NICOLA T. HANNA, SBN 130694, nhanna@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive, Suite 1200
Irvine, CA 92612
Telephone: (949) 451-3800
Facsimile: (949) 451-4220
Attorneys for Defendant STUART CARSON

KIMBERLY A. DUNNE, SBN 142721, kdunne@sidley.com
SIDLEY AUSTIN LLP
555 W. Fifth Street, Suite 4000
Los Angeles, CA 90013-1010
Telephone: (213) 896-6000
Facsimile: (213) 896-6600
Attorneys for Defendant HONG CARSON

THOMAS H. BIENERT, JR., SBN 135311, tbienert@bmkattorneys.com
BIENERT, MILLER & KATZMAN, PLC
903 Calle Amanecer, Suite 350
San Clemente, CA 92673
Telephone: (949) 369-3700
Facsimile: (949) 369-3701
Attorneys for Defendant PAUL COSGROVE

DAVID W. WIECHERT, SBN 94607, dwiechert@aol.com
LAW OFFICES OF DAVID W. WIECHERT
115 Avenida Miramar
San Clemente, CA 92672
Telephone: (949) 361-2822
Facsimile: (949) 496-6753
Attorneys for Defendant DAVID EDMONDS

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' REPLY IN SUPPORT OF AMENDED MOTION TO DISMISS COUNTS ONE THROUGH TEN OF THE INDICTMENT

Hearing
Date: May 9, 2011
Time: 3:00 p.m.
Courtroom: 10C
Trial Date: October 4, 2011
The Honorable James V. Selna

TABLE OF CONTENTS

TABLE OF CONTENTS *(continued)*

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(continued)*

Page(s)

Statutes

I. INTRODUCTION

In 1977, Congress could have enacted a general anti-bribery statute that made it a crime to pay a commercial bribe to *any foreign national*, but it did not. Rather, the FCPA criminalizes improper payments only to a "foreign official." Thus, making an improper payment to a "foreign official" violates the FCPA; making that same payment to someone who is not a "foreign official" does not. This is undisputed.

The Government argues that "[s]tate-owned business enterprises ['SOEs'] may, *in appropriate circumstances*, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials." But Congress (i) knew about SOEs when it enacted the FCPA, (ii) knew that some of the questionable payments in the pre-FCPA era may have been made to employees of SOEs, and (iii) knew how to include SOEs in the definition of "foreign official" if it had wanted to do so. Clearly, Congress did not do so, and contrary to the Government's arguments, there is no evidence that Congress intended SOEs to be covered by this criminal statute, or intended the word "instrumentality" to encompass broadly anything through which a foreign government achieves an "end or purpose." In fact, the plain language of the statute and its history illustrate that the FCPA was aimed at preventing improper payments to traditional government officials.[1] If Congress had wanted SOEs to be included in the definition of "instrumentality," it would have expressly said so – just as it did in 1976 when it enacted the Foreign Sovereign Immunities Act ("FSIA").

Having no statutory authority for its sweeping position, the Government is thus unable to define the "appropriate circumstances" when an SOE allegedly falls within the FCPA. The Government states only that it is a "fact-based determination." Opp. at 1. But facts in isolation are irrelevant unless analyzed in the context of a legal

---

[1] The Government contends that Defendants' Motion is premised on the "insupportable legal conclusion that an entity cannot engage in both governmental and commercial activity." Opp. at 1. That has never been Defendants' argument. Rather, Defendants' contention is that the FCPA is directed to payments made to traditional government officials.

framework. And for over two hundred years it has been "emphatically the province and duty of the judicial department" – not the jury – "to say what the law is." *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803). Thus, while a jury may decide disputed issues of fact, this Court must first decide the law.

Defendants' Motion squarely challenges the Government's unsupported legal interpretation of the FCPA by arguing that the term "instrumentality" simply does not include SOEs, and thus employees of SOEs are not, as a matter of law, "foreign officials." The Government labels Defendants' position as extreme, insisting that it "is not asking for a legal conclusion that all SOEs are instrumentalities," Opp. at 8, only for a ruling that "the term instrumentality . . . *can* include SOEs." *Id.* at 7 (emphasis added). But it is the Government's position that is unreasonable, because the Government cannot articulate any principled test – and there is no test, other than one invented from whole cloth – for what would make one SOE, but not another, a government "instrumentality" under the FCPA. Accordingly, the Government's concession, that some SOEs fall within and some outside the statute, coupled with the complete lack of any meaningful or discernable standards for deciding which is which, undermines the Government's position and requires that it be rejected because it would render the FCPA unconstitutionally vague as applied.

Accordingly, the Court should hold that employees of SOEs are not "foreign officials" under the FCPA and should dismiss Counts One through Ten of the Indictment. Contrary to the Government's overblown rhetoric, the sky will not fall upon such a ruling; rather, the issue will be returned to its proper forum: Congress. *See Skilling v. United States*, 561 U.S. ___, 130 S. Ct. 2896, 2933 (2010) ("If Congress desires to go further . . . it must speak more clearly than it has.").

