Thus, the FCPA was not concerned only about the high-level government officials receiving the bribes, but the legislative history includes references to bribes paid to officials at SOEs. See Kay I, 359 F.3d at 749 ("Congress was obviously distraught not only about high profile bribes to high ranking foreign officials, but also by the pervasiveness of foreign bribery by United States businesses and businessman.").

Because the legislative history is supportive of the conclusion that Congress intended to prohibit bribery of officials of SOEs, the Court should reject defendants' narrow interpretation of instrumentality.

(c) When Congress Chose a General Term Over a List of Specific Categories, It Did Not Intend to Exclude the Specific Categories

The defendants' remaining substantive argument concerning the FCPA's legislative history is that because Congress was presented with bills that explicitly included SOEs in a list of covered entities and did not choose to incorporate that list in

the final bill, Congress must have intended to exclude SOEs from the FCPA's requirements. (Defts' Mot. at 3183-84). The fatal flaw in the defendants' logic, however, is that Congress did not choose a more limited definition of "foreign official" but instead chose to include a broad general term that by its plain meaning and previous use would include officials at SOEs. There is no reason to presume that when Congress chooses a general term over a specific list it intends to exclude the specific items. See National-Standard Co. v. Adamkus, 881 F.2d 352, 360 (7th Cir. 1989) (finding it significant that Congress "chose [a] broad, general term" over an enumerated list).

A side-by-side comparison of the four versions of bills discussed by the defendants demonstrates the replacement of a specific enumerated item with the broad term instrumentality:

S. 3741, 94th Cong. (1976)	H.R. 7543, 95th Cong. (1977)	S. 305, 95th Cong. (1977)	H.R. 3815, 95th Cong. (1977)
Defined "foreign government" as (1) the government of a foreign country, irrespective of recognition by the United States; (2) a department, agency, or branch of a foreign government; (3) a corporation or other legal entity established or owned by, and subject to control by, a foreign government; (4) a political subdivision of a foreign government, or a department, agency or branch of the political subdivision; or	Defined "foreign government" as: (A) the government of a foreign country, whether or not recognized by the United States; (B) a department, agency, or branch of a foreign government; (C) a political subdivision of a foreign government, or a department, agency or branch of such political subdivision; (D) a corporation or other legal entity established, owned, or subject to managerial control by a foreign government;	Prohibited payments to an official of a foreign government or instrument-ality of a foreign government	Defined "foreign official" as Any officer or employee of a foreign government or any department, agency or instrumentality thereof, of any person acting in an official capacity for or on behalf of such government or department, agency or instrumentality.

(5) a public international organization. (emphasis added)	or (E) a public international organization. (emphasis added)		

S. 3741 and H.R. 7543 were both bills requiring reporting of corrupt payments as opposed to prohibition of such payments.[17] Both were referred to committee, and no further action was taken. Ultimately, the FCPA of 1977 was an amalgamation of S. 305 and HR. 3815. With respect to the definition of "foreign official," the Senate acceded to the House. H. Conf. Rep. 95-831 (1977).

What is striking, in terms of understanding Congress's use of the term instrumentality, is that the final approved language of the FCPA mirrors the other four provisions of the proposed legislation in HR 7543 and S. 3741, but replaces the imprecise language referring generally to SOEs in subsection D of H.R. 7543 and subsection 3 of S. 3741, with the broader legal term of art "instrumentalities" that Congress had just adopted the previous year in the FSIA. Thus, it is clear that language describing SOEs was not an explicit rejection of SOEs, as argued by the defendants, Defts' Mot. at 3185, but instead that SOEs were included in the broad term instrumentality.

If anything, the intent of Congress was to broaden the law's scope beyond a specific enumerated list. A parallel can be seen in examining the Fifth Circuit's analysis of the broad term "obtaining or retaining business." Kay I, 359 F.3d at 753. After examining the legislative history of the FCPA which included specific recommendations from the SEC regarding payments

[17] These bills can be found as Exhibits 32, 38, 39, and 44 of Professor Koehler's Declaration.

made "for the purpose of obtaining more favorable tax treatment," id. at 753, the Fifth Circuit found that the "more generally worded prohibition against payments designed to assist in obtaining or retaining business," id., demonstrated that Congress's intent was broad enough to include payments to customs officials to obtain favorable tax treatment. Id. at 755. Indeed, the Fifth Circuit affirmed the trial convictions of two defendants who bribed customs officials for the purpose of obtaining favorable tax treatment. Id. Similarly, the Court should interpret instrumentality broadly to include SOEs.

