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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

STUART CARSON, et al.,

Defendants.

Case No. SA CR 09-00077-JVS

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THE INDICTMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 2, 2012
Time: 3:00 p.m.
Courtroom: 10C (Hon. James V. Selna)
Trial Date: June 5, 2012

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT ON April 2, 2012, at 3:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable James V. Selna, United States District Judge, located at 411 West Fourth Street, Santa Ana, California, Defendants Stuart Carson, Hong "Rose" Carson, Paul Cosgrove, and David Edmonds (collectively "Defendants") will and hereby do move this Court to dismiss the Indictment in its entirety.

The basis for Defendants' Motion is that the impact of the cumulative impediments – unique investigation tactics preventing Defendants access to millions of pages of evidence they would normally receive under Rule 16, the lack of a meaningful *Brady* review, CCI's loss of crucial documents underlying many of the counts and transactions, the inability of Defendants to obtain foreign documents and subpoena foreign witnesses, CCI instructing its employees not to speak with the defense, many of which are pertinent to the counts and transactions, as well as opaque statutes applied in a novel fashion and failure to provide mandated public awareness – in combination, deprived Defendants' of their Due Process and Sixth Amendment rights, including the right to present a complete defense, and have prejudiced Defendants to such a severe extent that dismissal is the only appropriate remedy.

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities filed in support thereof, the Declarations of Michael A. Weinbaum, Ari Seldman Hawbecker, Stephen W. Polak and Gary K. Morley, the files and records of this case and such other and further argument and evidence as may be presented to the Court at the hearing of this matter.

Dated: March 5, 2012 Respectfully submitted:

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I. INTRODUCTION

The goal of a federal criminal prosecution is not to obtain a conviction, but to do justice. *Berger v. United States*, 295 U.S. 78, 88 (1935). Here, a confluence of factors resulted in a fundamentally unfair prosecution in which the Defendants do not have a constitutionally acceptable opportunity to present a vigorous defense against the charges that as employees of Control Components, Inc. ("CCI") they violated the Foreign Corrupt Practices Act ("FCPA") and Travel Act through a course of commercial bribery including: (1) Rule 16 discovery tactics precluding Defendants access to millions of pages of normally-discoverable evidence; (2) the lack of a meaningful *Brady* review; (3) CCI's loss of critical documents underlying many of the counts and transactions; (4) Defendants' inability to obtain foreign documents and subpoena foreign witnesses, (5) CCI instructing its employees, including key witnesses, not to speak with the defense, and (6) unclear statutes. This Court, therefore, should dismiss the Indictment, as Defendants' right to due process cannot be guaranteed.

II. FACTUAL BACKGROUND

A. Allegations Against Defendants

On April 9, 2009, the grand jury returned an Indictment charging defendants, Stuart Carson, Hong "Rose" Carson, Paul Cosgrove and David Edmonds (collectively "Defendants") with conspiring to violate, and committing substantive violations of, the FCPA and the Travel Act. Essentially, the government alleges Defendants collaborated to win worldwide business by extending bribes and lavish entertainment to employees of state-owned-enterprise customers from 1998 to 2007. Defendants are former senior managers of Control Components, Inc. ("CCI"). Stuart Carson was the President of CCI from 1989 to 2005; Paul Cosgrove was CCI's Executive Vice President from 2002 to 2007 and head of CCI's Worldwide Sales Department from 1992 to 2007; Hong Carson was CCI's Manager of Sales for China and Taiwan from 2000 to 2002 and CCI's Director of Sales for China and Taiwan from 2002 to 2007; and David Edmonds was CCI's Vice-

President of Worldwide Customer Service from 2000 to 2007. Defendants were responsible for oversight of significant international business, yet IMI/CCI provided no FCPA training. FBI 302 of Richard Morlok, (May 1, 2008) at 8, 19 attached hereto as Exhibit B; Ngai Biu ("NB") Fung (Dec. 18, 2007) at 10 attached hereto as Exhibit C.

B. DOJ's and CCI's Partnership Has Prevented the Defendants' from Obtaining Millions of Pages of Discoverable Evidence

As Defendants have described in a current submission to the Court,[1] from the outset of CCI's internal investigation in August 2007, CCI, through its counsel Steptoe & Johnson LLP ("Steptoe"), worked hand-in-hand with DOJ to investigate the matters at issue in this case. DOJ recently disclosed three emails from August 15-17, 2007, in response to Defendants' informal request for the communications between the government and IMI/CCI from July 2007 to October 2007, which show that DOJ and CCI were aligned and working together towards a common interest.[2] Tellingly, in the earliest of these emails, one dated August 15, 2007, Patrick Norton from Steptoe comments on DOJ's attempt to control the timing of IMI's public announcement regarding the internal investigation, and he refers to "your and our interest in getting access to senior management who may have been involved in the payments in questions [sic] while [they] may still be willing to cooperate." Exhibit A at 2 attached to Munk Dec. at ¶ 4 to Motion to Suppress. Norton goes on to say, "I would hope to be able to advise you by the end of the day tomorrow…whether the individuals are cooperating or not. If they are, you can then decide whether you wish to send someone from the DOJ or FBI to speak with them." *Id.*

The recently disclosed August 2007 emails between DOJ and CCI show a joint

[1] *See* Defendants' Motion to Suppress Defendants' Statements concurrently filed herewith.

