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UNITED STATES DISTRICT COURT

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' OBJECTIONS TO GOVERNMENT'S PROPOSED JURY INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"

Hearing
Date: August 12, 2011
Time: 1:30 p.m.
Courtroom: 10C
Trial Date: June 5, 2012
The Honorable James V. Selna

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I. INTRODUCTION

Significant portions of the Indictment in this case may survive or fall based upon the jury's ultimate conclusion regarding whether the specific state-owned enterprises ("SOEs") identified in the substantive FCPA counts (Counts Two through Ten) qualify as government "instrumentalities" under the FCPA and their employees "foreign officials." Yet rather than propose a jury instruction that sets forth a clear legal yardstick against which this central factual determination must be measured, the government instead proposes a vague and amorphous "foreign official" and "instrumentality" jury instruction that (1) is legally incorrect, and (2) provides no concrete guidance to the jury to intelligently determine which SOEs qualify as "instrumentalities" and which do not. Accordingly, Defendants object to the government's proposed instruction.

II. ARGUMENT

A. Legal Standard

"[D]rafting jury instructions entails explaining existing law to nonlawyers." 1 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS 807 (6th ed. 2006 & Supp. 2010) (hereinafter "O'MALLEY"). "Jury instructions are generally viewed as important, even the most critical part of the trial." *Id.* Accordingly, "[d]rafting effective instructions requires accuracy and clarity[.]" *Id.* "To attain understandability, instructions need to be readable, clear, and unambiguous." *Id.* at 813.

In the Ninth Circuit, "[j]ury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996) (reversing and remanding based upon erroneous jury instruction). The "instructions must give the jury adequate guidance to intelligently determine the questions presented." *Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 532 (9th Cir. 1986); *see also United States v. Shryock*, 342 F.3d 948, 986 (9th Cir. 2003) (stating that jury instructions should not

be "inadequate to guide the jury's deliberation"). Additionally, while "[a] district court need not define a term when its use in jury instructions comports with its ordinary meaning[,] . . . a court must define '"enigmatic terms" that leave the jury to speculate on their meaning.'" *Miller v. Neathery*, 52 F.3d 634, 638 (7th Cir. 1995) (quoting *Mayall v. Peabody Coal Co.,* 7 F.3d 570, 574 (7th Cir. 1993)); *cf. United States v. McIver*, 186 F.3d 1119, 1130 (9th Cir. 1999) ("[T]he district court has an obligation, when a jury requests clarification on an issue, to 'clear away the confusion with concrete accuracy.'") (citation omitted).

B. The Government's Proposed Instruction That An FCPA "Instrumentality" Is "Any Entity Through Which A Foreign Government Achieves An End Or Purpose" Does Not Correctly State The Law

It is axiomatic that a jury instruction must "correctly state the law." *Chuman*, 76 F.3d at 294; *see also United States v. Garza*, 980 F.2d 546, 554 (9th Cir. 1992) (An appellate court reviews "de novo whether a jury instruction was an accurate statement of the law."). But the government's proposed instruction that "[a]n 'instrumentality' of a foreign government is any entity through which a foreign government achieves an end or purpose" plainly is not a correct statement of the law. It has not, despite the government's best efforts, been adopted by this Court, the *Aguilar* court, or any other tribunal.[1] And it should not be adopted for the first time now.

As explained in Defendants' proposed instructions, and as this Court is aware, the Ninth Circuit has stated that "the use of the word 'instrumentality' in a general, inclusionary definition does *not* indicate an intention to encompass entities which are not a part of the government, even though they may be governmental

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[1] None of the cases cited by the government in support of its proposed instruction adopted the government's proposed definition, and the issue of whether SOEs could be FCPA "instrumentalities" was not even litigated in the *Jefferson* and *Bourke* matters.