7. Absurd Examples Do Not Invalidate Meaning of Agency or Instrumentality

The defendants purport to have found "absurd" hypothetical examples of SOEs that, in their opinion, should not be considered government instrumentalities under the FCPA. (Defts' Mot. at 3176-78). Implicit in their argument is the flawed contention that if a single example exists in which the facts suggest that one SOE is not a government instrumentality, then no SOE could ever be a government agency or instrumentality.

Importantly, courts do not decide hypothetical cases, and imaginary situations do not control real ones. Cf. National Endowment for Arts v. Finley, 524 U.S. 569, 584 (1998) ("[W]e are reluctant ... to invalidate legislation on the basis of its hypothetical application to situations not before the Court.") (internal quotation marks omitted); Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language. It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of (disputed) legal terms

will be in nice question.... [However,] we think it is clear what the ordinance as a whole prohibits."). Thus, the defendants' hypothetical examples are irrelevant to a determination of whether this Indictment properly alleges violations of the FCPA.

Most importantly, posing the possibility of an "absurd" result does not mean that as a matter of law no SOEs could ever be an instrumentality. Some SOEs are instrumentalities, and some are not. While the issue has not been litigated in the FCPA context, U.S. courts and regulatory agencies often struggle with whether a U.S. entity is an instrumentality of the United States for a certain purpose.[18] See, e.g., Lebron, 513 U.S. 374 at 393 (determining that Amtrak is an instrumentality of the U.S. for certain purposes); Exhibit Q (relying on various factors to conclude that The Kennedy Center is an instrumentality). Similarly, in the FSIA context, courts examine a variety of factors to determine whether an SOE is an instrumentality of a foreign government. See, e.g., Corporacion Mexicana de Servicios Maritimos v. The M/T Respect, 89 F.3d 650, 653-54 (9th Cir. 1996) (examining various factors to conclude that Pemex, a state-owned oil company, is an instrumentality for purposes of the FSIA).

Defendants argue based on their "absurd" factual scenarios, (General Motors and CITGO), that an SOE could never be a foreign instrumentality. But their reliance on extreme facts demonstrate that whether an SOE is an instrumentality depends entirely on the facts of the instrumentality. Defendants' reliance on absurd

[18] The Government is not suggesting that the analysis used to determine what is an "agency and instrumentality" in those decisions is identical to that of the FCPA, but only that various facts and factors are examined in making the determination for that specific entity.

factual situations suggests that the inquiry is actually a factual issue not a legal question. See Section II.B supra on disputed factual issues. Whether the U.S. government's ownership of shares of GM stock makes GM an instrumentality is a factual determination that will depend on a number of factors - not merely, as defendants posit, on the ownership of its stock by the U.S. government. (Defts' Mot. at 3177).[19] Similarly, whether a CITGO employee is a Venezualan foreign official or whether an employee of Blackstone Group is a Chinese foreign official is not controlled by simple stock ownership, but by a number of factors, including the origin and purpose of the entity and the extent of the control of the entity by the foreign government.[20]

Similarly, defendants argue based on a hypothetical that a janitor could never be an "official" of a foreign government for purposes of the FCPA. (Defts' Mot. at 3172). Yet, under domestic law, if a government janitor is acting in his official capacity and was bribed to inappropriately allow access to a government building to gather sensitive information about an upcoming procurement contract, such a bribe would be a violation of 18 U.S.C. § 201. Defendants posit no valid reason why such a

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[19] Indeed, in finding that Amtrak was a governmental entity, the Supreme Court differentiated a corporation that was merely "in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be)" from Amtrak. Lebron, 513 U.S. at 398.

[20] Defendants argue, Defts' Mot. at 3172, that because certain statutes enumerate the officials of a foreign government and exclude employees of SOEs, that the FCPA must do the same. Because those statutes do not include the broader FCPA terms of "department, agency and instrumentality," their argument fails.

bribe would not also be an FCPA violation if the bribe provided a business advantage.