[2] *See* Exhibit A to Declaration of Jessica C. Munk at ¶ 4 attached to Defendants' Motion to Suppress Defendants' Statements filed concurrently herewith (hereinafter referred to as "Munk Dec. to Motion to Suppress").

investigative effort from inception, before internal investigators even spoke to the Defendants. This is confirmed in a letter, dated June 22, 2009, in which the President of IMI/China concedes that the DOJ and Steptoe worked together in the investigation. That letter unequivocally states "CCI was required to provide to the DOJ all evidence that appeared to be relevant to the investigation" and that "the entire investigation was carried out in co-operation between the DOJ and IMI's external counsel and was independent of IMI/CCI."[3]

As an integral aspect of this investigative venture, DOJ and CCI agreed in writing that CCI could provide the government with attorney-client privileged and attorney work-product information obtained from witness interviews and other sources, so long as the government would not assert that this disclosure constituted a waiver of the protections afforded by those doctrines. Declaration of Brian M. Heberlig In Support of the Opposition of IMI plc and CCI to Defendants' Joint Motion to Compel Discovery (hereinafter referred to as "Heberlig Dec.") at ¶ 18 (Doc. No. 121-2). The government assured CCI that the government would not take steps leading to the further disclosure of any such information, except to the extent that the government in its sole discretion determined disclosure was legally required. The DOJ and CCI essentially agreed to a private information-sharing arrangement between them. With this agreement in place, CCI selectively disclosed only information CCI believed inculpated Defendants and DOJ did not seek additional information.[4] While DOJ has recently provided Defendants with additional discovery, there are millions of pages of potentially relevant evidence Defendants likely will never see, nor has DOJ requested such evidence from CCI. For

[3] Exhibit A to the Declaration of Teresa Céspedes Alarcón accompanying Defendants' Motion for Reconsideration of Court's December 8, 2009 Order Denying Defendant's Motion to Compel at 1 (Doc. No. 555-1).

[4] CCI compiled and reviewed over 5.6 million "potentially relevant" documents (75 million pages) but only provided approximately 36,930 pages to the DOJ. CCI interviewed a substantial number of witnesses and carefully prepared written interview memoranda memorializing those interviews, but only provided DOJ with "oral summaries of a subset of its witness interviews." Heberlig Dec. at ¶¶ 9, 19, 21.

example, Mr. Heberlig has stated "The Department [of Justice] has not asked IMI or CCI to produce any attorney notes or memoranda summarizing the Steptoe interviews…." Heberlig Dec. at ¶ 12.

The collaborative nature of DOJ's and CCI's relationship provided both parties benefits, to the detriment of Defendants as outlined in detail below.[5] The course of the discovery and subpoena litigation show just how advantageous this investigative relationship with CCI has been for the government, as it has enabled the government to utilize the Federal Rules of Criminal Procedure to limit Defendants' access to pertinent evidence. During lengthy and costly Rule 16 litigation, the government and CCI did not make the Court aware of the extent of their relationship when they contended that DOJ did not have Rule 16 "custody or control" over the millions of documents held at CCI. Specifically, during the hearing on CCI's motion to intervene in the Rule 16 litigation, CCI's counsel characterized CCI as a "third party cooperating witness who is not aligned with the government." Reporter's Transcript of Proceedings (hereinafter referred to as "Rep. Tr."), October 13, 2009 at 6, lns. 13-14. CCI's counsel then stated "[w]e are certainly not working in any joint investigation with the DOJ. We were adversaries…." *Id.* at 10, lns. 22-24. At no time did the government do anything to dispel this mischaracterization, which had the effect of significantly limiting Defendants' access to the materials CCI's counsel had reviewed by forcing Defendants to seek the discovery they were denied by way of a Rule 17 subpoena to CCI.

Despite lengthy litigation and extensive meet and confer efforts between the Defendants, CCI, and the government, Defendants have received less than 3% of the potentially relevant documents. During the first round of Rule 17 motions (a second round is on the horizon), CCI's counsel continued to minimize the symbiotic relationship

[5] CCI pled guilty and paid a fine of roughly two-thirds of the minimum amount, and less than forty percent of the base fine amount, provided for under the Sentencing Guidelines. *United States v. Control Components, Inc.*, SA CR 09-00162, Plea Agreement at 9-13 (Doc. No. 7). The government obtained CCI's commitment to continue its joint investigative effort with the prosecution.

between his clients and the DOJ. CCI's counsel informed the Court that on August 15, 2007, IMI made a voluntary disclosure to the government of potential FCPA violations (Heberlig Dec. at ¶ 17), but he certainly did not disclose that on that same day CCI and the government were already collaborating on the timing of IMI's public announcement and investigation strategy for Defendants' interviews. *See* Exhibit A at 2 attached to Munk Dec. at ¶ 4 to Motion to Suppress. As a result, Defendants have been unfairly denied access to basic Rule 16 discovery. Three years later Defendants still have not received all of the potentially relevant and exculpatory information in CCI's possession.