II. ARGUMENT

A. Defendants' Motion Is Not Premature

The Government argues that Defendants' purely legal challenges are "premature." Opp. at 8. But Defendants' Motion does not mount a "challenge to the

sufficiency of the evidence," nor is it "substantially founded upon and intertwined with evidence concerning the alleged offense." *Id*. at 9-10. Just the opposite, the Motion states that "[f]or the purpose of deciding Defendants' Motion, the Court can assume that the entities named in the Indictment are 100% state-owned." Mot. at 11.

Notwithstanding this assumption for purposes of the Motion, the Government, by its own admission, concedes that at least seven of the nine entities named in the Indictment are not even directly owned by a foreign government; rather, they are *subsidiaries* of entities wholly or partially owned by a foreign government. *See* Smith Decl., ¶¶ 13-25, 28-29. The entities therefore do not qualify as "instrumentalities" under the FSIA, a 1976 statute the Government says this Court should look to in ascertaining the meaning of "instrumentality" in the FCPA. *See* Mot. at 31 n.17; *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473 (2003). Therefore, based on the Government's own legal arguments and factual representations, at a minimum the counts involving those subsidiaries (Counts 2-7 and 9) should be dismissed.

The Government also is incorrect that Defendants' Motion is rendered premature by the Government's eleventh-hour request that Defendants "stipulate to certain facts so that there would be no disputed issues for purposes of this motion." Opp. at 9. Contrary to its representations, the Government never asked Defendants to stipulate to actual facts; rather, the Government asked Defendants to stipulate to a vague and undefined pseudo-legal conclusion – to wit, that each of the entities identified in the Indictment was an "entity through which the government of [a foreign country] achieved an end or purpose."[2] McCormick Decl., Exh. D. In other words, the Government asked Defendants to stipulate that each of the entities identified in the Indictment was a foreign government "instrumentality" under the Government's

[2] The Government initially also asked Defendants to stipulate to seven "factors" supposedly "relevant in determining whether" a given entity achieved a governmental "end or purpose." McCormick Decl., Exh. D. When challenged, the Government refused to identify the source of the factors or any legal authority supporting their use, and abandoned them entirely. *See id.*

preferred definition of that term. The proposed stipulation does not moot the *legal issues* raised by Defendants' Motion, although it does illustrate the Government's gamesmanship.

The so-called *Hagner* test is similarly beside the point. If the Government charged a convenience store robber with bank robbery, the *Hagner* test presumably would be satisfied because the defendant (1) would be on notice of the charge and (2) would have a sufficient basis to make a claim of double jeopardy. But the indictment still would be subject to pretrial dismissal because the charge would not state a federal bank robbery offense. So too here, the Indictment does not state an offense because, as a matter of law, the FCPA does not proscribe corrupt payments made to officers and employees of SOEs. *See* Indictment, ¶ 12.

Finally, the Government's assertion that the Motion is premature because it "focuses only on the definition of 'instrumentality,'" and not "department" or "agency," is not serious. Opp. at 11-12; *see also id*. at 14 n.6. The Government told the OECD that it considers SOEs to be "*instrumentalities* of a foreign government," Hanna Decl., Exh. B (emphasis added) – not "departments" or "agencies" – and the Government cannot colorably argue here that any of the entities identified in the substantive FCPA counts is a "department" or an "agency." The Government's focus on the European Agency for Reconstruction is a red herring. Opp. at 11-12. That entity is not identified in the Indictment (and it is unlikely the grand jury heard anything about it) and is only relevant to the alleged conspiracy count, which fails because the legally defective substantive FCPA counts infect it. *See* Mot. at 6.

B. Whether "Instrumentality" Generically Can Include SOEs Is Irrelevant; The Issue Before The Court Is The FCPA's Meaning Of The Term

The Government states that "defendants' argument turn[s] the ordinary canons of statutory construction on their head by starting with the legislative history rather than the language of the statute." Opp. at 14. The Government is incorrect. As Defendants noted in their Motion, "[w]here the meaning of the statutory text is clear,

there is no need to resort to legislative history to discern the text's meaning." Mot. at 22. Indeed, since a *criminal* statute must give "fair warning . . . to the world in language that the common world will understand, of what the law intends to do if a certain line is passed," *McBoyle v. United States*, 283 U.S. 25, 27 (1931), Defendants explained that "there is some debate as to the propriety of considering legislative history in criminal cases even when the text is *unclear*." Mot. at 22 n.15. Although the legislative history supports Defendants' position that Congress intended the FCPA to cover only improper payments to traditional government officials, Defendants' Motion has never hinged on the FCPA's legislative history.

In any event, *if* the Court determines that a consideration of the legislative history is unnecessary, it can only be because the term "instrumentality" "as it is used in the [FCPA] . . . plainly does *not* encompass state-owned enterprises." Mot. at 12 (emphasis added). The Government's contrary argument that the plain meaning of the term "instrumentality" in the FCPA definitely *can* include SOEs – and thus no resort to the legislative history is necessary – does not withstand critical scrutiny.

