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

19 UNITED STATES OF AMERICA,) NO. SA CR 09-00077-JVS
 20)
 Plaintiff,) GOVERNMENT'S SUPPLEMENTAL BRIEF
 21) REGARDING JURY INSTRUCTIONS;
 v.) MEMORANDUM OF POINTS AND
 22) AUTHORITIES
 STUART CARSON et al.,)
 23)
 Defendants.)
 24)
 25)

26 Plaintiff United States of America, by and through its
 27 attorneys of record, the United States Department of Justice,
 28 Criminal Division, Fraud Section, and the United States Attorney

1 for the Central District of California (collectively, "the
2 government"), hereby files its Supplemental Brief Regarding Jury
3 Instructions. The government's supplemental brief is based upon
4 the attached memorandum of points and authorities, the files and
5 records in this matter, as well as any evidence or argument
6 presented at any hearing on this matter.

7 DATED: September 26, 2011

8 Respectfully submitted,

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18 /s/

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 At the hearing on September 6, 2011, the government
3 requested an opportunity to submit further briefing on the
4 following hypothetical question posed by the Court:

5 THE COURT: I want to get the business, and I'm going to
6 pay you \$50,000. I want you to misuse your position.
7 I may or may not know that you're a government
8 official. But assume the record establishes that the
9 person is a foreign official and that the conduct
10 solicited, whether he knows it or not, is misuse of an
11 official position. He intended to make the bribe, and
12 his conduct brought about misuse of an official
13 position. Must he know that? Must he know that the
14 individual is in fact a government official?

15 The Court subsequently ordered the government to submit its brief
16 no later than September 20, 2011, with any defense response to be
17 filed no later than October 4, 2011. On September 21, 2011, the
18 parties filed a stipulation stating, in part, as follows:

19 Since the hearing, counsel for the government and
20 counsel for the Defendants have discussed the issue
21 raised by the Court. Those discussions have yielded
22 what appears to be at least some consensus that the
23 answer to the questions posed by the Court is "yes."
24 Accordingly, the parties have exchanged proposed jury
25 instructions to reflect the resolution of this issue.
26 The parties expect that their discussions will result
27 in a joint proposed jury instruction on the elements of
28 a substantive offense under the FCPA. If those
discussions do not result in a joint proposed jury
instruction, the parties expect that additional
submissions will be limited to their respective
proposed instructions, and any legal argument
explaining how their respective instructions in fact
differ.

On September 22, 2011, the Court issued an Order resetting the
briefing schedule, with the government's brief due on September
26, 2011, and the defendants' brief due on October 10, 2011. The
parties have continued to exchange proposed instructions over the
course of the past week but have been unable to reach agreement
on certain language in elements 4 and 5 of the instruction.

1 Accordingly, the government proposes the following
2 instruction regarding the elements of an FCPA offense:

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

5 (1) The defendant is a domestic concern, or an
6 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;

7 (2) The defendant acted corruptly and willfully;

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

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

13 (5) The payment or gift at issue in element 4 was to
14 (a) a person the defendant knew or believed was a
foreign official or (b) any person and the defendant
15 knew that all or a portion of such money or thing of
value would be offered, given, or promised (directly or
16 indirectly) to a person the defendant knew or believed
to be a foreign official.

17 The government need not prove that the defendant knew
18 the legal definition of "foreign official" under the
FCPA or knew that the intended recipient of the payment
19 or gift fell within the legal definition. The
defendant need not know in what specific official
20 capacity the intended recipient was acting, but the
defendant must have known or believed that the intended
21 recipient had authority to act in a certain manner as
specified in element 6.