1. Defendants Continue to Face Hurdles to Access *Brady* Information

Defendants consistently have expressed their great concern about the absence of meaningful *Brady* compliance inherent in the situation the government has created. *See* Rep. Tr., November 9, 2009 at 12, ln. 13 to 14, ln. 2; 39, ln. 18 to 40, ln. 19. After months of discussions about these *Brady* concerns,[6] the government sought limited *Brady* material from CCI, which CCI then refused to produce, despite its Plea Agreement obligation to comply. Instead of demanding cooperation, the government refused to challenge various positions CCI has taken in declining to turn over information DOJ requested from CCI. As with its approach to Rule 16 discovery, the government has allowed CCI to control the discovery process,[7] resulting in the government having an inherent advantage over Defendants in accessing information relevant to litigating this case.

2. Defendants Have Been Denied Access to Many of the Underlying Documents Pertinent to the Counts/Transactions

Despite the lengthy litigation to obtain access to the underlying documents related

[6] On August 11, 2010, counsel for Defendant Edmonds sent to the government a draft memorandum of law, *i.e. Brady* motion, Defendants were considering filing. *See* Weinbaum Dec. at ¶ 2.

[7] CCI has rejected government document requests based on claims that the requested documents fall outside of its cooperation obligation under the Plea Agreement; are attorney-client privileged or work-product protected; are possessed by IMI; or that the request is vague.

to each of the counts and transactions, there are numerous documents related to specific counts and transactions that CCI has not been able to locate. To date, Defendants have not received the project files for the transactions underlying Counts 4, 5, 8, 9, 11, 12 and 14. Weinbaum Dec. at ¶¶ 3-4. This is nearly half of the substantive counts in the Indictment. Also, of the additional thirty transactions that relate to the conspiracy count, Defendants have not received the project files for transactions 2, 6, 7, 8, 10, 15, 16, 22, 26 (Mawan project), 28, 29 and 30. *Id.* Again, Defendants have not received project files for almost half of the additional thirty transactions. In addition, the Defendants have not received the commission payment records for transactions 6, 7, 8, 9, 10, 14, 15, 17, 18, 20, 21, 23, 25, 26, 28, 29 and 30. Weinbaum Dec. at ¶¶ 5-6. Thus, Defendants are left to defend this case without access to some of the most pertinent documents, which make up the counts and transactions that the government alleges were illegal.

The government's inability to provide the basic documents that underlie so many of the allegedly tainted commercial transactions cannot be condoned. Defendants were not directly involved in the details of many of the transactions about the basic commercial and other terms, as well as which specific entities were involved, elements that could put the government's suppositions about the illicit nature of these transactions in a very different light.

Moreover, in a case about purportedly improper commissions, basic fairness demands that Defendants have access to CCI's commission payment records. Defendants should not have to attempt to establish reasonable doubt about whether particular transactions were illegitimate and/or that they knew of improprieties without having the foundational documents that show what the transactions actually involved, the course of the commercial negotiations, who was involved and all the related details that would provide context for what otherwise will necessarily be DOJ's guesswork.

3. Defendants Have Been Unable to Access Foreign Third-Party Records

Due to issues of sovereignty, Defendants have been unable to access documents in the possession of foreign entities. The only method available to Defendants to obtain foreign evidence is via letters rogatory.[8] Such requests often take years to be fulfilled, and often never are. Many nations have also restricted discovery through letters rogatory thereby significantly hindering Defendants' ability to gather evidence abroad.[9] Put simply, the countries in which CCI did business, to a great extent, lack mechanisms for obtaining basic information that any defense attorney would seek to obtain to assess a case and develop a defense for his/her client. As a result, Defendants are severely handicapped in obtaining relevant information.

Due to these hurdles, Defendants have been unable to obtain foreign evidence material to the allegations and their defenses. Due to the various banking/privacy laws in effect in Malaysia,[10] Defendants cannot obtain bank account information relating to Crystal Progress and the alleged improper Petronas transactions. Additionally, Defendants were just informed by the Chinese Embassy that China will not produce any documents requested via the letters rogatory process because China deems such requests inapplicable in criminal prosecutions. Weinbaum Dec. at ¶ 7.

In comparison, DOJ can compel foreign evidence through its Mutual Legal

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[8] A letter rogatory is issued pursuant 28 U.S.C. § 1781 via the U.S. State Department. It is a diplomatic request by a U.S. Court to foreign judiciaries, requesting that the judicial authority compel production in its country.

[9] *See* French Blocking Code as example, French Penal Code Law No. 80-538. Indeed, independent investigation techniques and data collection in foreign countries may violate foreign blocking statutes or otherwise subject defendants and their counsel/investigators to criminal prosecution and penalties which, in turn, could affect the admissibility of evidence in U.S. proceedings.

[10] Malaysian Banking and Financial Institutions Act of 1989 ("BAFIA"), Act 372, Laws of Malaysia (August 23, 1989), *available at* http://www.bnm.gov.my/index.php?ch=14&pg=17&ac=14&full=1; Malaysian Banker's Books (Evidence) Act of 1949 ("BBEA"), Act 33, Laws of Malaysia (Amended January 1, 2006), *available at* http://www.agc.gov.my/Akta/Vol.%201/Act%2033.pdf.

Assistance Treaties ("MLATs") with foreign nations,[11] as well as through various international conventions,[12] all of which call for enhanced mutual legal assistance, preservation and sharing of evidence, and extradition. MLATs provide the government with significant rights and access to foreign evidence.