1. The Term "Instrumentality" Does Not Have "An Accepted Legal Definition," And The Term As Used In The FCPA Does Not Mean "An Entity Through Which A Government Achieves An End Or Purpose"

To arrive at its conclusion that an "SOE *could* be an instrumentality," Opp. at 16 (emphasis added), the Government contends that the term "instrumentality" has "an accepted legal definition," *id.*, which, according to the Government, is "an entity through which a government achieves an end or purpose." *Id.* at 8; *see also id.* at 16 (relying on a definition of "instrumentality" contained in the *2009 edition* of Black's Law Dictionary). The Government is incorrect on both counts.

First, although the term "instrumentality" is used widely in federal statutes, the term plainly does not have "an accepted legal definition." In fact, as the Government's brief acknowledges, different federal statutes contain different definitions of the term (or, as in the case of the FCPA, no definition). *See* Opp. at 24-25. The Government

also concedes that "U.S. courts and regulatory agencies *often struggle* with whether a U.S. entity is an instrumentality of the United States *for a certain purpose*," *id.* at 40 (emphasis added), illustrating that there simply is no uniform, "one-size-fits-all" definition of the term in the civil context, much less in the criminal one.

Moreover, the Ninth Circuit has held that an entity may be considered a government "instrumentality" under one statute but not another. In *Hall v. American National Red Cross*, 86 F.3d 919 (9th Cir. 1996), the Court squarely rejected the contention that the Red Cross was a government "instrumentality" for First Amendment purposes even though it was an "instrumentality" for tax-immunity purposes. *Id.* at 922. The Court held that the contrary assumption was a "serious logical and semantic error . . . based on the fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted into an entirely different context." *Id.* (quoting *United States v. City of Spokane*, 918 F.2d 84, 88 (9th Cir. 1990)); *see also Paris v. Federal Power Com.*, 399 F.2d 983, 986 (D.C. Cir. 1968) ("[O]f course, while an entity may be considered a government instrumentality for certain purposes, it need not be so considered for all purposes."). In fact, in *Hall*, the Ninth Circuit observed:

> [C]ourts sometimes use the phrase "agency or instrumentality" when they are actually asking whether a particular institution is part of the government itself. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 972, 130 L. Ed. 2d 902 (1995). Because the language used by courts to refer to entities which are actually part of the government itself is not always precise, Congress's incorporation of words which are sometimes used to refer to those entities simply indicates a desire to encompass all parts of the government itself within the Act. *Thus, 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 "instrumentalities" in some sense.*

Hall, 86 F.3d at 921 (emphasis added). Thus, contrary to the Government's bald assertion, there is no uniform meaning of "instrumentality."[3] Moreover, modern definitions of the term cannot inform the Court what Congress meant in 1977. While the current version of Black's Law Dictionary contains definitions of "instrumentality," the version in effect in 1977 had no entry for the word, undermining the Government's claim that the word had a uniform and established legal meaning at that time. *See* Reply Declaration of Nicola T. Hanna ("Hanna Reply Decl."), Exh. 1. Accordingly, the Court must construe the term as it is "used in the statute, " *United States v. Santos*, 553 U.S. 507, 512 (2008), not as it might be defined today.

Second, just as there is no uniform definition of the term "instrumentality," the Government's cherry-picked definition of the term is not correct because, among other things, the definition would render the terms that precede it 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 "[a]n entity through which a government achieves an end or purpose." Opp. at 8. "Instrumentality" cannot be construed in a manner that would swallow those other terms. *See Corley v. United States*, 129 S. Ct. 1558, 1560 (2009).

Furthermore, the Government's preferred definition must be rejected because it effectively would convert the FCPA into a general commercial bribery statute by sweeping within its scope companies that have no government ownership whatsoever. Indeed, as the Government correctly notes, "Government purposes and policies can be

---

[3] As noted in Defendants' Motion, however, Congress can and does expressly define "instrumentality" to include state-owned enterprises when it wants to do so. *See* Mot. at 30-33. And certain statutes, such as Dodd-Frank, expressly differentiate between an "instrumentality of a foreign government" and "a company owned by a foreign government." *See id.* at 32.

myriad," including things like "redistributing wealth through welfare systems." Opp. at 16. The first step in "redistributing wealth" is collecting the wealth by levying taxes. Since governments collect taxes from corporations that have no government ownership, those corporations would be considered governmental "instrumentalities" under the Government's definition because they are "entities through which a government achieves an end or purpose" – namely, the collection of revenue. To take another example, any entity that contracts with a foreign government to "achieve an end or purpose" – whether it is Bechtel to build a power plant for the government, IBM or Microsoft to supply software to the government, or a U.S.-based law firm to provide legal advice to the government – would be captured by the Government's definition. Congress could not have intended such a boundless and unchecked definition.[4]