'instrumentalities' in some sense." *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 921 (9th Cir. 1996) (emphasis added). Yet the government's proposed instruction ignores *Hall* and would reach countless entities that are not part of a foreign government.[2] The reason is obvious: foreign governments achieve an "end" or "purpose" through virtually every business enterprise operating in their countries since those enterprises employ workers, pay taxes, and engage in myriad other activities that are beneficial to those governments. Foreign governments also achieve an "end" or "purpose" through every private company they hire or contract with, such as engineering, procurement, and construction firms, law firms, information technology firms, and the like. Indeed, every company that sells a product or service to a foreign government helps that government achieve an end or purpose; and under the government's proposed definition, each would be considered an "instrumentality."[3] Additionally, most, if not all, business enterprises are creatures of law (*i.e.*, creatures of the government). In the United States, for example, corporations exist through the grace of government and are created under the laws of the various States, thus underscoring that governments believe they serve a public good – *i.e.*, they "achieve an end or purpose." Thus, in a very real sense, virtually all corporations around the globe can be said to "achieve an end or purpose" of government; otherwise they would not be permitted to exist in the first place.

Adopting the government's proposed instruction here would place no practical limits on the definition of "instrumentality." Such an instruction would ensnare

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[2] The government contends this Court should disregard *Hall* because "*Hall* had nothing to do with the FCPA." Docket No. 426 at 7. The statement is remarkable, given that the government has repeatedly argued that *domestic* "instrumentalities" and *civil* statutes – both of which have "nothing to do with the FCPA" – are highly relevant to the Court's interpretation of the FCPA.

[3] Under the government's proposal, even U.S. companies that provide products or services to foreign governments would be considered foreign government instrumentalities. This obviously is absurd, and establishes the fallacy of the government's "achieves an end or purpose" test. A test that is so broad that it encompasses entities outside the statute plainly misstates the law.

legions of business enterprises that are not part of a foreign government – in violation of the precept set forth in *Hall* – and would convert the FCPA into a general commercial anti-bribery statute, something Congress plainly did not intend (a fact even the government acknowledges). *See, e.g.*, Docket No. 390 (Government's Opposition To Defendants' Travel Act Motion) at 16-17 (government arguing that "commercial bribery" is a "completely separate field" than "official bribery" that the FCPA "was not intended to address"); *see also* H.R. Rep. No. 95-640, at 4 (1977) (defining the purpose of the FCPA as a prohibition on bribing "foreign officials, foreign political parties, or candidates for foreign political office").

Second, as previously noted by Defendants, the government's proposed "instrumentality" definition must be rejected because it would render the terms "department" and "agency" in the definition of "foreign official" mere surplusage. *See, e.g., Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981) (It is a "well-settled rule that all parts of a statute, if possible, are to be given effect."). Specifically, both a "department" and an "agency" are obviously an "entity through which a foreign government achieves an end or purpose." "Instrumentality" cannot be construed in a manner that would swallow those other terms. *See Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) ("The Government's reading [of 18 U.S.C. § 3501] [was] . . . at odds with one of the most basic interpretive canons, that [a] statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation and internal quotation marks omitted). In its May 18 Order, this Court stated that it "agrees that the term 'instrumentality' was intended to capture entities that are not 'departments' or 'agencies' of a foreign government . . . ." 5-18-11 Order (Docket No. 373) at 7. Because the government's proposed "instrumentality" instruction would capture such entities, it must be rejected.

Third, as discussed in Defendants' proposed instructions, under the "commonsense canon of *noscitur a sociis,*" *United States v. Williams*, 553 U.S. 285, 294 (2008), "instrumentality" should not be construed in a manner that is

fundamentally different than "department" and "agency." *See* Docket No. 384 at 8-9. Thus, even if the term "instrumentality" *can*, as this Court held, include *some* SOEs, it does not follow that the term encompasses a boundless and undefined universe of entities through which a foreign government "achieves an end or purpose"; rather, the term should be construed relative to the words that precede it (and in a manner that fits with the FCPA's overarching goal of attacking *government* corruption). *See, e.g.*, *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("The maxim *noscitur a sociis*, . . . while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.") (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)) (ellipsis in original); *Shell Oil Co v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) ("As Judge Learned Hand so eloquently noted: 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .'") (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)); *United States v. King*, 244 F.3d 736, 740 (9th Cir. 2001) ("[W]ords are to be judged by their context and [] words in a series are to be understood by neighboring words in the series.") (citations omitted).