Additionally, while the FCPA's statute of limitations is five years, pursuant to 18 U.S.C. § 3292, upon request, under appropriate circumstances, the government may automatically receive a three-year extension to obtain foreign evidence. This statute is not applicable to the defense and the FCPA lacks any procedural protections for Defendants required to gather foreign evidence abroad. It is fundamentally unfair to have a statute prohibiting overseas bribery (*i.e.*, the FCPA) in the absence of a viable mechanism for criminal defendants to obtain overseas evidence relevant to the alleged conduct.

4. Defendants Have Been Denied Access to the Vast Majority of Witnesses Relevant to the Pertinent Counts/Transactions

The government also has benefitted from steps CCI has taken to inhibit Defendants' ability to interview witnesses. The government's tentative witness list has many current and former employees. None of these individuals has agreed to an interview by the defense. *See* Declarations of Stephen W. Polak ("Polak Dec.") at ¶ 2; Gary K. Morley ("Morley Dec.") at ¶ 2. None of these individuals is in jeopardy of being prosecuted; the five year statute of limitations has run on everything at issue in the case.[13] However,

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[11] Korea, a nation critical to the charges at hand has an MLAT with the United States. 19. U.S. - South Korea MLAT, signed November 23, 1993; entered into force 5/23/97; 104th Cong., 1st Sess., Treaty Doc. 104-1, Exec. Rpt. 104-22.

[12] UN Convention Against Corruption, GA Res. 58/4 (2003), *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, and OECD Convention on Combating Bribery (1997), *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf, afford the government with increased foreign discovery power, while maintaining sovereignty limitations.

[13] The risk to non-senior management of a legal entanglement has always been virtually nonexistent; the FBI 302 interview reports for several individuals, taken at face value, describe personal conduct regarding the transactions at issue of the precise nature the government contends was, as to Defendants, illegal.

before this case was indicted, CCI employees were influenced not to talk to the defense. *See* under seal Exhibit A attached to Declaration of Jessica C. Munk at ¶ 3 (hereinafter referred to as "Under Seal Exhibit A"). Thus, CCI actively prevented Defendants from speaking to individuals potentially with exculpatory information.

Defendants do not know whether the government was aware or approved CCI's admonition. But even if CCI did not act at DOJ's behest or knowledge, the government has benefited from the obstructive conduct of CCI. Accordingly, Defendants have been unable to interview almost 70 current and former CCI employees. Polak Dec. at ¶ 2; Morley Dec. at ¶ 2. Of these employees, nearly 40 are pertinent to the counts and transactions against Defendants. The government, in contrast, has interviewed dozens of these employees.

Furthermore, many of the percipient witnesses are thousands of miles away, usually virtually impossible to locate, and, even if locatable, not subject to any compulsory process. Only a few foreign witnesses have agreed to Rule 15 depositions. The defense is aware of witnesses with favorable information who have refused to testify in the United States or be deposed internationally. For example, key witnesses for Count 10 advised the defense that the alleged improper payment was never given to a Petronas official. Morley Dec. at ¶ 3.

III. THE RELEVANT CRIMINAL STATUTES AND THE HISTORY OF PROSECUTIONS THEREUNDER

A. The FCPA and Congressional Efforts for Clarity

Portions of the FCPA[14] are obscurely written and a key term at issue in this case is the meaning of "instrumentality," which is not defined in the statute. This Court's ruling, which involves a non-exclusive, multiple factor test to determine whether a state-owned-enterprise is an "instrumentality," shows just how

[14] 15 U.S.C. § 78dd-1

complex and unclear the FCPA is.[15] The FCPA's history reflects Congress' recognition of the inherent lack of clarity.[16] Eleven years after Congress enacted the FCPA, Congress adopted amendments via the 1988 Omnibus Trade and Competitiveness Act ("Trade Act"), reflecting an important policy decision: the federal government must make substantial efforts to inform the public about the FCPA. Congress, therefore, required the Attorney General ("AG") to consult with various federal agencies and departments; obtain the views of interested persons through a public notice and comment procedure; determine based on this combined input "to what extent" FCPA compliance would be enhanced and the business community assisted by further clarification of the FCPA; and then, based on this determination, issue guidelines illustrating allowable and prohibited conduct, clarify Department of Justice's ("DOJ's") enforcement policies and generate precautionary procedures to aide in compliance. Trade Act, P.L. 100-418, 102 Stat. 1107; 15 U.S.C. §§ 78dd-1(d), 78dd-2(e).

The AG's compliance with Congress' directive has been minimal.[17] On July 12, 1990, the AG published his conclusion that "no guidelines are necessary" – without any explanation, publication of any comments he had received on the question, or other edification. 55 Fed. Reg. 28694 (July 12.1990). Having reached the counter-intuitive conclusion that there was no need for FCPA guidelines to enhance public awareness and

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[15] Order re Select Jury Instructions at 5-6 (Doc. No. 549) (citing Doc. No. 373 at 13). A previous submission to this Court by Defendants elaborates further on the FCPA's ambiguity on this critical element.

[16] The FCPA engendered considerable criticism in creating "grey areas" of debatably impermissible conduct, causing U. S. companies to cease foreign operations rather than risk accusations of FCPA violations. Michael V. Seitzinger, *CRS Report to Congress Foreign Corrupt Practices Act* (March 3, 1999), *available at* http://www.fas.org/irp/crs/Crsfcpa.htm.