Confronted with defining "instrumentality" in *United States v. Aguilar*, a case that involved the Mexican Comisión Federal de Electricidad ("CFE") (which described itself as an "agency" on its website, and which the Government later admitted, in what Judge Matz characterized as an "astounding" admission, was not an SOE, but rather was a "public entity"), Judge Matz declined to adopt a "particularly elastic dictionary definition" of "instrumentality" and instead held that the definition proffered by the defendants themselves, which expressly included "commissions," encompassed CFE.[5] Supp. McCormick Decl., Exh. H.4. Defendants agree that the term "instrumentality" as used in the FCPA encompasses "governmental boards, bureaus, commissions, and other department-like and agency-like governmental entities," Mot. at 2, but

---

[4] Moreover, if Congress intended "instrumentality" to have a meaning beyond traditional government components, it is logical to expect that there would have been at least some discussion about its scope during the two-and-a-half years that Congress considered the issue before enacting the FCPA. As demonstrated by Professor Koehler's declaration, there was none.

[5] Ironically, while the Government places on citizens the burden of knowing what foreign entities might qualify as "instrumentalities," the Government itself, using the full powers of the FBI and State Department, apparently could not determine the true character of CFE, *i.e.*, that it was in fact a public entity, until after trial started.

Defendants do not agree, and Judge Matz did not hold, that the term "instrumentality" means any "entity through which a [foreign] government achieves an end or purpose."

2. The Government's Proposed "Factors" Do Not Cure The Vagueness Of Its Proposed Definition Of Instrumentality

Well aware that an amorphous definition of "instrumentality" would never pass constitutional muster, the Government has at various times listed non-exclusive "factors" that it may consider in determining whether a particular entity qualifies as an FCPA SOE. The Government has never explained what all of the factors are, how much weight each is accorded, whether any factor is dispositive, or where the factors come from. The Government even proposed *new* factors as recently as last month.

For example, the Government informed the OECD in 1998 that "among the factors that it considers are the foreign state's own characterization of the enterprise and its employees, *i.e.*, whether it prohibits and prosecutes bribery of the enterprise's employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government." *See* Hanna Decl., Exh. B. The OECD itself noted that these non-exclusive "factors" provide scant guidance to companies and individuals as to which SOEs qualify as foreign government "instrumentalities." *See* Mot. at 9; Hanna Decl., Exh. G.

Moreover, whenever a particular "factor" favors the Government's expansive position, it cites that factor to support its "instrumentality" argument; but when that same factor disfavors its position, the Government contends the factor is not dispositive. This proclivity is illustrated in the Smith Declaration. For example, Agent Smith fails to inform the Court that under Korean law, as made clear by the Declaration of In Gyu Lee (filed in support of Defendant Han Yong Kim's Motion to Dismiss), "employees of KHNP [the entity named in Counts 2 and 3 of the Indictment] are *not* considered as public officials in relation to the crime of bribery." Hanna Reply Decl., Exh. 2 (emphasis added). The Government's "heads I win, tails you lose"

application of its self-proclaimed "factors" highlights the dangers of arbitrary enforcement inherent in such ill-defined "standards."

Additionally, right before it filed its Opposition, the Government sent Defendants a proposed stipulation identifying seven factors (many of which were different from the factors DOJ identified to the OECD) the Government contended were "relevant in determining whether" an entity was "an entity through which a foreign government achieved an end or purpose." McCormick Decl., Exh. D. The Government could not provide any authority in support of these factors, and there is none. The Court should not follow the Government's bouncing-ball approach to statutory interpretation or place its imprimatur on this "prosecutor-made common law," which has no basis in the statute and is a violation of the separation of powers.[6]

Finally, even if the Government's various factors had a legal basis, they cannot save the Government's vague and amorphous definition of "instrumentality" from rendering the FCPA unconstitutionally vague as applied. *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 . . . ."); *see also id*. at 678 (further holding that the ordinance "leaves to the arresting or prosecuting authorities the job of determining, essentially without legislative guidance, what the prohibited offense is"); *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

---

[6] In *Aguilar*, Judge Matz came up with a third and completely different set of "non-exclusive" factors to decide whether an entity was an "instrumentality" under the FCPA. *See* Supp. McCormick Decl., Exh. H.4 at 9. The Government's various iterations of its proposed factors and Judge Matz's factors are contained in a chart attached hereto as Exhibit A.

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").[7]

3. The Government's Reliance On A Handful Of Distinguishable Court Decisions And On Prior Guilty Pleas Is Misplaced

The Government attempts to convince the Court that its position is a *fait accompli* by arguing that "every court that has confronted the issue and examined the meaning of instrumentality in the FCPA has determined that it can include SOEs." Opp. at 17. This is a significant overstatement. In *Nguyen* and *Esquenazi*, defendants made arguments that appeared to hinge on disputed issues of fact, and neither court undertook a plenary analysis (much less with the benefit of the full legislative history) of the issues raised by the present Motion. The *Aguilar* decision is also readily distinguishable because the entity at issue was not an SOE, but rather was a "public entity," and the court merely accepted Defendants' own proposed definition of "instrumentality" in concluding that CFE could qualify.

