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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 SUPPRESS DEFENDANTS' STATEMENTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS OF JESSICA C. MUNK, DAVID EDMONDS; PAUL COSGROVE; AND HONG JIANG CARSON

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

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT on April 2, 2012 at 3:00 p.m. in the courtroom of the Honorable James V. Selna, in the United States District Court for the Central District of California ("Court"), located at 411 West Fourth Street, Santa Ana, California, Defendants David Edmonds, Paul Cosgrove and Hong "Rose" Carson (collectively "Defendants") will and hereby do move this Court to suppress the Defendants' statements as they were compelled in violation of the Fifth Amendment. Defendants further will seek the setting of an evidentiary hearing, along with appropriate discovery, if the Court determines that there currently is insufficient evidence of state action during Defendants' interviews.

The basis for this Motion is that CCI and its counsel were *de facto* public actors when they implicitly threatened to terminate Defendants' employment if they did not cooperate and participate in interviews with CCI's investigators. At the time of the interviews, CCI and IMI were not only in contact with law enforcement authorities regarding the investigation, but were collaborating with the Department of Justice ("DOJ") in how to conduct the investigation and obtain relevant admissions from the Defendants. CCI compelled the Defendants' statements with the government's knowledge, certainly at a minimum with the government's general encouragement, and with the intent to cooperate with the DOJ. As a matter of fact and law CCI was an agent of the government during the interviews. Thereafter and further to published DOJ memoranda, CCI spared no expense in cooperating with the government by identifying purported culprits and disclosing the fruits of its investigation, including interviews of the Defendants, to the DOJ. Thus, CCI's actions are "fairly attributable to the government." CCI compelled the Defendants' statements under a classic "penalty situation" – CCI required them to answer all questions regardless of their Fifth Amendment right against self-incrimination or be fired. Because CCI was a state actor when it compelled the Defendants' statements, it violated their Fifth Amendment rights and the statements must be suppressed.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Jessica C. Munk, David Edmonds, Paul Cosgrove and Hong Jiang Carson, the files and records of this case and on 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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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2002, the Department of Justice ("DOJ") created the Corporate Fraud Task Force to combat white collar corporate malfeasance. Soon after, the DOJ published, in turn, the Thompson, McNulty, and Filip Memoranda, which provide corporations guidance on, and incentives for, government cooperation. The memoranda have been unabashed in extolling the benefits of corporate self-policing followed by full disclosure to the DOJ. The memoranda had the desired effect – private companies became public deputies, investigating and assisting in the prosecution of their employees. Sometimes the corporate conduct promoted by the government exceeds permissible limits.

In 2007, corporate counsel for IMI plc and IMI's wholly-owned United States subsidiary Control Components Inc. (hereinafter collectively referred to as "CCI"), undertook an internal investigation on behalf of its clients and the governments of the United States and the United Kingdom. By summer 2007, the investigators, including Steptoe & Johnson LLP ("Steptoe"), believed a number of CCI employees had violated the Foreign Corrupt Practices Act ("FCPA"). For three managers, David Edmonds ("Edmonds"), Paul Cosgrove ("Cosgrove") and Hong "Rose" Carson ("Carson") (collectively "Defendants"), Steptoe and CCI coerced them to submit to interviews about matters at the heart of Steptoe's investigation at the risk of losing their jobs. Defendants were not told at the time of their interviews that CCI and Steptoe already were convinced of their culpability, were collaborating with the DOJ to obtain their statements and intended to share any statements with prosecuting authorities.

CCI's and Steptoe's conduct regarding the interviews of Defendants violated their constitutional rights, mandating preclusion of their statements. Under *Garrity v.*

New Jersey,[1] CCI and its counsel as *de facto* public actors could not compel unprotected statements from the Defendants without rendering those statements and their fruits inadmissible as violative of Defendants' Fifth Amendment right against self-incrimination. Thus, Defendants' statements should be suppressed.

II. FACTUAL BACKGROUND

On April 9, 2009, a grand jury returned a 16-count indictment (*see generally* Indictment, Doc. No. 298-1) against six former officials of CCI, alleging they conducted a broad conspiracy to violate the FCPA and the Travel Act. Among the managers indicted were Edmonds, CCI's Vice-President of Worldwide Customer Service from 2000 to 2007; Cosgrove, CCI's Executive Vice President from 2002 to 2007 and head of CCI's Worldwide Sales Department from 1992 to 2007; and Carson, 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.

The Indictment followed a two year joint investigation by CCI and the DOJ. Based on discovery and court filings it appears that by the summer of 2007, CCI had initiated an internal investigation into potential improper payments authorized by management to secure business. *See United States v. Control Components, Inc.*, SA CR 09-00162, Memorandum on Behalf of Control Components, Inc. In Support of Rule 11(c)(1)(C) Plea and Agreed-Upon Sentence (hereinafter referred to as "CCI Sentencing Memorandum") at 3 (Doc. No. 11) attached as Exhibit A; *see also United States v. Control Components, Inc.*, SA CR 09-00162, Government Sentencing Memorandum at 6-7 (Doc. No. 8) attached as Exhibit B. On August 15, 2007,[2] IMI formed a Special Committee and authorized Steptoe to cooperate fully with law enforcement. CCI Sentencing Memorandum at 3, 5.

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[1] 385 U.S. 493 (1967).

[2] All dates refer to 2007 unless otherwise indicated.