Finally, it is worth noting that until this case and the *Aguilar* case, the government does not appear to have ever publicly taken the position that the term "instrumentality" in the FCPA means "any entity through which a foreign government achieves an end or purpose." And for good reason: the position has no grounding in the text of the statute or the statute's legislative history. Now that the issue is being actively litigated, however, the government has cherry-picked the most expansive dictionary definition possible. But the government can point to no evidence – and there is no evidence – that Congress ever intended such an expansive definition of the term. In fact, all of the evidence is to the contrary. *See* Docket No. 384 at 9 (citing evidence that the FCPA was aimed at preventing improper payments to traditional

government officials). For each of the foregoing reasons, it would be error for this Court to instruct the jury that "[a]n 'instrumentality' of a foreign government is any entity through which a foreign government achieves an end or purpose."

C. The Government's Proposed Instruction Does Not Provide The Jury With Adequate Guidance To Intelligently Determine Whether A Particular SOE Is An FCPA "Instrumentality"

In addition to correctly stating the law, jury "instructions must give the jury adequate guidance to intelligently determine the questions presented." *Shad*, 799 F.2d at 532. But the government's proposed instruction does not provide adequate guidance to the jury to intelligently determine whether a particular SOE is or is not a foreign government "instrumentality." Instead, the government's instruction provides the jury with a list of six non-exclusive, unweighted factors – none of which is dispositive – that the jury may "consider." The instruction is devoid of a clear benchmark that must be met before the jury may conclude that the government has satisfied its burden to prove beyond a reasonable doubt that a particular SOE is a foreign government "instrumentality" under the FCPA. Such a vague, amorphous, and standardless instruction cannot be permitted.

During the hearing on Defendants' Motion to Dismiss, the government stated that it "anticipat[ed] [that] there will be lengthy briefing over the jury instruction going to the definition of 'instrumentality.'" *See* Hanna Decl. (Docket No. 384-1), Exh. A at 57:9-11. But the government's proposed instruction – its "lengthy briefing" – relies primarily upon this Court's May 18 Order to support its proposed inclusion of these six factors in the jury instruction. And indeed, this Court did state in that Order (albeit without citation to authority) that "[s]everal factors bear on the question of whether a business entity constitutes a government instrumentality," including the factors identified in the government's proposed instruction (which appear to be a mixture of the factors identified by this Court and by Judge Matz in *Aguilar*). 5-18-11 Order at 5.

The Court also noted that "[s]uch factors are not exclusive, and no single factor is dispositive." *Id.*

Importantly, however, the Court went on to explain that the "chief utility" of the factors it identified was "simply to point out that several types of *evidence* are relevant when determining whether a state-owned company constitutes an 'instrumentality' under the FCPA." *Id.* (emphasis added). Accepting, solely for the sake of argument and without waiving Defendants' rights on appeal, the Court's premise that some SOEs may qualify as FCPA "instrumentalities," it follows that "several types of evidence" would bear on the question, including evidence regarding ownership, control, public function, and the other factors contained in the Court's Order. And again assuming the correctness of that premise, either party should be permitted at trial to introduce, consistent with the Federal Rules of Evidence, admissible evidence regarding those factors and anything else relevant to the question of whether a particular entity is an "instrumentality." But the fact that "several types of evidence are relevant" to the inquiry does not mean the jury can be given a laundry list of various types of potentially relevant evidence *unaccompanied by a clear legal standard against which the evidence must be measured*. Clearly, it cannot, and this Court did not so hold. Indeed, if the Court had so held, there would be no need for the parties to be briefing the "instrumentality" jury instruction now.[4] The government's proposed instruction must be rejected because it fails to set forth with "accuracy and clarity" (O'MALLEY at 807) what the government must prove to show that a particular SOE is a government "instrumentality" and therefore fails to provide "adequate guidance" to the jury. *Shad*, 799 F.2d at 532; *cf. Phillip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) (explaining that "it is constitutionally important for a court to

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[4] The central question left unanswered by the Court's Order was: What is the standard for determining whether a particular business entity is, or is not, a foreign government instrumentality? The government's proposed instruction does nothing to answer that question, and the government's failure to actually brief the issue demonstrates the paucity of support for its position.

provide assurance that the jury will ask the right question, not the wrong one," and "it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance").