The Government's assertion that "district courts have accepted more than 35 guilty pleas by individuals who have admitted to violating the FCPA by bribing officials of SOEs," Opp. at 18, is similarly irrelevant. Indeed, this is "not the kind or quality of precedent this Court need consider." *United States v. Giffen*, 326 F. Supp. 2d 497, 505 (S.D.N.Y. 2004). District court judges routinely accept guilty pleas, but the acceptance of such pleas does not mean courts have closely interpreted each statute, much less placed their stamp of approval on the Government's interpretations. Indeed, before *Skilling*, many defendants pled guilty to honest services fraud not

---

[7] There is no evidence that Congress envisioned that individuals would be required to undertake a detailed factual and legal inquiry to determine whether a foreign company was an " instrumentality." Had Congress wanted such a far-reaching inquiry, especially where access to reliable information in the foreign nation could not be assured, it would have said so.

involving a bribe or kickback, but that did not prevent the Supreme Court from holding unanimously that the statute simply did not extend to such conduct.

C. The Government's Remaining Arguments Regarding The Meaning Of "Instrumentality" Fail

1. There Is No Support For The Proposition That "Foreign Official" Or "Instrumentality" Should Be Construed Broadly

The Government contends that Congress intended for the FCPA to be construed broadly, but the "broadly" language it cites relates to the types of transactions that are prohibited, not to the definition of "foreign official." Opp. at 19. The Government has cited no authority – and there is none – that Congress intended the terms "foreign official" or "instrumentality" to be construed broadly. In fact, the authority is to the contrary. *See* Mot. at 16 (citing cases). Further, the government's "any" argument, Opp. at 19, only begs the question. *See, e.g., United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) ("To emphasize the use of the term 'any' without acknowledging the limitations imposed by the term 'threat' ignores the intent of Congress . . . ."). If the term "instrumentality" does not encompass SOEs, the use of the modifier "any" does not change this outcome.

2. Giving Meaning To All Parts Of The Statute Supports Defendants' Interpretation, Not The Government's

The parties agree that "courts should not interpret a statute in such a way that portions of the statute have no effect." Opp. at 20. But that is precisely what the Government's proposed definition of "instrumentality" would do: it would swallow "department" and "agency."

The Government is also incorrect that the "routine *governmental* action" exception favors its position. Logically, it does not follow that SOEs are included within the definition of "instrumentality" merely because they might perform a small fraction of the items defined as "routine governmental action," such as "mail pick-up," or "providing phone service, power and water supply." 15 U.S.C. § 78dd-2(h)(4)(A).

The Government's position would lead to absurd results because it would mean that grease payments could legally be made to employees of *certain* SOEs (*e.g.*, those hooking up consumers to the "power and water supply"), but not to employees of *other* SOEs (*e.g.*, those scheduling treatment at a state-funded hospital). Plainly, Congress was focused on corrupt payments to traditional *government* officials, which is why it made an exception for grease payments for "routine *governmental* action."

Finally, the Government all but abandons its argument that the FCPA should be interpreted in a way that gives effect to each portion of the statute by ignoring the "bona fide expenditure" affirmative defense that expressly applies only to "a contract with a foreign government or agency thereof," not to one with an "instrumentality." Mot. at 19. The Government's only response is that "[l]ogic suggests 'contracting with the foreign government' also includes departments and instrumentalities." Opp. at 23 n.10. The existence and language of the bona fide expenditure defense, which applies only to government and agency contracts, dooms the Government's argument.

3. The Fact That Other Statutes Expressly Define "Instrumentality" To Include SOEs Supports Defendants, Not The Government

The Government points to the FSIA and the Economic Espionage Act ("EEA") for the proposition that an "SOE could be an agency or instrumentality of a foreign government." Opp. at 24. Defendants agree: where Congress *defines* the term "instrumentality" to include SOEs, as it did in the FSIA and the EEA, SOEs may be considered government instrumentalities. But the Government's assertion that the term "instrumentality" should be read to encompass such entities *in the absence of an express definition* does not follow. The term "instrumentality" does not have an "accepted legal definition," and Ninth Circuit case law is clear that an entity may qualify as an instrumentality under one statute but not another. The analysis is statute-specific, and the default position is 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 . . . ." *Hall*, 86 F.3d at 921. So while the FSIA

and the EEA underscore the point in Defendants' Motion – *i.e.*, that Congress knows how to define "instrumentality" to include SOEs (and any evidence the Government points to showing the alleged prevalence of SOEs in 1977 only bolsters that point) – they provide no support for the Government's argument here.

The exact same thing is true of the Government's focus on domestic SOEs. Defendants do not dispute that there are a handful of U.S. SOEs and that some of these entities may be considered U.S. "instrumentalities" under specific statutes. But these facts simply have no bearing on the meaning of "instrumentality" as used in the FCPA. Rather, they highlight Congress's ability to define them specifically as "instrumentalities" where desired.