[17] Although the Trade Act required the AG to publish a notice within six months after enactment soliciting public comment about whether publishing FCPA guidelines would enhance public knowledge of the FCPA, the AG did not publish the notice until October 4th, 1989, fourteen months after enactment. 54 Fed. Reg. 40918 (Oct. 4, 1989).

clarity, it then took the AG four years, until 1994, to publish (jointly with the Department of Commerce) an informal brochure offering general commentary about the FCPA, the "Lay-Person's Guide to the FCPA Statute,"[18] Also, over more than 18 years, the DOJ has only issued 33 opinions about whether prospective conduct would conform to DOJ's enforcement policies.[19]

In conjunction with this lack of public education, for many years the FCPA was virtually never enforced and only very recently was it used to prosecute individuals, who have fewer resources at their disposal to become knowledgeable about their FCPA obligations and certainly would rely on employers and the government for guidance.[20] This opacity is especially problematic given the FCPA's world-wide reach generally and particular reach here.

B. The Travel Act

The Travel Act, the other statute grounding the conspiracy and substantive counts of the Indictment, raises similar issues to those arising under the FCPA. Enacted in 1961 to assist states in enforcing their laws against organized crime, the Travel Act thus criminalizes "bribery … in violation of the laws of the State in which committed" and was an important tool in combatting domestic bribery. 18 U.S.C. § 1952(b). Only recently has DOJ broadened the application of this fifty-year-old statute to apply it to foreign commercial bribery. Motion to Dismiss Counts One, Eleven Twelve and Fourteen of the Indictment at 21 (Doc. No. 374). "In the half century that the Travel Act has been in effect, moreover, only one federal court has upheld criminal charges for foreign

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[18] *Available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

[19] *The Foreign Corrupt Practices Act: Hearing Before the Crime, Terrorism and Homeland Security Subcommittee of the House Judiciary Committee*, Testimony of the Hon. Michael B. Mukasey, 112th Cong. (June 14, 2011), at 10, *available at* judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf.

[20] DOJ's recent and broad enforcement of the FCPA has prompted Congress to hold congressional hearings addressing the need for clarity in the "foreign official" and "instrumentality" definitions. *See* Professor Michael J. Koehler, *House Hearing – Overview and Observations* (June 14, 2011), *available at* http://www.fcpaprofessor.com/house-hearing-overview-and-observations.

commercial bribery under that Travel Act, and that court's decision is a doubtful precedent." Kenneth A. Cutshaw, et al., *Corporate Counsel's Guide to Doing Business in China* (3d ed. 2009) (Ch. 13 written by Patrick M. Norton).[21] This legal landscape presents additional due process challenges as Defendants have been denied meaningful access to a critical source of relevant and potentially exculpatory evidence.[22]

IV. THE CUMULATIVE IMPACT OF IMPEDIMENTS TO PRESENT A COMPLETE DEFENSE WARRANT DISMISSAL AS A DUE PROCESS VIOLATION

Over several decades and in several different contexts, the United States Supreme Court has recognized that fundamental fairness requires criminal defendants to have a meaningful opportunity to present a complete defense. One essential element of this opportunity is the ability to access evidence material to the case. Fundamental fairness has been absent here. Looking at the cumulative impact of impediments – (1) Defendants not receiving millions of potentially relevant documents, (2) the loss of crucial documents and the inability of Defendants to obtain foreign evidence, (3) interference with access to witnesses, (4) the absence of a *Brady* review, (5) opaque statutes applied in areas of first impression, and (6) failure to provide mandated public education – all make it impossible for Defendants to exercise their right to constitutionally guaranteed due process. The due process violation is exacerbated because the government enjoys greater access to material evidence. The Constitution does not permit the government such a one-sided approach to pursue convictions. At this stage, the Court can redress this unacceptable situation only by dismissing the Indictment.

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[21] Patrick Norton is an expert on anti-corruption investigations and a Partner at Steptoe & Johnson, LLP, the law firm partnering with DOJ in this investigation.

[22] While the Court previously denied Defendants' argument that the Travel Act and the FCPA are unconstitutionally vague, Defendants respectfully disagree and reiterate the issues only to reinforce the overall fundamental unfairness in DOJ's recent and overly broad interpretations of these statutes.

A. The Supreme Court and the Ninth Circuit Have Recognized the Constitutional Right to Present a Complete Defense

A criminal defendant's right to present a defense is "a fundamental element of due process of the law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). As the Supreme Court recently observed: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

A meaningful opportunity to present a complete defense is inextricably linked to what the Supreme Court has called the "constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). *Valenzuela-Bernal* dealt with the constitutional implications of the federal government deporting alien witnesses who a criminal defendant claimed would have provided relevant testimony. The Court recognized that defendants cannot be deprived of material, *i.e.* potentially exculpatory, evidence, but declined to reverse conviction because defendant never attempted to establish materiality. 458 U.S. at 874. The constitutional right affirmed in *Valenzuela-Bernal* is bolstered by *Washington v. Texas*, in which the Supreme Court held unconstitutional a Texas statute prohibiting alleged co-participants to a crime from testifying for one another, which violated the right to present a complete defense. These two rights, to secure and present evidence, derive from a common constitutional principle – defendants are entitled to a fair playing field in attempting to defend themselves against criminal charges.

