

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. SACR 09-0077 JVS Date December 8, 2009

Present: The Honorable James V. Selna

Interpreter Not Needed

Karla J. Tunis

Not Present

Not Present

Deputy Clerk

Court Reporter.

Assistant U.S. Attorney

<u>U.S.A. v. Defendant(s):</u>		<u>Present</u>	<u>Cust.</u>	<u>Bond</u>	<u>Attorneys for Defendants:</u>	<u>Present</u>	<u>App.</u>	<u>Ret.</u>
1.	Stuart Carson			X	1. Nicole T. Hanna			X
2.	Hong Carson			X	2. Kimberly A. Dunne			X
3.	Paul Cosgrove			X	3. Kenneth Miller			X
4.	David Edmonds			X	4. David W. Weichert			X

(In Chambers)

Proceedings: Order Granting in Part and Denying in Part Defendants' Motion to Compel

Defendants Stuart Carson *et al.* (collectively “Carson” or “defendants”) move pursuant to Rule 16 of the Federal Rules of Criminal Procedure to compel the Government to produce 16 categories of documents, the bulk of which are not in the possession of the Government but rather Control Components, Inc. (“CCI”) and its corporate parent IMI plc (“IMI”). In large measure, the Motion turns on the theory that the Government has constructive custody and control over the CCI materials sought. For that reason, the Court deals with that theory first and then turns to other aspects of the Motion.¹

Both the Government and CCI oppose the Motion.²

I. The Scope of the Government’s Custody and Control.

A. Background.

The present Indictment charges Carson with violations of the Foreign Corrupt

¹Unless germane to the issue discussed, the Court simply refers to CCI and does not distinguish between the corporate third parties in this order.

²The Court granted CCI and IMI the right to intervene on this Motion on a limited basis to the extent CCI’s rights under Plea Agreement, including claims of privilege, are affected. (Docket No. 115.)

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Practices Act (“FCPA”), 15 U.S. C. § 78dd-2, and the Travel Act (“TA”), 18 U.S.C. § 1952. A separate but parallel prosecution was brought against Carson’s employer, CCI. United States v. Control Components, Inc., Case No. SACR 09-162 (“CCI Case”). CCI ultimately entered into a Plea Agreement and pled guilty to the charges. (CCI Case, Docket Nos. 7, 22.) CCI was fined \$18.2 million and placed on corporate probation. (Id., Docket No. 23.)

Prior to the prosecution, CCI had conducted an extensive internal investigation. The investigation was led by outside counsel Steptoe & Johnson LLP (“Steptoe”) with the assistance of forensic accountants from Ernst & Young (“E & Y”). (Heberling Decl., ¶¶ 6-8.) The investigation resulted in the capture of documents and databases throughout the corporations’ world-wide operations which were then organized into a searchable database by E & Y. (Id.)

The volume of material captured is 5.6 million documents, equating to 75 million pages. Significantly, Steptoe made no effort to conduct a document-by-document review, but used the E & Y database to gather relevant materials. (Id., ¶¶ 13-14.) Similarly, no effort was made to identify each privileged document in the captured materials. (Id., ¶ 15.) The captured materials include attorney-client and work product materials, including the files on IMI’s general counsel and in-house attorneys. (Id.)

As part of conducting interviews with CCI personnel, Steptoe used the database to compile relevant documents, and created interview binders. (Id., ¶ 13.) The interviews were conducted on behalf of the corporations, and interviewees were so informed through so-called “Upjohn warnings.”³ (Id., ¶ 10.) The results of the interviews were memorialized in the form of the work product of Steptoe attorneys. (Id., ¶ 11.)

The Plea Agreement is essentially a contract between CCI and the Government. Among other things, CCI agreed to:

- “continue to cooperate fully with the Department [of Justice] and the Federal Bureau of Investigation, in a manner consistent with the non-waiver agreement between the parties.” (Plea Agreement, ¶ 6.)
- “disclose to the Department all non-privileged information with respect to the activities of CCI and its affiliates . . . concerning all matters relating to corrupt payments to foreign official or to employees of private customers . . . and about which the Department, or the Federal Bureau of Investigation . . . shall inquire.”

³See Upjohn Co. v. United States, 449 U.S. 383 (1981).

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(Id.)

- “provide to the Department, upon request, any non-privileged document, record or other tangible evidence relating to such corrupt payments.” (Id.)