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On August 15, IMI disclosed the existence of the investigation to the DOJ and the United Kingdom Serious Fraud Office. *Id.*; *see also* IMI August 15, 2007 Notification Letter (hereinafter referred to as "Notification Letter") at 1 attached as Exhibit C. The defense just received from the government emails between it and Steptoe from August 15-17, 2007, which substantiate the collaboration between IMI/CCI and the DOJ. *See* Declaration of Jessica C. Munk ("Munk Dec.") at ¶¶ 2, 4. In one email, dated August 15, 2007, Steptoe attorney Patrick Norton and Fraud Section Deputy Chief Mark Mendelsohn discuss the status of CCI's effort to collect evidence for the government. Norton writes, in part:

> Mark, ***I've been discussing with IMI's general counsel the feasibility of holding off on their announcement to the London Exchange***. ***He doesn't think it's doable.*** The Company's Board of Directors, on advice from UK counsel, decided at about 6 PM UK time to issue the release at 7:30 AM in London tomorrow. … ***It's simply not feasible to get UK counsel to opine on this and contact all the Board members in time to derail the announcement***.
>
> We fully recognize ***your and our interest in getting access to senior management who may have been involved in the payments*** in questions [sic] while [sic] may still be willing to cooperate. To that end, I am now planning to fly to LA this evening or first thing in the morning and to be present when the individuals are informed that they are being suspended pending the investigation. We intend to inform them that the suspension is temporary and we are not prejudging the outcome, ***but that the company expects them to cooperate with the investigation.*** Then I proceed to interview them. This will give our associate in LA time to assemble many, if not all of the relevant documents.

> ***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 to them.*** I will also be on-site to help coordinate with the company. If they refuse to cooperate with us, they will presumably refuse to cooperate with you too. In either case, you should have a better idea of what course you wish to take.

Exhibit A at 2 (emphasis added) attached to Munk Dec. at ¶.

Norton's email shows that CCI and the government were working together in trying to obtain evidence and that they were clearly strategizing on the timing of IMI's public announcement in order to get Defendants to submit to interviews prior to retaining counsel. This appears to be the tip of the iceberg of communications between CCI and the DOJ showing they were jointly aligned from the outset.[3] After Norton interviewed Defendants, he promptly emailed Mendelsohn updating him on their joint effort in obtaining statements from senior management. On August 17, 2007 at 1:22 a.m., Norton writes: "Mark, [w]e interviewed five of the senior management at CCI today in very general terms. So far they are being cooperative. We intend to ask more difficult questions tomorrow based on specific documents. If you would like to discuss this, please suggest a time by email …." *Id.* These emails confirm that CCI and the DOJ operated in concert. In every meaningful respect, the DOJ and CCI embarked upon a joint investigation.

[3] Defendants first requested from the government communications between the government and IMI/CCI from July 1, 2007 to October 31, 2007. In response to the recently disclosed emails, Defendants requested any notes and documents reflecting communications before August 17, 2007, as well as documents reflecting communications from August 17, 2007 to October 31, 2007. Munk Dec. at ¶¶ 2, 5.

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The DOJ collaborated on the search terms Steptoe would use to locate documents for each Steptoe interview. 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 ¶ 13 (Doc. No. 121-2) attached hereto as Exhibit D; Reporter's Transcript of Proceedings (hereinafter referred to as "Rep. Tr."), November 9, 2009 at 49, lns. 3-6. The government represented to the Court that "throughout this process, we've worked with CCI to come up with searches, to -- you know, to forward the investigation." Rep. Tr., November 9, 2009 at 49, lns. 3-6. Throughout the investigation, CCI provided DOJ with a large volume of documents on a rolling basis; prepared for DOJ an extensive factual summary of alleged improper payments, gifts, travel and entertainment expenses; and facilitated interviews of CCI employees by the government. CCI Sentencing Memorandum at 5-6; Government Sentencing Memorandum at 7.

In addition, Steptoe began interviewing "CCI and IMI employees who were identified as having potential knowledge of the improper payments at issue and other relevant issues." Heberlig Dec. at ¶10. CCI also entered into a Confidentiality and Non-Waiver Agreement with DOJ whereby it provided the government with information protected by the attorney-client privilege and work product doctrine – privileges that could only be maintained if there was a joint investigation. *See* Confidentiality and Non-Waiver Agreement attached hereto as Exhibit E. CCI also touted that it provided the DOJ with a "roadmap" for the prosecution of the Defendants in this case. CCI's Sentencing Memorandum at 6. CCI directed its employees to "cooperate fully with the Steptoe and DOJ investigations . . . [and] facilitated cooperation with the DOJ investigation by paying for travel expenses and counsel for employees whom the Department sought to interview . . . ." CCI's Sentencing Memorandum at 5-6. Heberlig admits having "hundreds" of conversations with prosecutor Andrew Gentin. Rep. Tr., September 13, 2010 at 42, lns. 17-18.

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When CCI and Steptoe actually commenced the internal investigation is unclear, but Norton's email to the DOJ shows it was before August 15. Steptoe began the interviews of the Defendants on August 16 and questioned them about transactions with specific documents on August 17. These events followed Norton's collaboration with Mendelsohn regarding how to obtain statements from the Defendants. Thus, when these interviews took place, the DOJ had not only been notified of the investigation, but had already teamed up with CCI.[4] Also, it is patently obvious that CCI had made the decision to cooperate with the government early on, most likely to gain potential benefits as portended by the DOJ Memoranda. Yet the fact of this cooperation and joint effort was never shared with Defendants. CCI and Steptoe had already reached the conclusion that the Defendants had engaged in criminal wrongdoing and the internal investigators intended to gather evidence against the CCI executives. As CCI counsel acknowledged, CCI identified what they believed to be a "known problem" and further believed the "defendants were the cause of the problem." Rep. Tr., April 26, 2010 at 111, lns. 8-12. When CCI compelled the Defendants to submit to interviews, CCI counsel further acknowledged that the questioners viewed the interviews, not as a fact-gathering exercise, but as an "interrogation." Rep. Tr., April 26, 2010 at 111, lns. 7-14. The notion that CCI and Steptoe intended to conduct an "interrogation" was never shared with the Defendants.

