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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GERALD GREEN and PATRICIA GREEN, Defendants.	CR No. 08-59(B)-GW <u>GOVERNMENT'S MEMORANDUM IN RESPONSE TO DEFENDANTS' SUPPLEMENTAL SENTENCING INFORMATION FILED ON AUGUST 10, 2010</u> Sent. Date: August 12, 2010 Sent. Time: 9:30 a.m.

Plaintiff United States of America, through its counsel of record, the United States Attorney's Office for the Central District of California, and the Fraud Section, United States Department of Justice, Criminal Division, hereby files the

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attached memorandum in response to defendants' Supplemental Sentencing Information filed on August 10, 2010.

DATED: August 11, 2010

Respectfully submitted,

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/s/

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MEMORANDUM IN RESPONSE TO DEFENDANTS' SENTENCING INFORMATION

I.

INTRODUCTION

In a supplemental sentencing brief filed on August 10, 2010 ("Def. 8/10/10 Br."), defendants GERALD GREEN and PATRICIA GREEN make two last attempts to persuade the Court to disregard the significant prison sentences that have been imposed in recent years, months, and weeks for violations of the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA").

First, defendants attempt to improperly cast doubt on the relevancy of the recent sentencing of FCPA defendant Juan Diaz in United States v. Diaz, 09-CR- 20346 (S.D. Fla. 2010), claiming incorrect guidelines were used, his sentence is solely a place-holder, and that it somehow illustrates disparate treatment among FCPA cases. These arguments are factually incorrect and constitute yet another attempt to shift the Court's focus away from defendants' conduct, the posture of their case, and where it fits in within the contours of the FCPA sentencing landscape.

Second, defendants once gain compare apples to oranges by looking to government resolutions (including of civil claims) of FCPA-related investigations involving corporate defendants. Defendants' arguments have no place in an analysis under 18 U.S.C. § 3553(a)(6) to avoid unwarranted sentencing disparities.

The Court should reject defendants' arguments and, as the government has previously argued, the should sentence each defendant tomorrow to 10 years in prison.

II.

DISCUSSION

A. DEFENDANTS DISCUSSION OF THE DIAZ CASE IS FACTUALLY INCOMPLETE AND INACCURATE

In their most recent filing, defendants attempt to cast the Diaz sentence as an example of disparate treatment in the FCPA landscape, and claim that the 57 months sentence he received is simply a "place-holder, a fictional sentence" not to be relied upon by the Court. (Def. 8/10/10 Br., at 4). Defendants' arguments are not only factually incomplete, they are also factually incorrect. The Diaz case is well within the FCPA sentencing landscape outlined for the Court in the government's Sentencing Memorandum Re: Three Most Instructive FCPA cases, filed May 6, 2010 (Docket Entry 346, the "Gov FCPA Landscape Memorandum").

Defendants' analysis of the Diaz case ignores its significance of three essential points, namely, that Diaz:

1. Promptly accepted responsibility for his actions (indeed, defendant Diaz agreed to waive indictment and proceed by information);

2. Promptly plead guilty after the filing of the charging document and gave a full account of his misconduct; and

3. Is cooperating with the government.

Defendants have done none of these things, yet they are asking for probation. On the other hand, in the Diaz case, despite doing all of these things, Diaz currently has a sentence of close to 5 years. This sentence, which does not reflect credit Diaz may ultimately receive for cooperation, is well within the range of other individual FCPA sentences in the category of "Plea, No Cooperation", as pointed out in the Gov FCPA Landscape Memorandum at 7-11. For example, in United States v. Jumet, 09-CR-397 (E.D. Va. 2009), the defendant received 87 months imprisonment, in United States v. Shu Quan Sheng, 08-CR-194 (E.D. Va. 2008), the defendant received 51 months imprisonment, and in United States v. Warwick, 09-CR-449 (E.D. Va. 2009), the defendant received 51 months imprisonment. The Diaz case is a prime example of how the FCPA sentencing landscape has developed defined contours, with defendant Diaz, falling in the mid to lower range of those contours for having promptly accepted responsibility for his actions.