B. Carson’s Request for CCI Documents.

Although Carson has some more specific requests, the first request is sweeping: for “Control Component Inc.’s (‘CCI’) Electronic Database collected during its internal investigation.” (Motion, p. 2.) Other requests include “Documents relating to the 2007-2008 investigation into commission payments conducted on behalf of CCI,” “Documents relating to any investigations, audits or inquiries conducted by IMI/CCI into allegations of wrongdoing by Defendants,” and “Documents relating to the 2004 audit of commission payments conducted on behalf of IMI and/or CCI.” (Id.)

C. The Theory of Constructive Custody.

By virtue of the CCI Plea Agreement, Carson argues that documents within the possession of CCI fall within the scope of required production under Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure. (Memorandum, p. 6.) In relevant part, the Rule provides:

Upon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody, or control and:

(I) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(Fed. R. Crim. P. 16(a)(1)(E); emphasis supplied.) The Court rejects the contention that under Rule 16 the Government’s obligation extends to materials in the possession of a private third party.

1. Carson as Third-Party Beneficiary.

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While the argument is somewhat formalistic, the Government contends that Carson is not a third-party beneficiary of the Plea Agreement. It is plain that usual contract principles govern interpretation of a plea agreement. United States v. Given, 164 F.3d 389, 395-96 (7th Cir. 1999). In deciding whether third parties were beneficiaries to an immunity agreement, the Seventh Circuit in United States v. Andreas, 216 F.3d 645, 663 (7th Cir. 2000), looked to the intent of the parties and the circumstances of the agreement in concluding that no third-party rights existed. There is nothing in Plea Agreement to suggest that either the Government or CCI intended expressly or otherwise to create rights in Carson. Indeed, the obligations of CCI are carefully circumscribed.

Carson argues that there exists an obligation to produce documents in CCI's possession without regard to creation of any third-party beneficiary relationship under the Plea Agreement.⁴ (Reply, pp 15-16.) With this the Court agrees—if there is an independent basis for the production of documents in CCI's possession. However, as noted below, the Court finds none.

2. Possession.

Generally, the trigger for an obligation to produce under Rule 16(a)(1)(E) is actual possession. In United States v. Fort, 472 F.3d 1106, 1118 (9th Cir. 2007), the requested materials were in the hands of a state agency which was not part of the Government's investigation. The Ninth Circuit described its case law:

We held that the evidence became discoverable only when the state authorities placed it in the hands of the federal authorities, because “the triggering requirement under rule 16[(a)(1)(E)] is that the papers, documents, and tangible objects be in the actual possession, custody or control of the government.”

(Id.) There is no dispute that the Government has physical possession of only those materials which CCI had produced to it, which is only a small subset of the 75 million pages in the CCI Electronic Database. The Government points out that it has produced substantially all of those documents. (Government Opposition, pp. 1, 5 .)

The fact that the concept of possession extends to federal agencies participating in the Government's investigation is of no benefit to Carson. United States v. Santiago, 46 F.3d

⁴Certainly, no third-party beneficiary relationship would be required to compel production of materials in the hands of a federal investigating agency working with the Department of Justice. See discussion in text, Section I.C.2.

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885, 893-68 (9th Cir.1995); United States v. Bryan, 886 F.2d 1032, 1036 (9th Cir. 1989). Whatever its obligations under the Plea Agreement, CCI is not a federal agency and is not part of the investigation.⁵

At the end of the day, Carson's argument rests on the district court decision in United States v. Stein, 488 Supp. 2d 350 (S.D. N.Y. 2007). There are many reasons not to follow Stein's lead. First, the terms of the Deferred Prosecution Agreement executed by KPMG in Stein were sweeping and open ended:

8. KPMG agrees that its continuing cooperation with the Office's investigation shall include, but not be limited to, the following:

(a). Completely and truthfully disclosing all information in its possession to the Office and the IRS about which the Office and the IRS may inquire, including but not limited to all information about activities of KPMG, present and former partners, employees, and agents of KPMG . . .⁶

(Id. at 353; emphasis supplied; internal quotation marks deleted.) By no stretch of the imagination did CCI enter into an agreement allowing the Government to request anything in the possession of CCI. The KPMG agreement is devoid of the subject matter and comprehensive privilege strictures for which CCI bargained.⁷ (Plea Agreement, ¶¶ 6.) Even if Stein were taken at face value, it would not justify the blanket production of much of what Carson requests, including most specifically CCI's Electronic Database.⁸

⁵As the Government points out (Government Opposition, p. 17), parallel inspection obligations under Rule 16(a)(1)(E) cannot be stretched to third parties. United States v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980). This reinforces the notion that Rule 16 concerns the Government, not third parties.