A. <u>David Edmonds</u>

On August 16, CCI President Ian Whiting ("Whiting") held a company-wide meeting at the headquarters of CCI. Declaration of David Edmonds at 2, ¶ 2. Whiting announced that IMI had launched an investigation into possible irregular payments

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[4] The August 15, 2007 email indicates Norton and Chief Deputy Mendelsohn had additional conversations regarding the investigation and interviewing the Defendants before this exchange. Full disclosure of these communications is needed to get the entire picture of the extent of their joint efforts.

and he ordered that "every employee *must fully cooperate* with the investigation and *meet as required with investigators*." *Id.* (emphasis added). Later that same day, Whiting came into Edmonds' office and said that he expected Edmonds' full cooperation. *Id.* at ¶ 3. Edmonds reasonably assumed his job depended on meeting with investigators. *Id.* at ¶ 4. Whiting also told Edmonds that he was not a focus of the investigation and had nothing to worry about. *Id.* at ¶ 3. To fully cooperate as a required condition for continued employment, Edmonds met with Steptoe attorneys Patrick Norton and Andrew Irwin on August 16 and 17. There were also two Ernst & Young investigators present. Edmonds answered the attorneys' questions. *Id.* at ¶¶ 5-7. During the August 16 and 17 interviews, Edmonds was never informed that his statements could or would be used against him in a criminal proceeding. *Id.* at 3, ¶ 10. After CCI had the information it needed, CCI suspended Edmonds. *Id.* at 2, ¶ 8.

B. <u>Paul Cosgrove</u>

CCI and Steptoe treated Cosgrove similarly. During the afternoon of August 16, Whiting approached Cosgrove and directed him to cooperate with the internal investigators. Declaration of Paul Cosgrove at 2, ¶ 2. While Whiting was friendly and never suggested that Cosgrove's own conduct was at issue, Cosgrove reasonably believed that he had to submit to the interview and that he could be fired if he disobeyed a direct order from the company President to meet with CCI's counsel. *Id.*

On August 16, Cosgrove met as directed with two attorneys from Steptoe and one attorney from Ernst & Young for approximately one hour. *Id.* at ¶ 3. Norton asked Cosgrove to answer general questions about CCI's commission procedures and Cosgrove was directed to return for an interview the next day. *Id.* At no time did Norton, Whiting or anyone else inform Cosgrove that he was a target of a government investigation and that CCI was not only cooperating with the government, but intended to share his statements with the government. *Id.* at 3, ¶ 6.

The following day, Cosgrove returned to meet with CCI attorneys as instructed by Whiting. *Id.* at 2, ¶ 4. CCI attorneys questioned Cosgrove about documents that now underlie this criminal case. *Id.* At the end of the interview, he was suspended. Cosgrove's company security key, office key, smart phone and company credit card were confiscated and he was escorted off CCI's premises. *Id.* at 2-3, ¶ 5. Whiting knew Cosgrove was a *target* of the investigation, yet he *directed* him to speak to CCI attorneys, knowing they would hand over incriminating evidence to the government. Underscoring the nature of the investigation, on the morning of August 17, Cosgrove met two gentlemen that he had never seen before at CCI – one in the front lobby of the building and one who sat near the outside door of the conference room – who he learned only after his interview were FBI agents. *Id.* at 2, ¶ 4.

C. Hong Carson

On August 16, Carson attended a CCI all personnel meeting led by Whiting where she learned that CCI had initiated an investigation of certain company activities. Declaration of Hong Jiang Carson at 1, ¶ 2. Carson was not sure about the specifics surrounding the investigation because Whiting has a thick British accent and used vocabulary that she did not understand as a non-native English speaker. *Id.*

On August 17, Carson was in the restroom at CCI when a woman entered, stood outside her stall, and told her to come out. *Id.* Carson asked her to wait and told her she would be out soon. When Carson came out of the stall, Joanne Karimi, the head of Human Resources, was outside of her stall and she realized this was the women who was instructing her to come out. *Id.* Karimi instructed Carson to follow her to a conference room. *Id.* Once they arrived at the conference room, Karimi told Carson to sit down and instructed her not to leave the room. *Id.* at ¶ 3. Karimi sat down and stayed in the conference room with Carson. Shortly thereafter, a person who Carson did not recognize at the time, but later learned was a lawyer involved in the

investigation, came into the conference room and spoke with Karimi. *Id.* Carson does not recall their entire conversation but remembers the lawyer saying he was going to call the "city" and find a plumber. *Id.* The lawyer stayed only a couple minutes, and Karimi continued to sit in the conference room with Carson. *Id.* Because Carson was a CCI employee, she was nervous and scared that Karimi had escorted her to the conference room and continued to watch her to ensure she did not leave. *Id.* at 1-2, ¶ 3. Carson believed there would be serious repercussions to her employment, including the possibility of immediate termination, if she did not comply with Karimi's instructions to stay in the conference room. *Id.* at 2, ¶ 3.