Tellingly, the Government actually gives away its game by pointing to these other statutes with one hand, while pointing away from them with the other. While the Government cites the FSIA and the EEA for the proposition that SOEs can be included within the definition of "instrumentality," the Government makes clear that it "is *not* suggesting that the analysis used . . . under the FSIA or EEA is identical to the analysis used in the FCPA . . . ." Opp. at 25-26 (emphasis added); *see also id.* at 40 (same with respect to domestic "instrumentalities"). The Government's position is plainly outcome-driven: Under the FSIA, *subsidiaries* of SOEs do not qualify as "instrumentalities." *See Dole Food Co.*, 538 U.S. at 473. Thus, if the Court were to adopt the FSIA definition of "instrumentality," seven of the nine substantive FCPA counts would fail as a matter of law. So the Government asks the Court to look at these other statutes, but not too closely. The Court should reject this entreaty, which only underscores that the Government's position is unprincipled.

4. The *Charming Betsy* Doctrine Is Of No Help To The Government

The word "instrumentality" has been in the FCPA's definition of "foreign official" since 1977. Other portions of the definition have been amended, but not the "instrumentality" language. Nonetheless, the Government contends that because the U.S. Senate ratified the OECD Convention in 1998 and Congress subsequently made

changes to the FCPA to partially conform it to the OECD Convention (Congress knew there were differences between the two, even after the 1998 amendments, *see* Koehler Decl., ¶¶ 395-96), "instrumentality" should be construed to encompass SOEs. The proposition is meritless.

First, although representatives of the Executive Branch may have believed (incorrectly) that employees of SOEs already qualified as "foreign officials" under the FCPA, there is no evidence that Congress as a whole believed this or even debated this issue in making the 1998 amendments to the FCPA. *See* Koehler, ¶¶ 397-98, 407, 421, 428.

Second, the OECD Convention was not self-executing, but required that signatories "take measures" to implement its provisions. *See id.*, Exh. 85, Art. 1. It is black letter law that "if a treaty is not self executing it is not the treaty but the implementing legislation that is effectively the law of the land." *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980). Two important points follow from this. First, since the "instrumentality" language has remained unchanged since 1977, and did not change in the 1998 "implementing legislation," if that language did not cover SOEs prior to the 1998 amendments, it did not cover SOEs after 1998. *See Pedroza v. BRB*, 624 F.3d 926, 933 (9th Cir. 2010) (holding that "congressional inaction is not a reliable guide to determine legislative intent"). Thus, simply because the Executive Branch may have believed in 1998 that "instrumentality" covered SOEs, that belief does not indicate what the enacting Congress, in 1977, had in mind. Second, the scope of "instrumentality" did not change after the 1998 amendments even if the 1998 Congress thought the FCPA already covered SOEs (which there is no evidence of). If the 1998 Congress intended the FCPA to cover SOEs but made no changes to the statute to effectuate that change – which it did not – SOEs did not somehow become covered by osmosis. *See, e.g., In re Rath*, 402 F.3d 1207, 1211 (Fed. Cir. 2005) ("There is no question but that Congress generally intended Section 44 of the Lanham Act to implement the Paris Convention. But this does not mean that Congress intended

to do so in every respect or that it actually accomplished that objective in all respects . . . .").

The Government cites *United States v. Kay*, 359 F.3d 738, 752 (5th Cir. 2004) ("*Kay I*") for the proposition that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction," Opp. at 30, but the facts in *Kay I* were fundamentally different than here. Moreover, the Supreme Court has recently clarified that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). Accordingly, any post-1977 legislative history regarding the meaning of the word "instrumentality" is irrelevant.

Third, while the Government argues it will be in violation of its treaty obligations if this Court – which, importantly, "do[es] not review federal law for adherence to the law of nations with the same rigor that [it] appl[ies] when [it] must review statutes for adherence to the Constitution," *Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) – holds that payments to employees of SOEs are not covered by the FCPA, the Government fails to mention Commentary 15 to the OECD Convention, which states that the Convention does *not* require criminalization of payments made to employees of SOEs where "the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges." Decl., Exh. 85, at ¶ 15. This omission – citing Commentary 14 without mentioning Commentary 15 – demonstrates that the Government is not merely seeking conformity with the OECD Convention, but is seeking a ruling validating a much broader and boundless interpretation. Additionally, the Government fails to mention that it believes (although Defendants disagree) that bribes paid to non-foreign officials violate the Travel Act. Thus, if this Court were to hold that the FCPA does not cover bribes paid to employees of SOEs, the Government undoubtedly would contend that those payments are still violative of the Travel Act, meeting its OECD commitments.

Finally, some context is important: "T]he *Charming Betsy* canon is not an inviolable rule of general application, but a principle of interpretation that bears on a limited range of cases. . . . [W]e are bound by a properly enacted statute, provided it be constitutional, even if that statute violates international law." *Serra*, 600 F.3d at 1198-1200. Moreover, it will not come as a surprise to the OECD if this Court rules in Defendants' favor since the OECD has questioned the Government's reliance on the "instrumentality" language for years. *See* Mot. at 9; Hanna Reply Decl., Exh. 3.

