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15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17 SOUTHERN DIVISION

18 UNITED STATES OF AMERICA,) NO. SA CR 09-00077-JVS
19 Plaintiff,)
20 v.) GOVERNMENT'S OBJECTIONS TO
21 STUART CARSON, et al.,) DEFENDANTS' PROPOSED FOREIGN
22 Defendants.) CORRUPT PRACTICES ACT JURY
23) INSTRUCTIONS; MEMORANDUM OF POINTS
24) AND AUTHORITIES; EXHIBITS
25) Hearing: August 12, 2011, 1:30 p.m.
26)
27)
28)

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

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

8 DATED: July 25, 2011

9 Respectfully submitted,

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1 II.

2 BACKGROUND

3 Count one of the indictment charges the defendants with
4 conspiracy to violate the FCPA and the Travel Act, and counts two
5 through ten charge substantive FCPA violations. On February 28,
6 2011, the defendants moved to dismiss counts one through ten,
7 primarily asserting that as a matter of law an officer or
8 employee of a state-owned company can never be a "foreign
9 official" under the FCPA. (DE #317).

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

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

1 III.

2 ARGUMENT

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

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

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

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

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

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

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

19 Id. at 1337.

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

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

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

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

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

- 20 (1) The foreign government owns at least a majority of
21 the entity's shares of stock;
- 22 (2) The foreign government owns the entity's shares
23 "directly";
- 24 (3) The foreign government "itself" controls the day-
25 to-day operations of the entity;
- 26 (4) The foreign government "itself" has the power to
27 appoint the entity's key officers and directors;

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Third, adopting the defendants' profoundly prescriptive
4 definition approach would lead to absurd results, even in the
5 United States. Is the United States Postal Service not an
6 instrumentality of the United States government merely because
7 the Postal Service seeks to maximize profits? (See DE #373 at 9-
8 10 ("The fact that domestic, state-owned corporations have been
9 considered 'instrumentalities' of the United States . . . is
10 indisputably relevant to whether foreign, state-owned companies
11 could ever be considered 'instrumentalities' of a foreign
12 state.")).

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

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

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

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

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

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

16 The defendants further propose an instruction that would
17 categorically exclude from the definition of "instrumentality"
18 any entity that is a "mere subsidiary" of a state-owned entity.
19 (DE #384 at 23-25). The government agrees with the defendants
20 only to the extent they mean that a "mere subsidiary" is an
21 entity for which none of the factors identified by this Court in
22 its recent opinion (DE #373) weighs in favor of a finding of
23 instrumentality. But the defendants go too far when they assert
24 that "an 'instrumentality of an instrumentality' should not
25 count." (DE #384 at 24). Simply put, if the entity qualifies as
26 a foreign government instrumentality, it should make no
27 difference where in the corporate chain that entity might sit.
28

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

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

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

1 54 F.3d at 1462, are not instrumentalities. Moreover, the
2 practical effect of adopting the defendants' "mere subsidiary"
3 argument illustrates an additional problem with the defendants'
4 position. If a "mere subsidiary" can never be an
5 instrumentality, then FCPA culpability could be avoided simply by
6 creating an additional subsidiary for receipt of bribes.

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

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

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

3 1. "Corruptly"

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

14 2. "Willfully"

15 The defendants' proposed definition of "willfully" differs
16 substantially from that of the government. First, unlike the
17 government's proposal, the defendants' submission fails to
18 include the important instruction that a person need not be aware
19 of the specific law and rule that his or her conduct may be
20 violating in order to be guilty of violating the FCPA. This
21 standard instruction, which was given in both Aquilar and United
22 States v. Green, Case No. 08-CR-59(B)-GW (C.D. Cal.), makes clear
23 that ignorance of the law is no defense and that the government
24 need not prove that an FCPA defendant knew "the terms of the
25 statute and that [the defendant] was violating the statute."
26 United States v. Kay, 513 F.3d 432, 448 (5th Cir. 2007) (agreeing
27 with the Second Circuit that the FCPA does not fall within the
28

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

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

23 3. "Knowledge"

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

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

3 The FCPA provides in pertinent part as follows:

4 When knowledge of the existence of a
5 particular circumstance is required for an
6 offense, such knowledge is established if a
7 person is aware of a high probability of the
8 existence of such circumstance, unless the
9 person actually believes that such
10 circumstance does not exist.

11 15 U.S.C. § 78dd-2(h)(3)(B) (emphasis added). The government's
12 proposed instruction appropriately uses the exact language
13 highlighted above. (See DE #382 at 3).