After approximately 30 minutes in the conference room, another woman came in and told Karimi to go to another conference room and Karimi instructed Carson to follow her. *Id.* at ¶ 4. Karimi escorted Carson to another conference room, where she was asked to sit across the table from three lawyers. Carson does not remember being told that she was going to be meeting with lawyers for the company before being taken to this conference room. *Id.* The lawyers questioned Carson in English about various emails and documents, including certain emails she previously reviewed with someone from the company during an audit of commissions in 2004. *Id.* at ¶ 5. Carson answered the questions in English to the best of her memory. At one point during the interview, when she did not remember something, one of the lawyers spoke to her in fluent Mandarin Chinese. *Id.* She was surprised that someone spoke Mandarin Chinese because the entire interview was conducted in English. During the meeting, she was nervous and had difficulty understanding all of the questions asked but believed she had to cooperate with the lawyers. *Id.* She would have felt more comfortable if the interview was conducted in Mandarin Chinese. *Id.*

After the lawyers finished questioning Carson, Karimi informed her that she was suspended and instructed her to leave the building immediately. *Id.* at ¶ 6. Carson requested her car keys that were in her office. Karimi had someone fetch the

keys. She followed Karimi's instructions and left the building. *Id.* Like Edmonds and Cosgrove, Carson was never told that CCI suspected she had engaged in any wrongdoing or that CCI had already informed the government about its investigation. But at all times during the events described above, including meeting with the lawyers, Carson felt that she could not leave CCI and that if she did not comply with CCI's various requests, she would be fired or would suffer negative consequences regarding her employment there. *Id.* at 2-3, ¶ 7.

Defendants now move to suppress their compelled interview statements . *See* Summaries of Defendants' statements attached hereto as Exhibits F, G and H.[5]

III. DEFENDANTS' STATEMENTS TO CCI, A GOVERNMENT AGENT, MUST BE SUPPRESSED AS COMPELLED IN VIOLATION OF DEFENDANTS' FIFTH AMENDMENT RIGHTS

In *Garrity v. New Jersey*, the Supreme Court recognized that the collection of evidence by a state actor through economic compulsion violates the Fifth Amendment privilege against self-incrimination. 385 U.S. at 497-98. The Self-Incrimination Clause provides "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This privilege applies in the employment context when employers who are state actors conduct internal investigations. When a state actor expressly or implicitly threatens job loss if a person does not waive his or her Fifth Amendment privilege against self-incrimination, any statement made under threat of that penalty is compelled and inadmissible in a criminal proceeding. *Garrity*, 385 U.S. at 497-500; *United States v. Stein*, 440 F. Supp. 2d 315, 326, 334-35 (S.D.N.Y. 2006) ("*Stein II*"). Here, under two distinct doctrines, CCI and its counsel were *de facto* public actors who elicited statements

[5] It is unclear how the government intends to admit the Defendants' statements as there are currently no witnesses identified on the government's witness list who can testify regarding these statements.

from the Defendants through economic coercion. The Fifth Amendment requires that these statements be suppressed along with all leads and evidence derived therefrom.

A. CCI Was A De Facto Public Actor During Defendants' Interviews

The question whether conduct by a nominally private actor should be deemed state action is not novel. The federal courts have developed two distinct standards for making this determination, both of which justify the conclusion that CCI and its internal investigators were state actors rendering their August 2007 interrogations of the Defendants state action for purposes of applying Fifth Amendment strictures.

1. CCI Was Acting as a Government Agent In August 2007 When It Compelled Statements From Edmonds, Cosgrove and Carson

First, state action exists when an individual or entity is acting as an agent of the State. *See United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994). There are two requirements in order to find an agency relationship with the government: (1) the party performing the intrusive conduct intended to assist law enforcement efforts, and (2) the government's knowledge and acquiescence in the intrusive conduct. *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981); *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982) (finding no agency relationship where there is no evidence government encouraged private citizen to act on its behalf).[6]

In *United States v. Walther*, the Ninth Circuit held that an airline employee, who had previously reported suspicious packages to the DEA in exchange for a monetary reward, was an agent of the State when he searched a package and found illegal drugs. 652 F.2d at 790-91, 793. The court reasoned that although the DEA had no knowledge of this particular search, and had not directly encouraged the

[6] While these cases dealt with challenges to the Fourth Amendment, the same test is applicable to determine whether an agency relationship exists with the government in the Fifth Amendment context. *See United States v. Day*, 591 F.3d 679, 683 (4th Cir. 2010).

employee to conduct it, it had previously encouraged this type of search, and rewarded him for providing information thereby acquiescing in the activity. *Id.* at 793. The court found unpersuasive the fact that the employee had not made contact with the DEA for approximately two years prior to the challenged search. *Id.* at 793 n.3.

By this standard and its application in *Walther*, CCI undoubtedly was an agent for government. From the outset, when CCI counsel interviewed Defendants, after raising the specter of termination (the "intrusive conduct" discussed *infra*), CCI was conducting its investigation as a partner with the government. Even without full discovery regarding the DOJ's communications with CCI, there is ample evidence that DOJ acquiesced or encouraged CCI's conduct in compelling the Defendants' statements. Norton refers to their aligned interests: "***[w]e fully recognize your and our interest in getting access to senior management who may have been involved***…." Exhibit A at 2 (emphasis added) attached to Munk Dec. at ¶ 4. As to whether senior staff are cooperating, Norton writes to Mendelsohn, "[i]f they are, you can then decide whether you wish to send someone from the DOJ or FBI to speak to them. I will also be on-site to help coordinate with the company." *Id.* It is patent that DOJ and CCI were effectively investigating hand-in-hand when CCI sought statements from the Defendants.