5. The FCPA's Legislative History Supports Defendants' Interpretation

The Government contends that Defendants "cannot point to a single quote that supports the position that the FCPA should not apply to employees of SOEs" and argues that "that absence is striking." Opp. at 35. Even accepting the Government's literalistic argument as true – Professor Koehler's declaration provides ample support for the proposition that Congress did not intend for the FCPA to reach payments to employess of SOEs, *see* Koehler Decl., ¶¶ 16-18 – the inverse is equally true, that is, the Government "cannot point to a single quote" from a member of Congress that supports the position that the FCPA *should* apply to employees of SOEs.

But perhaps most noteworthy is the fact that the Government now has completely abandoned the legislative history it relied upon in *Nguyen* and *Aguilar*. In those cases, the Government cited to House Report 95-640 (Sept. 28, 1977), which stated in part that "[s]ectors of industry typically involved [in improper payments] are: drugs and health care; oil and gas production and services; food products; aerospace, airlines and air services; and chemicals." *See* Hanna Reply Decl., Exhs. 4-5. The Government cited this report for the proposition that the *recipients* of improper payments were often employed by SOEs in those industries. *See id*. But Professor Koehler's declaration makes clear, as does a plain reading of the language in context, that the House report "refers to the *payors* of the improper payments, not . . . the *recipients*[.]" Koehler Decl., ¶¶ 241-42 and Exh. 46. Faced with the fact that its

characterization of that legislative history in those cases was plainly wrong, the Government has now abandoned reliance on it and switched to Plan B.[8]

The Government's newfound contention that "[a] side-by-side comparison of the four versions of the bills discussed by the defendants demonstrates the replacement of a specific enumerated item with the broad term instrumentality" is similarly meritless. *See* Opp. at 36-39. Congress considered approximately twenty bills before enacting the FCPA, and there is no evidence that the bills that would have expressly included SOEs were dropped in order to *broaden* the language to "instrumentality."

Finally, in the *Aguilar* case, Judge Matz concluded that "the legislative history of the FCPA is inconclusive." Supp. McCormick Decl., Exh. H.4 at 14. If correct, such ambiguity inures to the benefit of the accused, not the prosecutor. Moreover, Congress's general distaste for bribery cannot justify extending FCPA proscriptions to payments made to SOE employees, even though this seemed to be the thrust of Judge Matz's "hypothetical," which he created in a novel "attempt[] to divine what Congress could be deemed to have contemplated." *Id.* Such a "hypothetical" is not necessary because Congress knew about SOEs when it enacted the FCPA and chose not to include them in the statute, but even if the intent of Congress was unclear on the point, the Supreme Court has held that "[w]hen interpreting a criminal statute, we do not play the part of a mind reader. . . . [P]robability is not a guide which a court, in construing a penal statute, can safely take." *Santos*, 553 U.S. at 516; *see also McBoyle*, 283 U.S. at 27 (rejecting the Government's contention that a stolen airplane was encompassed within the statute's definition of stolen "vehicle" and stating that "the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used").

---

[8] The Government's unchallenged misstatements to the *Nguyen* and *Aguilar* courts regarding this legislative history is further reason to give those rulings no weight. In *Esquenazi*, the Government argued the motion was premature and offered to provide legislative history if necessary.

D. The Rule of Lenity Mandates Dismissal of Counts One Through Ten

The Government contends that the rule of lenity applies "only where the statute is grievously ambiguous, leaving courts to guess as to its proper construction." Opp. at 42. Even accepting this formulation of the test – the Supreme Court in *Granderson* said the rule applied "where text, structure, and history fail to establish that the *Government's position is unambiguously correct*" (Mot. at 36) (emphasis added) – the test is satisfied here. After reviewing the text, structure, and history of the FCPA, it is impossible to say with certainty that Congress intended employees of any "entity through which the government of a foreign country achieved an end or purpose," including employees of SOEs, to be deemed "foreign officials." The Government's attempts to distinguish *Santos* fail. In the event of a "tie" between the Government's proposed interpretation and Defendants' interpretation, the "tie must go to the [D]efendant[s]." *Santos*, 553 U.S. at 514.

E. If The Term "Instrumentality" In The FCPA Is Construed To Encompass SOEs, The Statute Is Unconstitutionally Vague As Applied To Defendants

All parties agree that an FCPA violation, like the theft of a "vehicle" in *McBoyle,* is a specific intent crime. But the existence of the FCPA's scienter requirement does not mean the statute will not be rendered void for vagueness if the Court holds that employees of SOEs may be deemed "foreign officials." Because it is not an FCPA violation to bribe a non-foreign official – even if done so "willfully" and "corruptly" – the existence of the scienter requirement "cannot make definite that which is undefined." *Forbes v. Woods*, 71 F. Supp. 2d 1015, 1020 (D. Ariz. 1999) (quoting *Screws v. United States*, 325 U.S. 91, 105 (1945) (plurality opinion); *see also United States v. Loy*, 237 F.3d 251, 265-266 (3d Cir. 2001) ("Though in some situations, a scienter requirement may mitigate an otherwise vague statute . . . such a requirement will not cure all defects for all purposes. . . . Indeed, a contrary rule would rob the vagueness doctrine of all of its meaning, for legislatures would simply repair otherwise vague statutes by inserting the word 'knowingly.'").