To illustrate this critical flaw in the government's instruction, consider a scenario in which the jury concludes that factors 1, 2, and 3 favor an "instrumentality" conclusion, but factors 4, 5, and 6 do not (assuming the jury can even understand, based on the government's amorphous instruction, under what circumstances a factor militates in favor of, and in what circumstances a factor militates against, an "instrumentality" determination). How will the jury intelligently determine whether the entity is an FCPA "instrumentality"? Similarly, what if four of the six factors militate in favor of or against an "instrumentality" determination? What about five of the six? What if all of the factors militate against a determination that a particular SOE is an FCPA "instrumentality"? Since these factors are "not exclusive," can the jury still conclude in this last scenario that the SOE is an "instrumentality"? Under the government's proposed instruction, the answer is "yes." Indeed, while the government's proposed instruction states that "in order to conclude that an entity is an instrumentality of a foreign government, you need not find that all of the factors listed above weigh in favor of such a determination," it never states how many (if any) factors the jury must find. This is no standard at all.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364 (1970). But under the government's proposed jury instruction, there are no *facts* for the jury to find. Rather, there is a conclusion to be reached based on several non-binding considerations, all of which are not even spelled out for the jury. This is simply inconsistent with Defendants' right to only be convicted based on facts, passed on by a grand jury, and proven to a petit jury, beyond a reasonable doubt. It also runs afoul of Defendants' Sixth Amendment right to a jury trial in a criminal case since implicit in that right is

the right to have a jury that is properly instructed on how to apply the law to the facts of the case. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 10 (1999) ("[M]isdescriptions and omissions … preclude[] the jury from making a finding on the *actual* element of the offense.").

Furthermore, the government's proposed factors raise more questions than answers. For example, factor 1 tells the jury to consider "the circumstances surrounding the entity's creation," but it never explains precisely *what* circumstances the jury should consider and how those circumstances are relevant to the "instrumentality" inquiry. Similarly, factor 2 instructs the jury to consider, among other things, "whether the entity is widely perceived and understood to be performing official (i.e., governmental) functions." Perceived and understood *by whom*? The citizens of that country? The Defendants? The Department of Justice? The government's instruction does not say. A similar infirmity infects factor 4 – "the purpose of the entity's activities, including whether the entity provides a service to the citizens of the jurisdiction." Virtually all business enterprises by their very nature "provide a service to the citizens of the jurisdiction" in which they operate. In what way will this factor aid the jury in determining whether a particular entity is a foreign government instrumentality?

The unanswered questions set forth in the above paragraphs illustrate an additional problem with the government's proposed use of non-exclusive, non-dispositive, unweighted, ambiguous factors unaccompanied by any concrete legal standard – namely, if a jury concludes that a particular SOE is an FCPA "instrumentality," how can Defendants ever effectively move under Federal Rule of Criminal Procedure 29(c) for a judgment of acquittal on the basis that "the evidence [of instrumentality status] is insufficient to sustain a conviction"? Fed. R. Crim. P. 29(c). Similarly, as a practical matter, how could they ever challenge such a determination on those grounds on any appeal to the Ninth Circuit? If the jury can convict based on one, two, three, four, five, six – or zero – of the government's proposed factors, how can

Defendants ever meaningfully argue to this Court or the Ninth Circuit that the government's "instrumentality" evidence at trial was insufficient to sustain a conviction? On what basis could this Court or the Ninth Circuit say the evidence was insufficient? Adopting the government's proposed instruction would therefore deprive Defendants of their ability to challenge any conviction based on insufficient evidence of "instrumentality" status, a clear violation of their due process rights. *Cf. Phillip Morris*, 549 U.S. at 355 (holding significant risk jury misunderstood law deprived civil defendant of due process); *Giaccio v. State of Pa.*, 382 U.S. 399, 403 (1966) (holding a statutory scheme unconstitutional where it left "to the jury such broad and unlimited power in imposing costs on acquitted defendants that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is").