CCI spared no effort in fully cooperating with the DOJ. Upon becoming concerned about improper payments, CCI hired Steptoe to conduct an internal investigation. CCI Sentencing Memorandum at 3, 5. CCI worked in concert with DOJ: it shared investigative results with DOJ, including providing key documents and summaries of the employee interviews; it made witnesses available for DOJ to interview around the world; responded to DOJ's numerous requests for information; and it provided DOJ with a detailed "roadmap" for its prosecution. *Id.* at 1, 5-6. Defendants' interviews were among CCI's many investigative acts on behalf of DOJ.

Not only were CCI and the DOJ working in concert during the investigation, but the DOJ knew it had created a powerful incentive for CCI to compel statements from its employees through promulgation of the Thompson and McNulty Memoranda discussed below. DOJ rewards corporations that assist in a criminal investigation, disclose all relevant evidence and findings, and "identify the culprits within the corporation, including senior executives." *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL, McNulty Memorandum § VII, ¶ A (December 12, 2006). By bestowing the prospect of significant benefits on corporations that follow cooperation edicts, the DOJ invites companies to join forces turning them into state actors for constitutional purposes. *See United States ex rel. Sanney v. Montanye*, 500 F.2d 411, 413, 415 (2d Cir. 1974), *cert. denied*, 419 U.S. 1027 (1974) (finding state action where at police request a private employer administered a polygraph and asked the employee questions about a murder).

It would be anomalous indeed for DOJ now to contend that CCI was not acting at its behest by August 16. In dismissed Count 16 of the Indictment, the grand jury alleged that on or about August 17, Carson tore up documents and flushed them down the toilet at CCI prior to her interview with Steptoe, and that this conduct obstructed a federal investigation in violation of 18 U.S.C. § 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.") *See* Indictment at 35. Given that the statute requires an intent to "impede, obstruct, or influence" a government investigation, DOJ – at least at the time of the Indictment – believed CCI was conducting its investigation on the government's behalf as of August 17. DOJ's dismissal of this count does not affect this assessment.

Furthermore, when DOJ interviewed Dean Capper, the former CFO of CCI, Capper was in possession of personal notes and emails that he maintained at CCI. The FBI collected some of these documents, but instructed Capper to turn over the remaining documents to Steptoe. *See* Capper's Proffer Statement at CCI_163 attached

hereto as Exhibit I. Clearly the DOJ and Steptoe were working together for DOJ to instruct a witness to turn over documents relevant to an investigation to Steptoe.

In sum, not only did the government have knowledge of the intrusive conduct before it occurred, but CCI compelled the Defendants' statements in order to assist the government. Thus, both elements of the *Walther* test are met and CCI was acting as an agent for the government when it compelled the Defendants' statements.

2. There Is a Close Nexus Between DOJ's and CCI's Coercion of Defendants' Making CCI's Actions Fairly Attributable to DOJ

There is a second distinct doctrinal basis for concluding CCI was a state actor. When there is "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself" the private entity's actions are "fairly attributable" to the government and constitute state action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). The "close nexus" test is satisfied when the State has either: (1) "exercised coercive power over a private decision or [(2)] ***has provided such significant encouragement, either overt or covert***, that the choice by the private actor must in law be deemed to be that of the State[.]" *Stein II*, 440 F. Supp. 2d at 334 (emphasis added). As applied here, when employee statements are compelled by internal investigators acting to facilitate government guidance and interests, the compulsion is fairly attributable to the government within the meaning of the Fifth Amendment. *See id.* at 334-35, 337 (relying on *Sanney v. Montanye*, 500 F.2d at 415).

In *United States v. Stein*, KPMG was under investigation for involvement in marketing fraudulent tax shelters. *United States v. Stein*, 435 F. Supp. 2d 330, 338-39 (S.D.N.Y. 2006) ("*Stein I*").[7] KPMG and decided to cooperate with DOJ. *Id.* at 339.

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[7] *Stein I* addressed whether KPMG's cutting off of attorneys' fees for its employees violated their Sixth Amendment right to counsel.

In light of the Thompson Memorandum, KPMG committed to do anything it could to cooperate with DOJ's investigation in order to avoid indictment, including encouraging its employees to cooperate. *Id.* at 341-42, 345-46; *Stein II*, 440 F. Supp. 2d at 320. In *Stein II*, the court addressed whether KPMG was a state actor when it pressured its employees to surrender their Fifth Amendment rights and proffer to the government. 440 F. Supp. 2d at 320.[8] The court looked to the Thompson Memorandum and the DOJ's actions to determine whether there was a "close nexus" between the government and the challenged action by KPMG – specifically, KPMG's use of economic threats to coerce proffer statements. *Id.* at 334-35.

In concluding KPMG's conduct was state action, the court focused on, and was troubled by, the Thompson Memorandum's criteria for assessing a corporation's cooperation and those criteria's influence on KPMG. The court was concerned not only with the legal fees provision that was addressed in *Stein I*, but additional criteria that the DOJ may consider in assessing the corporation's cooperation:

> In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.

Id. at 319 (quoting U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL, § 9-162, § VI, ¶ A (January 2003)) (emphasis omitted). The court also referenced the associated commentary, which states: "One factor a prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the *completeness of its disclosure* including, if necessary, a waiver of the attorney-client and work product protections . . . ." *Id.* at 319-20 (quoting *Id.* at §

[8] A portion of the relevant facts were addressed in *Stein I*.