The Government also argues that the FCPA should be "subject to a less strict vagueness test" because the FCPA "regulates economic activity," Opp. at 48, but it is well-settled that "[i]f a statute subjects transgressors to criminal penalties" – like here – "vagueness review is even more exacting." *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000) (criminal statute held vague where the word "experimental" was ambiguous because it lacked a "precise definition"); *see also Kolender v. Lawson*, 461 U.S. 352, 358, n. 8 (1983); *Hunt v. City of L.A.*, 2011 U.S. App. LEXIS 5721, at *18 (9th Cir. Mar. 22, 2011). As Defendants face significant prison terms if convicted, *see* Hanna Reply Decl., Exh. 6, the Court should apply an exacting vagueness analysis.

Finally, *Skilling* does not support the Government's argument that because of the alleged "extensive previous prosecutions of bribes to officials at SOEs . . . [it is] clear that the 'core' encompasses those types of bribes." Opp. at 49. Just the opposite, the DOJ prosecuted citizens for violating the honest services statute with no allegation of a bribe or kickback for *over twenty years*, and the *Skilling* court without pause held that such conduct was *not* covered by the statute. The Government is also mistaken that "the 'core' of the FCPA is not what makes up a foreign official, but instead what was the corruption." Opp. at 49. This assertion is belied by the fact that Congress deliberately limited the statute to payments made to "foreign officials," and is further rebutted by the Government's citation to *Kay I*. *See Kay I*, 359 F.3d at 761 ("When the FCPA is read as a whole its core of criminality is seen to be *bribery of a* foreign official . . . ."). Like much of the authority it cites in its brief, the Government seeks to turn *Skilling* on its head. *Skilling* mandates that Defendants' Motion be granted.

III. CONCLUSION

For the reasons set forth in their Motion and above, Defendants respectfully request that the Court dismiss Counts One through Ten of the Indictment.

Dated: May 2, 2011

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: s/Nicola T. Hanna
Nicola T. Hanna

Attorneys for Defendant STUART CARSON

SIDLEY AUSTIN LLP

By: s/Kimberly A. Dunne
Kimberly A. Dunne

Attorneys for Defendant HONG CARSON

BIENERT, MILLER & KATZMAN, PLC

By: s/Thomas H. Bienert, Jr.
Thomas H. Bienert, Jr.

Attorneys for Defendant PAUL COSGROVE

LAW OFFICES OF DAVID W. WIECHERT

By: s/David W. Wiechert
David W. Wiechert

Attorneys for Defendant DAVID EDMONDS

101069951_1.DOC

EXHIBIT A

Proposed "Factors" For Determining Whether A State-Owned Business Enterprise Is An "Instrumentality" Under The FCPA

OECD Responses (1998)	Government's Proposed Stipulation (2011)	Hon. A. Howard Matz (2011)
The Department of Justice has not adopted a bright-line test for determining which enterprises are instrumentalities. Among the factors that it considers are: (1) The foreign state's own characterization of the enterprise and its employees, *i.e.*, whether it prohibits and prosecutes bribery of the enterprise's employees as public corruption; (2) The purpose of the enterprise; and (3) The degree of control exercised over the enterprise by the foreign government.	(1) The circumstances surrounding the entity's creation; (2) The extent of ownership of the entity by the foreign government; (3) The purpose of the entity's activities; (4) The foreign government's control of the entity; (5) The level of the foreign government's financial support of the entity; (6) The entity's employment policies; and (7) The entity's obligations and privileges under the foreign government's law.	(1) The entity provides a service to its citizens – indeed, in many cases to all the inhabitants – of the jurisdiction; (2) The key officers and directors of the entity are, or are appointed by, government officials; (3) The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such an entrance fees to a national park; (4) The entity is vested with and exercises exclusive or controlling power to administer its designated functions; and (5) The entity is widely perceived and understood to be performing official (i.e., governmental) functions.

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2011, I electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF AMENDED MOTION TO DISMISS COUNTS ONE THROUGH TEN OF THE INDICTMENT** with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Andrew Gentin — andrew.gentin@usdoj.gov

Douglas F. McCormick — USACAC.SACriminal@usdoj.gov, doug.mccormick@usdoj.gov

Hank Bond Walther — hank.walther@usdoj.gov

Charles G. LaBella — charles.labella@usdoj.gov

Kimberly A. Dunne — kdunne@sidley.com

David W. Wiechert — dwiechert@aol.com

Thomas H. Bienert, Jr. — tbienert@ bmkattorneys.com

Kenneth M. Miller — kmiller@bmkattorneys.com

Teresa C. Alarcon — talarcon@ bmkattorneys.com

Marc S. Harris — mharris@scheperkim.com, vkirkland@scheperkim.com

Jean M. Nelson — jnelson@scheperkim.com

/s/Nicola T. Hanna
Nicola T. Hanna