⁶KPMG's obligations went beyond simply producing information. For example, it agreed to "[a]ssembling, organizing, and providing, in responsive and prompt fashion, and, upon request, expedited fashion, all documents, records, information, and other evidence in KPMG's possession, custody, or control as may be requested by the Office or the IRS." 488 F. Supp. 2d at 353; internal quotation marks deleted.

⁷However, there were some limitations on privileged material. Stein, 488 F. Supp. 2d at 353-54.

⁸As discussed below, the CCI Electronic Database would appear to subject to a well-founded claim of attorney work

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The tenor of Stein is inconsistent with Ninth Circuit's delineation of the Government's obligations under Rule 16 and Rule 16 case law in general. Most of Stein's legal analysis of the concept of constructive custody hinges on private parent/subsidiary and like relationships. Stein 488 F. Supp. 2d at 361 & nn. 45, 46. The two district court criminal decisions which Stein cites provide modest support. (Id. at 362 & nn. 50, 52.) United States v. Kilroy, 523 F. Supp. 206 (E.D. Wis. 1981), involved an agreement just as broad as the KPMG agreement, and United States v. Skeddle, 176 F.R.D. 258, 261-62 (N.D. Ohio), required to the Government of recapture and produce documents which it once had but returned.⁹

3. Materiality.

With respect to many categories, Carson fails to make the required materiality showing under Rule 16. "Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense." United States v. Mandel 914 F.2d 1215, 1219 (9th Cir. 1990). Material evidence is evidence that will act as a shield to the Government's case which is a narrow focus. United States v. Armstrong, 517 U.S. 465, 462 (1996).¹⁰

Requests such as the blanket request for the CCI Electronic Database or documents

product. See text, Section II.A.

⁹The Government's citation of United States v. Mejia, 448 F.3d 436 (D.C. Cir. 2006), is somewhat helpful. (Government Opposition, pp. 17-18.) There the District of Columbia Circuit held that the Government was not required to seek documents in Costa Rica under the applicable treaty. (Id. at 444.)

¹⁰"[W]e conclude that in the context of Rule 16 'the defendant's defense' means the defendant's response to the Government's case in chief. While it might be argued that as a general matter, the concept of a 'defense' includes any claim that is a 'sword,' challenging the prosecution's conduct of the case, the term may encompass only the narrower class of 'shield' claims, which refute the Government's arguments that the defendant committed the crime charged. Rule 16(a)(1)(C) tends to support the 'shield-only' reading. If 'defense' means an argument in response to the prosecution's case in chief, there is a perceptible symmetry between documents 'material to the preparation of the defendant's defense,' and, in the very next phrase, documents 'intended for use by the government as evidence in chief at the trial.'" United States v. Armstrong, 517 U.S. at 462.

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relating generally to unspecified “allegations of wrongdoing by Defendants” simply lack the threshold showing which Rule 16 requires.

As both the Government and CCI point out (Government Opposition , pp. 8, 24; CCI Opposition, p. 14), to the extent that Carson can identify material evidence with relative particularity, his remedy is by way of a subpoena under Rule 17 directed to CCI.

II. Other Production Requests.

A number of requested items do not hinge on Carson’s expanded theory of custody and control. The Court takes these items up in turn.

A. CCI’s Privileged Documents.

The Government leaves to CCI response to Carson’s request for any privileged material in the possession of the Government. (Government Opposition, p. 23.) CCI represents that the only privileged materials in the possession of the Government are four charts which Steptoe created and provided to the Government. (CCI Opposition, p. 1.) The essence of one of those is reflected in the Government’s response to the Court’s grant of bill of particulars. (See Section II.E, below.) The remaining charts dealing with improper gifts, entertainment, and travel expenses; improper expenses for “training trips”; and a chart of CCI’s revenues and profits were prepared in a recognized manner to preserve work product. (Heberling Decl., ¶¶ 23-24.) Given the representation that the documents from which the charts were produced were delivered to the Government and produced to Carson (CCI Opposition, pp. 14-15; Heberling Decl., ¶¶ 22-23), the Court finds no good cause to set aside the work product privilege. In re Grand Jury Subpoena, 357 F.3d 900, 906 (9th Cir. 2004) (“documents may only be ordered produced upon an adverse party’s demonstration of ‘substantial need [for] the materials’ and ‘undue hardship [in obtaining] the substantial equivalent of the materials by other means’”).