VI, ¶ B). The court noted that the Thompson Memorandum made clear that a company's failure to ensure its employees disclose whatever they knew, regardless of their individual rights and concerns, might weigh in favor of indictment. *Id.* at 334-35. The court found significant that the prosecutor knew that KPMG would pressure any employee who refused to talk and even notified KPMG when employees were uncooperative. *Id.* at 335. Thus, the court held that the government, through the Thompson Memorandum and the actions of DOJ, "***deliberately coerced***" KPMG to pressure its employees to surrender their Fifth Amendment rights, creating a "clear nexus" between the government and the coercion. *Id.* at 337 (emphasis added). On this basis the court held that KPMG's actions constituted state action and, therefore, the coerced statements must be suppressed. *Id.* at 338.

The McNulty Memorandum, with minor changes, identifies the same factors as the Thompson Memorandum for assessing a corporation's cooperation. [9] Although the McNulty Memorandum no longer considers the advancement of legal fees (addressed in *Stein I*) in weighing cooperation, the McNulty Memorandum, like the Thompson Memorandum before it, contains numerous factors which entice a corporation's cooperation. Thus, the McNulty Memorandum in relevant part provides:

> In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.

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[9] On December 12, 2006, Deputy Attorney General Paul J. McNulty released revised guidelines concerning the Principles of Federal Prosecution of Business Organizations ("McNulty Memorandum"), replacing the Thompson Memorandum. The McNulty Memorandum was in effect when the statements Defendants seek to suppress were compelled.

§ VII, ¶ A. It further "encourages corporations . . . to conduct internal investigations and ***disclose their findings*** to the appropriate authorities." *Id.* at ¶ B (emphasis added). It states that waiver of attorney-client and work product protections is not a prerequisite in finding a corporation cooperated, but then emphasizes that "a company's disclosure of privileged information may permit the government to expedite its investigation . . . [and] ***disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure***." *Id.* (emphasis added). If a legitimate need exists, prosecutors may seek waivers of certain attorney-client privileged information including copies of key documents, witness statements and interview memoranda regarding the misconduct. *Id.* at ¶ B 2. If a request for such privileged material is made, the prosecutor may consider a corporation's response to such waiver in assessing cooperation. *Id.* A prosecutor may also consider whether a corporation is shielding culpable employees by entering into joint defense agreements. *Id.* at ¶ B 3.

By rewarding corporations that assist in a criminal investigation by disclosing not only relevant evidence but findings that provide a prosecutorial roadmap, the DOJ manifestly encourages corporations to join its team. Like KPMG, CCI was induced to cooperate fully with the government in order to avoid indictment or receive a substantially reduced penalty.[10] With the guidance of sophisticated federal criminal practitioners at Steptoe, CCI precisely navigated the DOJ roadmap. The Thompson and McNulty memoranda provided a compelling incentive for CCI to extract statements from its employees. Knowing it would turn over to the DOJ the fruits of

[10] IMI completely escaped liability and was never indicted. CCI pled guilty to three counts (one count conspiracy to violate the FCPA and the Travel Act and two substantive counts of the FCPA) with a substantially reduced penalty of $18,200,000, a mere fraction of the company's gross revenue. Government's Sentencing Memorandum at 8; *United States v. Control Components, Inc.*, SA CR 09-00162, Plea Agreement at 2-3, 11 (Doc. No. 7) attached hereto as Exhibit J.

the interrogations and after coordinating with the DOJ, CCI identified purported culprits within the corporation and ordered them to meet with investigators without regard to their Fifth Amendment right against self-incrimination. After compelling statements from Edmonds, Cosgrove and Carson under the threat of termination, as discussed *infra*, CCI promptly provided DOJ with these statements. *See* CCI's Sentencing Memorandum at 5. Just as in *Stein II*, there was a clear and close nexus between DOJ and the coercion of Defendants, making CCI and Steptoe state actors.

In conclusion, the government exercised coercive power over CCI and at the very least significantly encouraged CCI's actions. Under both tests, therefore, CCI's actions during the August 2007 interviews are fairly attributable to the government and constitute state action.

B. Defendants' August 2007 Interview Statements Were the Product of the Threat of Termination and Thus Meet the Fifth Amendment Standard for an Improperly Compelled Statement

In *Garrity v. New Jersey*, the Supreme Court held that threatening police officers with termination if the police officers did not waive their constitutional right against self-incrimination and answer incriminating questions violated the Fifth Amendment and rendered their statements inadmissible. 385 U.S. at 497-500. The court reasoned that the choice between the threat of one's livelihood or self-incrimination is the equivalent to "a choice between the rock and the whirlpool" which disables an individual from making a free and rational choice. *Id.* at 496-97. Because economic coercion induced the waiver of the privilege, the statements were compelled in violation of the Fifth Amendment. *Id.* at 497-98.

Since *Garrity*, courts have expanded this principle, finding other sanctions, including loss of contracts, loss of political office or the right to run for political office, and revocation of probation, to constitute coercion within the meaning of the Fifth Amendment. *United States v. Frierson*, 945 F.2d 650, 658 (3d Cir. 1991) (citing

Lefkowitz v. Cunningham, 431 U.S. 801, 804-08 (1977) (finding Fifth Amendment violation when the State divested defendant of his state political party office for refusing to waive his constitutional immunity before a grand jury); *Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968) (finding Fifth Amendment violation when city employees were discharged for invoking their privilege against self-incrimination); *Gardner v. Broderick*, 392 U.S. 273, 276-79 (1968) (holding a police officer cannot be discharged for failing to waive Fifth Amendment rights against self-incrimination without immunity while testifying before a grand jury)).