14 By contrast, the defendants ignore the statutory text (and
15 Aquilar) and propose the following instruction:

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

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

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

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

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

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

15 1. The Government's Proposed Instruction

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

22 A defendant may be found guilty of violating
23 the FCPA only if the government proves beyond
24 a reasonable doubt all of the following
elements:

- 25 (1) The defendant is a domestic concern, or an
26 officer, director, employee, or agent of a
27 domestic concern, or a stockholder of a domestic
28 concern who is acting on behalf of such domestic
concern;
- (2) The defendant acted corruptly and willfully;

- 1 (3) The defendant made use of the mails or any means
2 or instrumentality of interstate commerce in
3 furtherance of conduct that violates the FCPA;
- 4 (4) The defendant offered, paid, promised to pay, or
5 authorized the payment of money, or offered, gave,
6 promised to give, or authorized the giving of
7 anything of value;
- 8 (5) The payment or gift at issue was to a foreign
9 official, or was to any person while knowing that
10 all or a portion of such money or thing would be
11 offered, given, or promised (directly or
12 indirectly) to a foreign official;
- 13 (6) The payment or gift at issue was intended for at
14 least one of four purposes:
- 15 (a) to influence any act or decision of the
16 foreign official in his or her official
17 capacity;
- 18 (b) to induce the foreign official to do or omit
19 to do any act in violation of that official's
20 lawful duty;
- 21 (c) to secure any improper advantage; or
- 22 (d) to induce that foreign official to use his or
23 her influence with a foreign government or
24 department, agency, or instrumentality
25 thereof to affect or influence any act or
26 decision of such government, department,
27 agency, or instrumentality; and
- 28 (7) The payment or gift was intended to assist the
defendant in obtaining or retaining business for
or with, or directing business to, any person.

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

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

3 2. None of the Elements Should Be Merged

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

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

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

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

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

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

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

11 The defendants argue that in order to establish an FCPA
12 violation, the government must prove beyond a reasonable doubt
13 that the defendant knew that the transaction at issue involved a
14 "foreign official" as that term is defined in the FCPA.

15 Consistent with that view, the defendants propose moving "while
16 knowing" in element (5) so that it applies to the term "foreign
17 official." As explained below, this Court should reject this
18 modification because the FCPA does not require that level of
19 proof.⁴

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

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

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

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

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

- 19 • Payments or gifts made directly to a foreign
20 official (§ 78dd-2(a)(1));
- 21 • Payments or gifts made directly to a party or
22 political candidate (§ 78dd-2(a)(2)); and
- 23 • Payments or gifts made indirectly through
24 intermediaries (§ 78dd-2(a)(3)).

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

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

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

8 The defendants' reliance on Flores-Figueroa v. United
9 States, 129 S. Ct. 1886 (2009), is misplaced because the statute
10 in that case is not parallel to the FCPA. See United States v.
11 Barnett, 09-CR-091, 2009 WL 3517568, *1-*2 (E.D. Wash. Oct. 27,
12 2009) (distinguishing Flores-Figueroa on a similar basis). But
13 even if Flores-Figueroa was somehow comparable, its holding does
14 not compel a different conclusion. In that case, the Supreme
15 Court interpreted the knowledge requirement of 18 U.S.C.
16 § 1028A(a)(1), which requires a mandatory consecutive two-year
17 sentence if, during the commission of other crimes, the defendant
18 "knowingly transfers, possesses, or uses, without lawful
19 authority, a means of identification of another person." Relying
20 primarily on "ordinary English grammar," the Supreme Court ruled
21 that the knowledge requirement applied to all aspects of the
22 provision. See id. at 1894.

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

1 The Supreme Court in Flores-Figueroa recognized, however,
2 that "the inquiry into a sentence's meaning is a contextual one,"
3 id. at 1891, a point emphasized by Justice Alito. See id. at
4 1895-96 (Alito, J., concurring). Notably, he cited with apparent
5 approval Ninth Circuit and other decisions ruling that 18 U.S.C.
6 § 2423(a), which makes it unlawful to "knowingly transpor[t] an
7 individual under the age of 18 years in interstate or foreign
8 commerce . . . with intent that the individual engage in
9 prostitution" does not require knowledge that the victim was not
10 18. See id. at 1895-96 (citing United States v. Taylor, 239 F.3d
11 994, 997 (9th Cir. 2001)).