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

24 a. To influence any act or decision of a
foreign official in his or her official capacity;

25 b. To induce a foreign official to do or omit
26 to do any act in violation of that official's lawful
duty;

27 c. To secure any improper advantage; or

28 d. To induce a foreign official to use his or

1 her influence with a foreign government or department,
2 agency, or instrumentality thereof to affect or
3 influence any act or decision of such government,
4 department, agency, or instrumentality; and

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

8 **Element 4**

9 Defendants have suggested that elements 4 and 5 imply,
10 but do not make clear, that the actual or intended bribe
11 must be to a person who is, in fact, a "foreign official."
12 Defendants accordingly propose adding the words "to a
13 foreign official" at the end of element 4. The government
14 believes that this concept is made abundantly clear in
15 element 5 and that it would be repetitive to add this
16 language to element 4. Further, if such language is added
17 it would be necessary to clarify by adding, "or any person
18 while knowing that all or a portion of such money or thing
19 of value would be offered, given, or promised, directly or
20 indirectly, to any foreign official," in order to accurately
21 express the prohibitions set forth in 18 U.S.C. § 78dd-2(a).
22 Again, because this "middleman" concept is captured in
23 element 5, the government believes its proposed jury
24 instruction is sufficiently clear.

25 **Element 5**

26 At the September 6, 2011, hearing, both parties
27 appeared to agree that the government would not need to
28 prove at trial that the defendant knew the technical aspects
of the various factors that make up an instrumentality. At
the argument, Ms. Dunne, counsel for defendant Rose Carson,

1 stated "we are not talking about the defendants having to
2 know that the alleged recipients of these bribes were
3 technically government officials under the Foreign Corrupt
4 Practices Act." RT 9/6/2011 at 40. Ms. Dunne went on to
5 state, "if you agree that we get to argue that the
6 government must show that these defendants knew they were
7 bribing a government official not in the technical legal
8 sense under the statute but in the factual sense, and that
9 they knew the facts that made these people government
10 officials, then we are not going to be quibbling too much
11 over the language." Id. at 42-43.

12 The government has proposed language in element 5
13 which, while making clear that the government must prove
14 that the defendant knew or believed that the ultimate
15 recipient of the payment or gift was a foreign official,
16 also makes clear what defendants do not appear to dispute:
17 that the government need not prove that the defendant knew
18 the legal definition of "foreign official" under the FCPA or
19 knew that the intended recipient of the payment or gift fell
20 within that definition.

21 The government's instruction relies on the holding in
22 United States v. Jennings, 471 F.2d 1310 (2nd Cir. 1973),
23 which concerned the domestic bribery statute, 18 U.S.C. §
24 201(b)(1). The reasons for the government's reliance on
25 Jennings are detailed in the government's previously filed
26 Objections to Defendants' Proposed Foreign Corrupt Practices
27 Act Jury Instructions (Dkt. #426 at 22-24). In short, the
28 Jennings court indicated that the sole scienter required for

1 the domestic bribery statute is "knowledge of the corrupt
2 nature of the offer and an 'intent to influence an official
3 act.'" 471 F.2d at 1312. "[C]ulpability turns upon the
4 defendant's knowledge or belief that the person whom he
5 attempts to bribe is an official having authority to act in
6 a certain manner and not on whether the official possesses
7 federal rather than state authority." Id. at 1313.

8 The last two sentences of the government's proposed
9 element 5 clarify for the jury what the knowledge portion of
10 this element means (and does not mean). While agreeing that
11 some language on the issue is appropriate, defendants have
12 maintained that any such language should appear in a
13 separate instruction like, for example, the Court's
14 instructions about "willfully" and "corruptly." Unlike
15 these other concepts, however, these two sentences are
16 specific to this element of the instruction; to place it
17 elsewhere in the instructions would be confusing for the
18 jury.

19 Accordingly, the government requests that the Court:

20 A. Enter its order adopting the definitions of
21 "foreign official," "instrumentality," "corruptly,"
22 "willfully," and "knowledge," as set forth in the tentative
23 minute order issued before the September 6, 2011 hearing;¹
24 and

25
26
27 ¹ Defendants have indicated that they reserve the right to
28 seek, in connection with the Court's knowledge instruction, a
modified or supplemental instruction regarding deliberate
indifference.

1 B. Enter an order adopting the FCPA elements
2 instruction set forth herein.

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