In *Stein II*, the court addressed whether certain pre-indictment statements made by the defendants were coerced in violation of the Fifth Amendment. Relying on *Garrity*, the defendants moved to suppress their proffer statements made to the government arguing they were coerced by KPMG under the threat of a "penalty" in violation of their Fifth Amendment rights. Specifically, the defendants argued that their statements were coerced by KPMG conditioning payment of their legal fees, and in some cases, their continued employment upon their cooperation. *Stein II*, 440 F. Supp. 2d at 326.

The district court denied the motion with respect to a number of the defendants for their failure to present sufficient facts that, if proved, would demonstrate their statements were coerced. *Id.* at 326-27. However, the court held two of the defendants' proffer statements were coerced because one defendant only agreed to proffer to the government after KPMG threatened to terminate him and the other defendant felt compelled to return to government proffer sessions to avoid KPMG cutting off payment of his legal fees. *Stein II*, 440 F. Supp. 2d at 330-33. The court reasoned that although KPMG typically paid its employees' legal fees in connection with legal matters arising from their employment, under government pressure KPMG capped and conditioned the legal fees on the employees' cooperation with prosecutors. *Id.* The government immediately notified KPMG when its employees were

uncooperative. KPMG told the USAO that it would not pay legal fees for any employee who would not cooperate or who invoked the Fifth Amendment. KPMG often encouraged employees to cooperate with DOJ and "be prompt, complete, and truthful" but also threatened to cease payment of attorney fees and if necessary terminate employees if they refused to cooperate. *Id.* at 323-24. The court suppressed the proffer statements holding the statements were coerced in violation of the Fifth Amendment. *Id.* at 318-19, 330-33.

The economic coercion need not be explicit; statements made under an implicit threat of a "penalty" are equally compelled under the Fifth Amendment. *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984); *see also United States v. Swanson*, 635 F.3d 995, 1006-07 (7th Cir. 2011) (Manion, J., concurring) (Judge Manion noted that the arrest warrant provided an implicit threat of a "penalty" and took the form of "if you want bond, you must produce incriminating evidence"). The threat of the penalty must be subjectively believed and that belief objectively reasonable under the circumstances. *See United States v. Friedrick*, 842 F.2d 382, 395 (D.C. Cir. 1988); *McKinley v. City of Mansfield*, 404 F.3d 418, 436 (6th Cir. 2005); *United States v. Vangates*, 287 F.3d 1315, 1321-22 (11th Cir. 2002). In determining whether the belief was objectively reasonable, courts examine "the totality of the circumstances surrounding the testimony." *Vangates*, 287 F.3d at 1322.

In *United States v. Saechao*, the Ninth Circuit held that requiring a probationer to "answer all reasonable inquiries" or face revocation of his probation violated his Fifth Amendment right against self-incrimination and his statements were thus compelled by a "classic penalty situation." 418 F.3d 1073, 1075 (9th Cir. 2005). The Court accordingly affirmed the district court's order suppressing the statements and the fruits of the unlawful conduct. *Id.* The Ninth Circuit reasoned that requiring *answers* to *all* inquiries, the probation condition provided no exception for the invocation of the Fifth Amendment and thus, prohibited a probationer's ability to

exercise the right to remain silent without being subject to a penalty. *Id.* at 1079. The Court distinguished Saechao's probation condition from the probation conditions in *Minnesota v. Murphy*, 465 U.S. 420 (1984). *Id.* at 1078. In *Murphy*, the Supreme Court held that Murphy's statements were not compelled under threat of a penalty because the probation conditions did not actually require him to answer his probation officer's inquiries. 465 U.S. at 427. Accordingly, the Court concluded that Murphy could not have been objectively or subjectively "deterred from claiming the privilege by a reasonably perceived threat of revocation." *Id.* at 438-39. Distinguishing *Murphy*, the Ninth Circuit noted that Murphy's probation conditions only required him to "be truthful with his probation officers in all matters," and did not require him to respond to his probation officer's questions or face revocation of his probation. *Saechao*, 418 F.3d at 1078. Unlike Murphy, it was objectively reasonable for Saechao to believe that if he invoked his Fifth Amendment right and not answer *all* reasonable inquiries, he would face revocation of his probation and thus, was compelled by threat of penalty to answer incriminating questions. *Id.*; *see also Swanson*, 635 F.3d at 997, 1005 (Manion, J., concurring) (concurring opinion noting defendant's statements and gun should be suppressed on the grounds that the condition in the arrest warrant for possession of a firearm without a valid Firearm Owner's Identification card that required defendant to turn over all guns in his possession to the police as a condition of bond created a penalty situation whereby if defendant exercised his Fifth Amendment rights, he would be punished by being denied bail).

Like *Stein II*, *Saechao* and *Swanson*, Defendants were required to "*fully cooperate* with the investigation and *meet* ***as required*** *with investigators*" or face what they reasonably believed would be the penalty of termination from their employment. Declaration of David Edmonds at 2, ¶ 2. (emphasis added). There was an obvious, severe implicit threat – CCI implicitly threatened Defendants with termination of employment if they did not participate in interviews with CCI's investigators.

Undisclosed to Defendants was their employer's intention to provide the substance of their statements directly to DOJ as part of a complete cooperation effort. Defendants subjectively believed that it was a condition of their employment, under penalty of termination for failure to comply, to answer the questions of the CCI interrogators. Declaration of David Edmonds at 2, ¶ 4; Declaration of Paul Cosgrove at 2, ¶ 2; and Declaration of Hong Jiang Carson at 2-3, ¶ 7. Their belief was objectively reasonable under the circumstances – a major investigation by outside counsel, persistent demands by CCI's President that they fully cooperate, and assurances in some cases that they themselves were not in any personal jeopardy as long as they cooperated.