The Supreme Court has held that "fundamental fairness" requires the right to present a defense-- including access to evidence-- in a variety of settings. For example, in considering the prosecution's obligation to disclose to the defendant the name of an informer-eyewitness, the Supreme Court, calling the issue one of "fundamental fairness," stated the importance of avoiding a rigid approach and, instead, considering all the

relevant circumstances bearing on the alleged crime, potential defenses and the possible significance of the evidence. *Roviaro v. United States*, 353 U.S. 53, 60, 62 (1957). Similarly, when the government's delay in prosecuting a case causes a loss of evidence, there is a due process violation if the loss prejudices the defendant. *Valenzuela-Bernal*, 458 U.S. at 868 (citing *United States v. Marion*, 404 U.S. 307 (1971)). In *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984), an effective assistance of counsel case, the Supreme Court similarly recognized "the fundamental right to a fair trial" constitutionally guaranteed through the Due Process Clause and the several provisions of the Sixth Amendment, and observed that in any such case the inquiry must consider "all the circumstances." *See also United States v. Bohn*, 622 F.3d 1129, 1138 (9th Cir. 2010) (In *Valenzuela-Bernal*, "the Supreme Court held that the Due Process Clause protects the 'fundamental fairness' of a trial.")

The foregoing cases reflect that it would be wrong to put too fine a point on the core constitutional principle of a right to a defense in a criminal proceeding. Each addresses what is necessary to assure that a criminal defendant receives, in light of all the relevant circumstances, a fundamentally fair trial process, including the right to access relevant evidence necessary to present a defense.

The Ninth Circuit recently applied these principles to a discovery dispute. *United States v. Stever*, 603 F.3d 747 (9th Cir. 2010), involved a defendant convicted of conspiracy to manufacture (and manufacturing) marijuana on rural property where he lived. Defendant claimed that the marijuana plants found on the property were not his doing and sought pre-trial discovery of any government reports describing Mexican drug trafficking organizations (DTOs) involved in growing marijuana in the same general area as his property. The government did not deny it possessed such reports, but refused to comply and, despite defendant's offers of proof regarding DTOs and their activities in his area, the district court barred any evidence from either side about DTOs. Appealing his conviction, defendant argued that the combination of being denied discovery and *in limine* exclusion of evidence about DTOs violated his constitutional right to a meaningful

opportunity to present a complete defense. Recognizing that this right includes, at a minimum, the right to present to a jury evidence that might influence the determination of guilt, *id*. at 755, the Ninth Circuit agreed, stating:

> ***[f]rom well before the trial, the Government refused to turn over the documents-documents it does not deny it possesses and as to which it claims no privilege of any kind***-relating to the Mexican drug growing operations in Eastern Oregon. The district court then compounded this error by concluding that the documents were irrelevant to the point of immateriality, without even reviewing the requested documents in camera. Having denied Stever the opportunity to explore this discovery avenue, the district court declared a range of defense theories off-limits, without considering in any detail the available evidence it was excluding. As we have explained, its reasoning for doing so-that any such evidence was necessarily irrelevant-was deeply flawed. ***Stever was not only prevented from putting on evidence important to his defense … he was prevented from making his defense at all. We must conclude that Stever's Sixth Amendment rights were violated.***

Id. at 757 (emphasis added) (internal citation omitted).

Defendants acknowledge that none of the above-discussed cases confronted a situation where, like here, Defendants were deprived of access to evidence for multiple reasons, some directly related to decisions the government made and some to the nature of the charges. Taken together, however, the cases confirm that the constitutional rights to develop and present a complete defense must be given practical effect.

Defendants recognize that the right to access evidence also must have limits: the focus must be on relevant, or at least potentially helpful, evidence. This was the focus of *Valenzuela-Bernal*, and the Court there held that because the defendant could not show any prejudice – *i.e.* "some plausible showing of how [the] testimony would have been both material and favorable to his defense" – there was no constitutional violation. 458 U.S. at 867, 874. At the same time, the Court acknowledged the difficulty facing a defendant in showing that evidence he has not been able to obtain is both material and favorable. The Court was able to resolve the concern because (1) the defendant was present for all of the events at issue in the case, and (2) a defendant may make a showing

of the events to which a witness might testify and the relevance of those events to the crime charged, in demonstrating the materiality of the information. *Id.* at 871.

In its prejudice analysis, the Court in *Valenzuela-Bernal* looked to its earlier decision in *Roviaro*. As to informant disclosure, the Court in *Roviaro* spoke of the need to assess whether the informant's identity or the contents of the informant's communications were "relevant and helpful to the defense." *Roviaro*, 353 U.S. at 60. The Court concluded by stating that "[t]he desirability of calling [the informant] as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide." *Id*. at 64.

Fundamental fairness requires that Defendants be able to access relevant evidence and present a complete defense. If Defendants have been deprived that right, there has been a constitutional violation which must be remedied.

B. Defendants' Constitutional Right to Develop and Present a Complete Defense Has Been Infringed Due to Lack of Access to Documents and Witnesses and the Government's Failure to Conduct a Meaningful *Brady* Review

Defendants have been denied a constitutionally adequate opportunity to develop and present a complete defense. No Defendant is accused of personally handing a payment to a foreign official or being present when that occurred. Defendants instead are accused of acting through intermediaries, whether other CCI employees or third-party agents, thousands of miles away in countries in and from which it is especially daunting to identify, locate and interview relevant witnesses and documentary evidence.