D. Defendants' Legal Challenges Based on The Rule of Lenity and Void For Vagueness Doctrines Are Insufficient

As noted supra at II.B.3, defendants' legal challenges regarding the precise definition of instrumentality should not be brought under a motion to dismiss for failure to state an offense, but rather as challenges under the Rule of Lenity and the Void for Vagueness Doctrines. As detailed infra, under those strict requirements, defendants' challenges, Defts' Mot. at 3189-3204, fail to meet the legal standards.

1. The Rule of Lenity Does Not Apply

Defendants argue, (Defts' Mot. at 3191-96), that the rule of lenity obligates this Court to adopt their interpretation of the term "instrumentality." Defendants' argument misapprehends lenity's proper role in statutory construction. The rule of lenity applies not where it is possible to articulate a construction narrower than the government's, but only where the statute is grievously ambiguous, leaving courts to guess as to its proper construction. Such is not the case here. As discussed supra at II.C, the standard canons of statutory construction yield an interpretation of the term instrumentality that is clear and reflects Congress's purposes. Accordingly, defendants' efforts to invoke the rule of lenity should be rejected.

The Supreme Court recently reiterated the proper role of lenity in statutory interpretation. "[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in

the statute,' such that the Court must simply 'guess as to what Congress intended.'" Barber v. Thomas, 130 S. Ct. 2499, 2508-09 (2010) (quoting Muscarello v. United States, 524 U.S. 125, 139 (1998) and Bifulco v. United States, 447 U.S. 381, 387 (1980)); see also Chapman v. United States, 500 U.S. 453, 463 (1991) ("The rule of lenity ... is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [an] Act, such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute.").[21] "The simple existence of some statutory ambiguity ... is not sufficient to warrant application of [the rule of lenity], for most statutes are ambiguous to some degree." Muscarello v. United States, 524 U.S. 125, 138 (1998).

The Ninth Circuit has held that "[c]ourts should not deem a statute 'ambiguous' for purposes of lenity merely because it is possible to articulate a construction more narrow than that urged by the Government." Lisbey v. Gonzales, 420 F.3d 930, 933 (9th Cir. 2005); see also United States v. Banks, 514 F.3d 959, 968 (9th Cir. 2008); United States v. Carr, 513 F.3d 1164, 1168-69 (9th Cir. 2008) ("[L]enity ... may not be used in complete disregard of the purpose of the legislature ... to dictate an implausible interpretation of a statute or one at odds with the generally accepted contemporary meaning of a term."). Thus, the rule of lenity "only serves as an aid for resolving an ambiguity;

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[21] Similarly, in finding that the business nexus element of the FCPA did not merit application of the rule of lenity, the Fifth Circuit called the rule of lenity "a last resort of interpretation." United States v. Kay, 513 F.3d 432, 445 (5th Cir. 2007) (hereinafter "Kay II").

it is not to be used to beget one." Callanan v. United States, 364 U.S. 587, 596 (1961).

Contrary to defendants' suggestion, United States v. Santos, 553 U.S. 507 (2008), does not support application of lenity here. Five Justices in Santos applied the rule of lenity because they agreed that "proceeds" could mean "profits" or "receipts," in that both meanings are "accepted ... in ordinary usage." Id. at 511 (plurality opinion); see also id. at 524-26 (Stevens, J.).

> Under either of the word's ordinary meanings, all provisions of the federal money-laundering statute are coherent; no provisions are redundant; and the statute is not rendered utterly absurd. From the face of the statute, there is no more reason to think that 'proceeds' means 'receipts' than there is to think that 'proceeds' means 'profits.' Under a long line of decisions, the tie must go to the defendant.

Id. at 513-14 (plurality opinion). Justice Stevens, who supplied the deciding fifth vote, did not agree with this assessment, as he thought that the legislative history made clear that Congress intended "proceeds" to mean "receipts" for some specified unlawful activities. Id. at 525-26 (Stevens, J.). But because operation of an illegal gambling enterprise was not one of those activities, Justice Stevens agreed with the plurality that the rule of lenity dictated the outcome. Id. at 528 (Stevens, J.)