The circumstances relating to Edmonds are illustrative. On August 16, after CCI President Whiting directed all CCI employees, including Edmonds, to fully cooperate and meet *as required* with investigators, Whiting came into Edmonds' office and again reiterated, privately that he expected Edmonds' *full cooperation*. Declaration of David Edmonds at 2, ¶ 3. Whiting also assured Edmonds that he was not a focus of the investigation and therefore had nothing to worry about. *Id.* The following day, Lisa Choklos, Whiting's assistant, called Edmonds on his cell and directed him to immediately return to CCI and meet a second time with investigators. *Id.* at ¶ 6. When Edmonds returned, he was promptly escorted to the interview room to meet with Steptoe attorneys. *Id.* at ¶ 7. Edmonds was subsequently questioned regarding numerous emails and documents, many of which, in part, now make-up the Indictment against him. *Id.*; *see also* Exhibit F. After approximately an hour of questioning, CCI suspended Edmonds. Declaration of David Edmonds at 2, ¶ 8.

Like the defendant in *Stein II*, Edmonds met with CCI investigators because his job was conditioned on him cooperating and answering their questions. It was objectively reasonable for Edmonds to believe he would be terminated if he did not cooperate when CCI ordered him, multiple times and in multiple ways, to cooperate fully with the investigators. At no time did Steptoe

inform Edmonds that he was free to refuse to answer any statements or could invoke his Fifth Amendment right against self-incrimination. *Id.* at 3, ¶ 9. Edmonds was thus left with a choice between a rock and a whirlpool – he could either meet with investigators and risk incriminating himself or be fired. Thus, Edmonds' statements on August 16 and 17 were the product of economic coercion and should be suppressed in violation of his Fifth Amendment rights.

Similarly, Cosgrove was personally instructed by CCI's President to cooperate with CCI's attorneys on August 16. Declaration of Paul Cosgrove at 2, ¶ 2. Cosgrove was not given a choice of whether or not to meet with CCI's attorneys. Further, he was not told that he was a target of an investigation CCI was conducting for the government and that CCI intended to share his statements with the government. *Id.* at 3, ¶ 6.

Like Edmonds, Cosgrove was suspended immediately after providing CCI's attorneys with requested information. Had he known he was going to be suspended prior to the interviews, Cosgrove would not have felt compelled to speak in order to keep his job. *Id.* at 3, ¶ 7. Accordingly, Cosgrove's statements on August 16 and 17 resulted from economic coercion and use of these statements violates his Fifth Amendment rights.

Finally, Carson was similarly not given a choice of whether or not to meet with CCI's attorneys. Carson believed that if she did not do what CCI told her to do, she would be terminated. Declaration of Hong Jiang Carson at 3, ¶ 7. It was objectively reasonable for Carson to believe she would be terminated if she did not meet with the attorneys as ordered by CCI. First, Carson was ordered out of the restroom by the head of human resources, and then escorted to a conference room where she was instructed to stay while being watched by CCI personnel. She was then escorted to another conference room where she was questioned by attorneys regarding various emails and

documents. Not only does Carson not recall being informed that she was going to be questioned by the attorneys, but she was also never informed that she could choose not to answer their questions and that CCI had already informed the government about its investigation. *Id.* at 2, ¶¶ 4, 7. Also, the interview was conducted in English. As a non-native English speaker, Carson had difficulty understanding many of the questions, but reasonably believed that if she did not cooperate and answer the attorneys' questions, she would be fired or would suffer negative consequences regarding her employment. *Id.* at 2-3, ¶¶ 5, 7. Carson was suspended after providing the attorneys with the requested information. Similar to Edmonds and Cosgrove, CCI coerced Carson with the implicit threat of termination if she did not meet with and answer the questions of the attorneys. Thus, her statements were compelled by economic coercion and should be suppressed in violation of the Fifth Amendment.

C. Alternatively, Defendants Have Made A Sufficient Showing To Obtain Discovery To Further Review The Extent To Which The Interview Statements Are The Result Of Government Coercion

If this Court believes that Defendants have made an insufficient showing of state action by CCI, Defendants should be afforded a reasonable opportunity to take discovery on this issue and subpoena witnesses to an evidentiary hearing to provide the Court with additional facts. Specifically, Defendants request the notes taken by the internal investigators during the interviews of them as well as all of the documents and records that reflect CCI's and Steptoe's communications with the government prior to the dates of their interviews or within a couple months thereafter to assess the joint investigative effort. To date, the defense has received limited documentation relating to the interactions amongst CCI and DOJ. The concerted actions described in CCI's plea agreement and sentencing memoranda as well as various statements by Steptoe partner Brian Heberlig during litigation in this case, are telling. However,

there is undoubtedly more evidence of interactions relevant to applying the two legal tests discussed above. Further discovery therefore is justified if the Court deems Defendants showing of state action by CCI inadequate. Thereafter, to the extent necessary, the Defendants request an evidentiary hearing.

IV. CONCLUSION

For the foregoing reasons, the Court should grant this motion to suppress, or in the alternative, order discovery, and if necessary, hold a further evidentiary hearing on Defendant's request for suppression.

Dated: March 5, 2012

Respectfully submitted:

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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 SUPPRESS DEFENDANTS' STATEMENTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS OF JESSICA C. MUNK, DAVID EDMONDS; PAUL COSGROVE; AND HONG JIANG CARSON** 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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