While defendant Diaz may get a further reduction in sentence due to cooperation, as previously discussed in Gov FCPA Landscape Memorandum at 11-13, those defendants who plea and cooperate typically get lighter sentences than those who plea and do not cooperate. This entirely consistent with the well-accepted and well-reasoned principle that there would be considerably less cooperation -- and thus more crime -- if those who assist prosecutors could not receive lower sentences compared to those who fight to the last. U.S. v. Bartlett, 567 F.3d 901, 907 (7th Cir. 2009) (disparity was justified by material differences in offenders' conduct and acceptance of responsibility). Defendant Diaz's sentence is only a "place-holder" to the extent that it will be his sentence if he does not continue to cooperate with the government and to possibly justify a lighter sentence in the future.

In light of the sentences other defendants have received after accepting responsibility for less egregious conduct, defendants' request for probation flies in the face of any semblance of similarity in sentencing.

Moreover, defendants' claim that the government neglected to use the sentencing guideline for public corruption applicable to the FCPA (U.S.S.G. § 2C1.1) in its calculation of defendant Diaz's total offense level is plain wrong. While the offense level was calculated through the application of the money laundering guideline (U.S.S.G. § 2S1.1), defendants chose to ignore the fact that in order to calculate a money laundering offense level under that section, one first calculates the base level for the underlying offense -- that is, the offense level for the FCPA violations under § 2C1.1. Therefore, the defendant's conduct for his FCPA violations has been properly taken into account and is reflected in his total offense level. Contrary to defendants' suggestion, the Diaz sentence is a proper and appropriate data point for the Court to consider -- especially given that defendants here were likewise charged with (and convicted of) money laundering.

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B. <u>THIS COURT SHOULD NOT COMPARE THIS CASE TO DISPOSITIONS AGAINST CORPORATE DEFENDANTS OR ENGAGE IN SPECULATION AS TO INDIVIDUALS NOT CHARGED OR SENTENCED</u>

In arguing for non-custodial sentences in this case, defendants GERALD GREEN and PATRICIA GREEN once again point to pre-trial settlements in cases brought under the FCPA against corporate entities. (Def. 8/10/10 Br., at 5-8). Aside from the patent incomparability of civil settlements by the Securities and Exchange Commission, defendants' arguments are also misplaced under controlling criminal sentencing law. Defendants' discussion of apples and oranges has no place in a proper statutory analysis to avoid unwarranted sentencing disparities.

The penalties section of the FCPA's anti-bribery provisions sets forth criminal penalties as follows:

> (1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.
>
> * * *
>
> (2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

15 U.S.C. § 78dd-2(g).

Defendants cannot reasonably compare sentences imposed on business entities that may only be fined for violations of the FCPA's anti-bribery provisions, to sentences imposed on natural persons who may be fined and imprisoned for willful violations.

Moreover, the Court must decline defendants' remarkable invitation to join the wholesale speculation of FCPA "pundits" as to whether corporate settlements are "shielding" top corporate executives from punishment. (Def. 8/10/10 Br., at 5-8). Aside from being pure conjecture, such a question has no bearing on "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). A defendant cannot frame an unwarranted sentence disparity argument by comparing his case to someone who was "never convicted of any conduct and was never sentenced." United States v. Spoerke, 568 F.3d 1236, 1252 (11th Cir. 2009).[1]

Defendants' speculation about lenient treatment of guilty executives in corporate settlements is not only baseless and false,[2] it is belied by defendant's own reference to some of the individual prosecutions that have occurred alongside corporate dispositions. (Def. 8/10/10 Br., at 6). It is the sentences of the individuals in those cases that are appropriate here for consideration and comparison.

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[1] This rule makes eminent sense given the myriad factors that could lead to a wrongdoer not having been sentenced, from the pendency of a non-public investigation, to jurisdictional and statute of limitations problems, to evidentiary problems.

[2] The Department of Justice's corporate resolutions generally include language making clear that they do not protect the officers, directors, and employees of the corporation or entity from prosecution.

III.

CONCLUSION

The Court should disregard defendants' efforts to obscure the landscape of FCPA sentencing, which generally reflects significant prison terms for convicted individuals.

The government respectfully requests leave to supplement its sentencing position as necessary, and at the time of hearing.

DATED: August 10, 2010

Respectfully submitted,

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