During the hearing on Defendants' Motion to Dismiss, the government contended that a list of "factors" was a "typical standard for various juries to consider" and cited three examples:

> We think that this is a typical standard for various juries to consider, whether, whether – in the Ninth Circuit, there was a case where they looked at intimidation in a bank robbery statute. There are a number of different factors that a jury must look to in terms of identifying that. The cite there is 56 F.3d 175.
>
> Similarly, in gift and income tax laws, what is – a question whether it is a gift or whether it is income. There is a wide variety of factors that must be looked at by the jury in identifying these various different pieces. Similarly, with identification or credibility of a witness, specifically what are the various factors that a jury must apply when something that is case specific and is dealt with in the jury instruction phase?

See Declaration of Joshua A. Jessen, Exh. A (5-9-11 Hearing Transcript) at 57:16-58:5. Each of these examples is readily distinguishable from, and provides no support for, the government's proposed instruction here.

In the unpublished case referenced by the government relating to "intimidation in a bank robbery statute," *United States v. Simon*, 1995 U.S. App. LEXIS 11888 (9th Cir. May 18, 1995),[5] the Ninth Circuit was examining the adequacy of jury instructions on the element of intimidation for bank robbery under 18 U.S.C. § 2113(a). The district court had set forth a clear standard in the jury instruction for what constituted "intimidation": "intimidation means saying or doing something that would cause a reasonable person to fear bodily harm." *Id.* at *4. The instruction did permit the jury to consider certain factors in making this determination – the district court informed the jury that "use of a demand note, verbal instructions to provide money, and reactions of the bank teller are factors that may be considered in deciding intimidation." *Id.* at *5. But those factors were tethered to a clear legal standard, a standard that allowed the jury to draw upon human experience to answer a simple, factual question: in light of defendant's actions, would a reasonable person fear bodily harm? *Id.*[6] This is a vastly different scenario than presenting a jury with a list of six amorphous factors – factors with which they have no experience – and asking it to

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[5] The case was erroneously cited by the government as "56 F.3d **175**." In fact, the case appears in Table Case Format at 56 F.3d **75**, but the opinion is an unpublished one. Defendants cite it here only because the government raised it at the hearing.

[6] The Ninth Circuit also "note[d] that the court's instruction was directly patterned after language in [its] prior opinions describing the element of intimidation for bank robbery," *Simon*, 1995 U.S. App. LEXIS 11888, at *5 n.4, a safeguard that cannot be implemented here since there is no Ninth Circuit authority construing the term "instrumentality" under the FCPA.

determine, in the absence of any meaningful legal standard, whether a particular SOE is a foreign government "instrumentality" under the FCPA.[7]

The government's reliance upon the distinction between gifts and income under tax law is similarly unavailing. Although the government did not reference a specific case at the hearing, the leading "gift" case in federal income tax law is *Comm'r v. Duberstein*, 363 U.S. 278 (1960). *Duberstein*, though not a jury instructions case, reaffirmed the standard that whether a particular transfer is a "gift" (and, as such, not subject to federal income tax) or taxable income depends on the transferor's intention: "gifts" result from "detached and disinterested generosity" and are often given "out of affection, respect, admiration, charity or like impulses." *Id.* at 285 (citations and internal quotation marks omitted). Thus, as with the meaning of "intimidation" in 18 U.S.C. § 2113(a), the contours of the standard – "gift" – already are clear to the jury based on common experience. The factors only elaborate on that standard. And again the jury is left with a simple question of fact: what was the transferor's intention?

The *Duberstein* court noted that in considering whether or not a particular transfer was truly a "gift," as defined, the jury (or other factfinder) is able to draw upon its own personal experience:

> Decision of the issue presented in these cases must be based ultimately on the application of the *fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts* of each case. The *nontechnical nature of the statutory standard*, *the close relationship of it to the data of practical human experience*, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our

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[7] The government's proposed "any entity through which a foreign government achieves an end or purpose" instruction simply is not a meaningful legal standard.