Even under the best of circumstances, therefore, it would be an enormous challenge for Defendants to conduct the sort of robust pre-trial investigation and evidence gathering any criminal defendant would expect constitutionally adequate counsel to conduct. But given the discovery hurdles erected by the government and CCI, all reasonable efforts have been blocked. Defendants have been deprived access to a wealth of relevant, potentially exculpatory information.

1. Defendants Have Been Denied Relevant Documents

Defendants have been denied access to critical document discovery. Since the inception of CCI's internal investigation, the government chose only to receive inculpatory evidence, leaving in CCI's possession millions of pages of potentially exculpatory material. This has occurred because the DOJ outsourced the gathering of inculpatory documents from within the set of documents gathered by CCI.

This re-shaping of normal criminal discovery has resulted in fundamental legal rights and principles being turned upside down. CCI and DOJ have been allowed to agree on the nature and extent of attorney-client privilege and attorney work-product waivers CCI will make, and share information pursuant to those agreements. Yet Defendants cannot invoke that same investigative partnership to obtain discovery of the documents CCI reviewed in developing the evidence on which DOJ is basing its prosecution.

Moreover, Defendants have been deprived of basic foundational documents relating to a number of the transactions at issue. CCI claims it cannot locate project files for seven counts and twelve transactions and cannot locate commission payment records for seventeen transactions at issue. Weinbaum Dec. at ¶¶ 3-6. Accepting CCI's representations at face value, documents delineating the commercial terms and parameters of the very transactions DOJ alleges were tainted, as well as documents setting forth the commissions CCI paid in connection with those transactions, have been lost or destroyed by the very entity which, working in cooperation with the government, conducted the bulk of the investigation which underlies this prosecution.

Given the significance of this evidence, the Court need not speculate about whether it "might have been helpful to the defense." *Roviaro*, 353 U.S. at 63-64. The unavailable business records define the very transactions the government seeks to claim were not bona fide and, for that matter, individuals who participated in those transactions. As the Court stated in *Valenzuela-Bernal*, "[i]t is of course not possible to make any avowal of **how** a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of

the required materiality." 458 U.S. at 871 (emphasis in original). That certainly is the case here. Moreover, the government's delay in prosecuting a case can cause a due process violation if there is a prejudicial loss of evidence, *Valenzuela-Bernal*, 458 U.S. at 868. Here, CCI's carelessness in retaining significant evidence has similarly caused prejudice. As Defendants have been prejudiced by CCI's loss of evidence, particularly given all the other impediments which lie before the Defendants, due process should bar prosecution of this case.

It is important to note that in both *Valenzuela-Bernal* and *Roviaro*, *supra*, the defendants were present at the alleged crime and this played into the courts' prejudice analysis, beneficially so to the defendant in *Roviaro* and negatively so to the defendant in *Valenzuela-Bernal*. The case at hand is distinguishable in that the alleged illegal conduct of Defendants was undertaken through various intermediaries and steps rather than a single personal transaction at with Defendants were present. Thus, Defendants here have less opportunity than the *Valenzuela-Bernal* and *Roviaro* defendants did in explaining to the court the nature of potential witnesses' testimony. Defendants should not be further prejudiced by the non-personal nature of the counts against them, and this Court should consider the possibility, not certainty, that the evidence sought would be helpful and relevant to the defense.

The Ninth Circuit has followed this approach. In *United States v. Montgomery*, the Court ruled that the government had failed to use reasonable efforts to produce a confidential informant. 998 F.2d 1468 (9th Cir. 1993). In applying the *Valenzuela-Bernal* "material and favorable to the defense" (*i.e.*, prejudice standard), the Court addressed matters in which the informant "*might* testify." *Id.* at 1478 (citing *Roviaro*, 353 U.S. at 64). Describing the missing informant's central role in the drug transactions at issue, calling him a "percipient witness to the offenses charged against [the defendant]," and identifying related matters on which it appeared the informant might be able to testify or which the defendant contended he would, the Court held the defendant made a "plausible showing" of prejudice for which a remedy was required. *Montgomery*, 998

F.2d at 1478.

Here, the missing business records are central to the transactions at issue. Other unproduced records and emails, which Defendants consistently have contended would provide important context about the business relationships between CCI and its customers, and to the email snippets on which the government relies, also show that Defendants have been prejudiced. By the *Valenzuela-Bernal* criteria – the events to which the missing evidence relate and the relevance of those events to the crimes charged – Defendants clearly have not had access to a potential treasure trove and have thereby been prejudiced in defending themselves.

In addition, Defendants have no meaningful way to access foreign evidence material to the allegations against them. Defendants cannot compel foreign evidence through MLATs and International Conventions like the DOJ. China for example, which accounts for seven counts and eight transactions, has explicitly declined to produce evidence the Defendants requested via the letters rogatory process, and Defendants cannot conduct their own investigation for fear of criminal sanctions abroad. For a case that involves allegations of foreign commercial bribery, it is virtually impossible to defend against such allegations when Defendants are categorically denied access to foreign evidence.