Here, by contrast, the plain meaning of the term instrumentality could encompass SOEs, see supra at II.C.1, and there is no legitimate alternate definition of instrumentality that does not include SOEs. Additionally, the text of the entire FCPA, the broad purpose of the FCPA, and the interpretation given to other similar statutes all support the Government's interpretation. See supra at II.C. Thus, unlike Santos, this is not a situation when "the tie must go to the defendant."

In sum, this is not a case where the statute, like that examined in Santos, is infected by such "grievous ambiguity or uncertainty" that this Court is left to "guess as to what Congress intended." The plain meaning of instrumentality, together with the text, context, and purpose of the FCPA, leave "no reasonable doubt" that the term instrumentality could include SOEs. While it is possible to posit an interpretation of the term instrumentality that is narrower than the Government's, that fact alone does not warrant application of the rule of lenity.

2. "Foreign Official" is Not Void for Vagueness

The Court should also reject the defendants' void for vagueness challenge. (Defts' Mot. 3196-3204). A statute is void for vagueness only if it fails to "define the criminal offense with (1) sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement." Skilling v. United States, 130 S. Ct. 2896, 2927-28 (2010) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). The relevant inquiry "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 267 (1997). Simply because a term is not defined in the statute does not mean that is it void for vagueness. See, e.g., United States v. Rudzavice, 586 F.3d 310, 314-15 (5th Cir. 2009). In assessing void for vagueness challenges, courts should "construe, not condemn, Congress' enactments." Skilling, 130 S. Ct. at 2928 (quotations omitted).

Additionally, it is well-established that a mens rea or scienter requirement may serve to defeat a claim that a defendant is being punished for conduct he did not know was wrong. See Gonzales v. Carhart, 550 U.S. 124, 149 (2007) ("The Court has made clear that scienter requirements alleviate vagueness concerns."); United States v. Jae Gab Kim, 449 F.3d 933 (9th Cir. 2006) ("[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."); see also United States v. Guo, 634 F.3d 1119, 1123 (9th Cir. 2011) (rejecting vagueness challenge to conviction for exporting without license because of statute's willfulness element).

No court has applied these principles to hold that the definition of "foreign official" in the FCPA is unconstitutionally vague. Indeed, in three recent decisions on similar motions, the district courts denied the motions to dismiss and rejected defendants' void for vagueness arguments. See Exhibit H-1 (Aguilar 4/1/11 Tr. at 30:21-31:1); Exhibit H-2 (Esquanazi Order ("[T]he Court finds that persons of common intelligence would have fair notice of this statute's prohibitions")); Exhibit H-3 (Nguyen order). Additionally, no court has adopted the defendants' position since the FCPA was enacted over three decades ago despite approximately 35 guilty pleas from individuals who admitted to bribing officials at SOEs, see Exhibit I; it is thus "plain as a pikestaff," Skilling, 130 S. Ct. at 2933, that the FCPA prohibits paying bribes to officials who work at SOEs.

Despite the fact that "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand," United States v. Mazurie, 419 U.S. 544, 550 (1975), defendants do not make any reference to the facts of this case in arguing that the statute is vague as applied. Instead, they raise what they themselves describe as "an extreme example" related to a gas station attendant at a local CITGO station and argue that, "[a]t best, one could only hazard a guess as to whether a gasoline company might constitute a government 'instrumentality.'" (Defts' Mot. at 3197). The facts of this extreme example, however, do not relate in any way to the case at hand. Such an example is irrelevant in an as-applied challenge because the facts do not apply to defendants' conduct. Indeed, improper payments made to employees of several of the relevant entities in the instant matter could be prosecuted under the domestic bribery statutes of the foreign country, see, e.g., Smith Dec. ¶¶ 6-11, 25, 33.

Moreover, the FCPA's scienter requirement eliminates any claim that the statute is unconstitutionally vague as applied to defendants. For a violation to occur, Section 78dd-2(a) requires that defendants act "corruptly." Additionally, the penalty provision, Section 78dd-2(g)(2), requires the defendants to act "willfully." Because the statute requires corrupt and willful conduct, the statute is not unconstitutionally vague as applied to defendants. See, e.g., Guo, 634 F.3d at 1123; United States v. Jensen, 532 F. Supp. 2d 1187, 1196 (N.D. Cal. 2008) (rejecting

vagueness challenge because "knowing and willful conduct" "mitigates any vagueness in the statute.").