> conclusion that primary weight in this area must be given to the conclusions of the trier of fact.

Id. at 289 (emphasis added). Unlike determining whether a particular transfer is a gift, however, a jury has no "practical human experience" to draw upon to determine, in the absence of a clear legal standard, whether a particular SOE is a foreign government "instrumentality."

Finally, the government's suggestion that "instrumentality" factors are appropriate because a jury may consider factors with respect to "identification or credibility of a witness" is meritless. Model Instructions 3.9 and 4.11 of the Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit (on "Credibility of Witnesses" and "Eyewitness Identification," respectively) do provide lists of factors that a jury may consider in evaluating testimony, but permitting jurors to consider factors (and, as with previous examples, factors with which jurors have some experience) to evaluate witness testimony is fundamentally different from giving jurors a list of ambiguous factors – untethered to a clear legal standard – to determine whether the government has satisfied its burden to prove a particular element of the offense beyond a reasonable doubt. To compare the two is to compare apples with oranges.

There may be instances in which courts can provide juries with lists of factors to help determine ultimate issues of fact, but to do so in the absence of a clear legal standard, especially when addressing an abstract term like "instrumentality," a term with which jurors have no common experience, would be error. Indeed, absent specific *elements* that the government must prove to establish "instrumentality" status (such as those set forth in Defendants' proposed instruction) – elements that put the world on notice regarding the outer bounds of an FCPA "instrumentality" – the jury instruction will be unconstitutionally vague. *See, e.g., Record Head Corp. v. Sachen*, 682 F.2d 672, 677 (7th Cir. 1982) (holding that the vagueness of the word "instruments" in a criminal ordinance was not cured by a list of legislatively-declared

factors; "[f]ar from curing vagueness, these factors seem to us to exacerbate it . . . ."); *Berger v. City of Seattle*, 569 F.3d 1029, 1047 (9th Cir. 2009) (rejecting government's proposed construction of regulation where it would have required police officers to examine myriad factors); *Carter v. Welles-Bowen Realty, Inc*., 719 F. Supp. 2d 846, 853 (N.D. Ohio 2010) (rejecting 10-factor test for interpreting statutory provision because "[t]he vagueness of the individual factors is compounded by the subjective balancing process inherent in the test"; the test provided "no indication how many factors might be determinative, or which factors might weigh more heavily in the analysis," and companies were "thus confronted with a massive gray area"); Docket No. 317 (Defendants' 2-28-11 Motion to Dismiss) at 40-48; Docket No. 354 (Defendants' Reply In Support of 2-28-11 Motion to Dismiss) at 10-11, 19-20.

III. CONCLUSION

In its May 18 Order, this Court recognized the "Government's substantial evidentiary burden to establish that a business entity constitutes a government instrumentality[.]" 5-18-11 Order at 16. The government should not be allowed to do an end run around that substantial burden by way of a jury instruction that (1) is an incorrect statement of the law, (2) fails to give the jury adequate guidance to intelligently determine the question presented, and (3) deprives Defendants of their due process rights. Moreover, if the government's proposed instruction is given to the jury, it will unfairly slant the playing field in the direction of the government since, in the absence of a clear legal standard, the jury almost certainly will disregard the "foreign official"/"instrumentality" issue and focus instead on whether any corrupt payment was made. *See, e.g*, Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 78 n.12 (1993) (quoting a former juror's statement to a Tenth Circuit conference: "The Judge instructed us in language none of us understood. It was involved and tedious and long, and so full of whereases and therewiths that he lost us halfway through. . . . We proceeded to consider the case according to our rough sense of justice without much regard for the law.").

Defendants therefore respectfully request that the Court reject the government's proposed "foreign official"/"instrumentality" instruction and adopt Defendants' proposed instruction.

Dated: July 25, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, I electronically filed the foregoing **DEFENDANTS' OBJECTIONS TO GOVERNMENT'S PROPOSED JURY INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"** with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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