2. Denial to Access of Pertinent Witnesses

In a criminal case, generally each side has a right to seek interviews from witnesses and subpoena their testimony for trial. But in this case, most witnesses have refused to speak with the defense. Polak Dec. at ¶ 2; Morley Dec. at ¶ 2. While a witness has a right to voluntarily refuse to speak with counsel from either side – that is not what happened in this case. CCI directed employees not to talk with defense counsel. *See* Under Seal Exhibit A. This has deprived Defendants access to nearly 70 current and former CCI employees. Polak Dec. at ¶ 2; Morley Dec. at ¶ 2. Of these witnesses, almost 40 were somehow involved in the counts and transactions.

Had the government directly instructed witnesses not to speak with the defense, or

even to do so only in the prosecution's presence, such conduct would violate Defendants' constitutional right to present a defense. *Gregory v. United States*, 369 F.2d 185, 187-88 (D.C. Cir. 1966); *see also United States v. Cook*, 608 F.2d 1175, 1180 (9th Cir. 1979), *disapproved on other grounds by Luce v. United States*, 469 U.S. 38 (1984) ("[a] witness belongs neither to the government nor to the defense. Both sides have the right to interview witnesses before trial.") The same constitutional principle should apply here, given CCI cooperated in the government's investigation, including by sharing witness-specific information.

Like the missing informant in *Montgomery*, Defendants have made a plausible showing of prejudice. Despite, Defendants' struggle to locate and receive cooperation from potential overseas witnesses, CCI's former Regional Sales Manager for New Construction Sales in Southeast Asia between 2002 and 2007, Charles Seah signed a declaration stating he has no knowledge of illicit conduct by any of the Defendants. When Mr. Seah told Steptoe of this, Steptoe lawyers became angry, agitated, threatening, and they accused him of lying. Weinbaum Dec. at ¶ 8. Defendants have every reason to believe they could obtain similar evidence if only given access.

Steptoe's actions against Seah and possibly others would constitute government intimidation of a witness if this Court finds CCI was an agent of the government,[23] which clearly would violate Defendants' Fifth and Sixth Amendment rights. *See United States v. Heller*, 830 F.2d 150 (11th Cir. 1987) (government's intimidation and threatened prosecution caused accountant to offer false testimony on behalf of his client in a tax fraud case); *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979) (government threat that defense witness would have "nothing but trouble" if he continued testifying kept him from continuing to testify); *United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998) (prosecutor's threat to revoke plea agreement in unrelated prosecution prevented wife from testifying on husband's behalf).

[23] In Defendants' Motion to Suppress filed concurrently herewith, Defendants assert that CCI was an agent of the government when it conducted its internal investigation, thus finding the constitution applicable to CCI's actions.

3. Defendants' *Brady* Rights Have Been Eviscerated

The government's fundamental position has been that it need only conduct a *Brady* review of the material in its, as opposed to CCI's, possession. CCI, in turn, contends it has no obligations under *Brady*, particularly because its counsel cannot know what information might be exculpatory. Rep. Tr., October 13, 2009 at 11, lns. 9-12; 24, lns. 7-25. These twin positions effectively eliminate Defendants' *Brady* rights.

C. The Indictment Should Be Dismissed With Prejudice

In light of the clear lack of access to material evidence vital to mount a defense, this Court should dismiss the Indictment. In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to … guilt … irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). Under Ninth Circuit precedent, any *Brady* violation justifies dismissing an indictment. *United States v. Chapman*, 524 F.3d 1073, 1087 (9th Cir. 2008). Even before *Brady*, the Supreme Court in *Roviaro* already had stated that when "disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause … the trial court may require disclosure and, if the Government withholds the information, dismiss the action." 353 U.S. at 60-61.

The situation here falls within these Supreme Court pronouncements. Evidence at the heart of this case, directly relating to the transactions at issue, is unavailable to Defendants, some because CCI cannot find it; some because CCI will not produce it and the government will not force its investigative partner CCI to do so; some because CCI has discouraged witnesses from telling Defendants what they know; and some because it is simply impossible for Defendants to extract it from the countries where the transactions occurred. These cumulative impediments have deprived Defendants of exculpatory evidence and the ability to defend against the government's allegations as due process requires. Thus, Defendants have been prejudiced and this Court should dismiss the

Indictment.[24]

V. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court dismiss the Indictment.

Dated: March 5, 2012

Respectfully submitted:

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[24] It is too late for the Court to impose a lesser remedy. An Order requiring immediate production of all the material Defendants should have received over two years ago would push trial back months if not years; will not conjure up all the documents CCI has represented it cannot find; nor will it unring the bell and induce witnesses who for years have been deterred from speaking with the defense to suddenly have a change of heart.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, Danielle Dragotta, am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 115 Avenida Miramar, San Clemente, CA 92672.

On March 5, 2012, I served the foregoing document described as **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THE INDICTMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed and sent as follows:

SEE ATTACHED SERVICE LIST

[ ] **BY MAIL:** I caused such envelope(s) to be deposited in the mail at San Clemente, California with postage thereon fully prepaid to the office of the addressee(s) as indicated on the attached service list. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[x] **BY E-MAIL** I caused a courtesy copy to be transmitted by email to the email address of the offices of the addressee(s) as indicated on the attached service list.

[ ] **BY PERSONAL SERVICE:** I caused such envelope to be hand-delivered to the offices of the addressee(s) as indicated on the attached service list.

[X] **FEDERAL**: I declare that I am employed in the office of a member of the bar of this court at whose direction service was made.

Executed on March 5, 2012 at San Clemente, California.

Danielle Dragotta
Danielle Dragotta

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