In addition, where, as here, "a criminal statute regulates economic activity, it generally is subject to a less strict vagueness test because its subject matter is more often narrow and because businesses can be expected to consult relevant legislation in advance of action." United States v. Reliant Energy Services, 420 F. Supp. 2d 1043, 1054 (N.D. Cal. 2006) (quoting United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir. 1998)); United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir. 1999) (same); Jensen, 532 F. Supp. 2d at 1196 (fact that "the statute regulates only economic conduct" was one factor in court's finding that criminal sanctions for falsifying company's books, records, and accounts was not void for vagueness). The legislative history makes clear that the FCPA was a criminal statute focusing on "economic activity." See Section I.A. Indeed, unlike domestic bribery statutes, the FCPA only addresses corruption that is linked to a business advantage. See Section I.B (discussing the elements of the FCPA, including requiring a business nexus to the corrupt act).

Contending that Congress "plainly had a 'core' of 'foreign officials' in mind when it enacted the FCPA," Defts' Mot. at 3190-91, defendants inappropriately apply the Supreme Court's guidance in Skilling to urge the Court to find that bribery of officials at SOEs is somehow outside the "core" of the FCPA. Skilling involved the reach of the honest services statute, 18 U.S.C. § 1346, which states that a "scheme or artifice to defraud" includes "a scheme or artifice to deprive another of the

intangible right of honest services." Because bribery, kickbacks, or other fraud schemes are not specifically mentioned in the text of the honest services fraud statute, the Supreme Court in Skilling relied primarily on an analysis of the factual predicate of pre-McNally[22] honest services cases to determine that Section 1346 criminalized "only the bribe-and-kickback core of the pre-McNally case law." Skilling, 130 S. Ct. at 2931.

If the Court were to follow Skilling and similarly examine the "core" factual predicate of past prosecutions, the extensive previous prosecutions of bribes to officials at SOEs would make clear that the "core" encompasses those types of bribes. See Exhibit I (identifying over 35 FCPA prosecutions related to SOEs). Indeed, when examining the conduct prohibited by the FCPA, there is no need for a court to "write in" what the text prohibits because, considering the plain meaning of instrumentality and the many other factors discussed supra, what is prohibited is spelled out in the text of the statute itself. Defendants are simply incorrect about what they believe the core of the FCPA to be – the "core" of the FCPA is not what makes up a foreign official, but instead what was the corruption. See Kay I, 359 F.3d at 761 ("We conclude that, as important to the statute as the business nexus element is, it does not go to the FCPA's core of criminality. When the FCPA is read as a whole its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner.").

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[22] Congress enacted 18 U.S.C. § 1346 in specific response to the Supreme Court's decision in McNally v. United States, 483 U.S. 350 (1987), striking down the common law "honest services" theory of mail and wire fraud.

The question of whether a specific individual would be considered a "foreign official" is a factual question that relates to the "core," but is not, as defendants claim, the "core" itself.

Defendants further assert that the Department's "Lay-Person's Guide [to the FCPA]," the U.S. Attorney's Manual, and the government's submissions to the OECD do not state with technical clarity when an employee of an SOE is considered a foreign official for purposes of the FCPA. The determination of whether an individual is a "foreign official" under the FCPA is a fact-specific inquiry, which may take into account various factors including the ownership, control, nature, and function of the relevant entity.[23] None of the documents cited by the defendants provide any support for defendants' claim that employees and officials of SOEs can never be held to be "foreign officials" under the FCPA.

For all these reasons, defendants' void for vagueness claim should be rejected.

III. CONCLUSION

For the reasons set forth above, this Court should deny the defendants' motion to dismiss the FCPA counts of the Indictment.

[23] Relatedly, the Fifth Circuit has rejected a "technical interpretive question as to the exact meaning of" the business nexus element of the FCPA because it was not void for vagueness. Kay II, 513 F.3d at 441; see also Kay I, 359 F.3d at 744 n.16 (rejecting vagueness claim on appeal of dismissal).