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

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

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

12 Second, it would be illogical to conclude that the law
13 requires proof that a defendant knew the legal intricacies
14 defining the status of a particular entity as a "department,
15 agency, or instrumentality" of a foreign government, thereby
16 making the employee or officer at issue a "foreign official."
17 Although the government must prove that the intended recipient
18 was, in fact, a "foreign official," it cannot be the law that the
19 government must prove that the defendant knew the official
20 qualifies as a "foreign official" as that term is defined under
21 the FCPA or – as the defendants in this case would require – show
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26 ⁷ Just as a § 2423(a) defendant is constitutionally
27 protected by the requirement that the government prove he or she
28 acted "with intent that the [victim] engage in prostitution," so
too is the FCPA defendant by the requirement that the government
prove he or she acted "corruptly" and "willfully."

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

3 In United States v. Jennings, 471 F.2d 1310 (2nd Cir. 1973),
4 the Second Circuit was faced with an argument similar to that now
5 made by the defendants in this case. In Jennings, the defendant
6 was arrested after he offered to bribe two undercover federal
7 agents in exchange for "protection" for illegal gambling
8 activities. The defendant was charged with violating 18 U.S.C.
9 § 201(b)(1), which prohibits an individual from "corruptly"
10 paying any "public official" (defined to include federal agents)
11 for certain improper purposes. At trial, the defendant asserted
12 that he believed the agents were merely "cops" and therefore
13 requested a jury instruction requiring the government to "prove
14 beyond a reasonable doubt that that defendant knew that the
15 agents in question were acting for and on behalf of the United
16 States." Id. at 1311. The district court denied the request and
17 the defendant was convicted. On appeal, the Second Circuit held
18 that it was sufficient for the government to prove that the
19 defendant was acting corruptly:

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

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

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

14 Id. at 1312 (internal citations omitted); see also United States
15 v. Feola, 420 U.S. 671, 678-79, 684 (1975) (assault on federal
16 officer statute does not require proof that defendant knew of
17 victim's status); United States v. Howey, 427 F.2d 1017, 1018
18 (9th Cir. 1970) (holding that the government need not prove under
19 18 U.S.C. § 641 that the defendant knew the property stolen
20 belonged to the United States). The Second Circuit in Jennings
21 summarized that "culpability [under § 201] turns upon the
22 defendant's knowledge or belief that the person whom he attempts
23 to bribe is an official having authority to act in a certain
24 manner and not on whether the official possess federal rather
25 than state authority." 471 F.2d at 1313 (emphasis added).

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

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

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

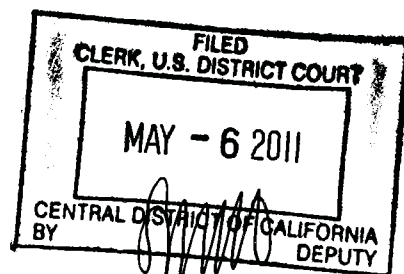
6 Element (6) of the government's proposed instruction
7 contains the list of improper purposes set forth in 15 U.S.C.
8 § 78dd-2(a)(1)(A)-(B) & (3)(A)-(B). The defendants fail to
9 include in their proposed elements the improper purpose of "to
10 secure any improper advantage." In this case, the government
11 intends to prove at trial that the defendants' purpose in making
12 corrupt payments included a host of improper business advantages
13 they sought to obtain. Therefore, this purpose – to secure an
14 improper advantage – should be included in the instructions.

15 **IV.**

16 **CONCLUSION**

17 For the foregoing reasons, this Court should adopt the
18 government's jury instructions, and not those of the defendants.
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA

Plaintiff,

v.

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

Defendants.

CASE NO. CR 10-1031 AHM

JURY INSTRUCTIONS

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COURT’S INSTRUCTION NO. 30

FOREIGN CORRUPT PRACTICES ACT – ELEMENTS (GENERALLY)

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

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

- (1) The defendant is a “domestic concern,” or an officer, director, employee, or agent of a “domestic concern,” or a stockholder of a domestic concern who is acting on behalf of such domestic concern.
- (2) The defendant acted corruptly and willfully.
- (3) The defendant made use of the mails or of any means or instrumentality of interstate commerce in furtherance of conduct that violates this statute.
- (4)(a) The defendant knowingly either paid, or offered, promised, or authorized the payment of, money or anything of value to a foreign official.

OR

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

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

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

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

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

(c) to secure any improper advantage.

AND

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

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

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

REPORTER'S TRANSCRIPT

JURY TRIAL

Thursday, July 30, 2009

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

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

For the Government

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

For the Defendant

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

MICHAEL A. RODRIQUEZ, RPR/CM/RMR

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

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

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

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

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

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

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

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

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

25 Six, that the payment was for one of four

MICHAEL A. RODRIQUEZ, RPR/CM/RMR

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

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

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

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

MICHAEL A. RODRIQUEZ, RPR/CM/RMR