To the extent that CCI produced privileged materials, it preserved their confidentiality by way of a Confidentiality and Non-Waiver Agreement between IMI and the Government. (Heberling Decl., ¶ 18 & Ex. A.) The Government acknowledges the Confidentiality and Non-Waive Agreement and its limitation in the Plea Agreement. (Plea Agreement, ¶ 6.) There is ample authority for respecting this type of an agreement. (See CCI Opposition, pp. 18-19 and cases summarized there.)

Carson relies heavily on the district court decision in United States v. Bergonzi, 216 F.R.D. 487, 493-96 (N.D. Cal. 2003). In contrast to Bergonzi, the Confidentiality and Non-Waiver Agreement and Plea Agreement here do not vest in the Government entities the type of

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discretion to disclose which the Bergonzi court found vitiated any expectation of confidentiality. Carson accurately pointed out in oral argument that both here and in Bergonzi, the Government could disclose confidential information “to the extent that DOJ determines in its sole discretion that disclosure is otherwise required by law.” Compare Heberling Decl., Ex. A, p. 2 with Bergonzi, 216 F.R.D. at 494. But the agreements with the SEC and the DOJ in Bergonzi went much further:

Specifically, the Company authorized the SEC to, in its discretion, “determine that disclosure is otherwise required by federal law or in furtherance of [either entities'] discharge of its duties and responsibilities.” SEC Agreement at 2. Likewise, the Company “consent[ed] to the disclosure of the [documents] to a federal grand jury as the [USAO] deems appropriate, and in any criminal prosecution that may result from the [USAO's] investigation.”

Bergonzi, 216 F.R.D. at 494 (bracketed material in original). The tenor of the CCI Confidentiality and Non-Waiver Agreement is to maintain confidentiality except “as required by law.” Unlike the situation in Bergonzi, this Court is “persuaded that the Company intended the communications to remain confidential.” (Id.)

To the extent that the present Motion seeks privileged materials in CCI’s possession, the Court notes the strong showing which CCI has made with respect to attorney-client and work product materials. (Heberling Decl., ¶¶ 10-12, 18-20.) However, the Court also finds that any privilege challenge to documents in CCI’s possession is better addressed in the context of enforcing a subpoena to CCI or IMI which has met the requirements of Rule 17 of the Federal Rules of Criminal Procedure.

B. Pages Missing from Government Production.

Carson contends that the Government has not produced some of the 37,000 pages which CCI produced to the Government. The Government adequately explains that there was an error in CCI’s page count in its Sentencing Memorandum. (Government Opposition, p. 5 n. 2.) It represents that all materials have been produced including an additional 2,000 pages. (Id.)

C. Communications with the Government.

Carson seeks documents reflecting communications between CCI and IMI and the federal agencies involved in this investigation. The Government acknowledges that it is required to produce such documents to the extent that they constitute Brady or Giglio materials,

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and as noted in the next section, represents that is has complied with these obligations.

The Court finds that Carson has not made a sufficient showing of materiality to support blanket production. Courts have noted the minimal evidentiary value of drafts, United States v. Shanahan, 252 F.R.D. 536, 542 (E.D. Mo. 2008) (“As a general rule, requests for ‘any and all documents’ are emblematic of a discovery request or of a fishing expedition.”).

D. Brady and Giglio Materials.

Carson seeks all Brady and Materials which have not been produced. Putting aside documents in CCI’s possession, the Government represents that it has produced all such material. (Government Opposition, p. 6.)

E. Supplemental Bill of Particulars.

The Government sought to satisfy its obligation to provide a bill of particulars concerning the 236 alleged bribes by providing Carson a chart which Steptoe had prepared and provided to the Government. (Government Opposition, p. 7 & Ex. 1.) In it May 18, 2009 Order, the Court directed to the Government to furnish the following specifics:

- The date of the payment.
- The amount of the payment.
- The name of the recipient and business affiliation of the recipient, or if the recipient is an intermediary, the business affiliation of the individual who was intended to benefit from the payment.

(Docket No. 75, pp. 3-4.) While the Government may have provided more than ordered by the Court with its end notes and other explanations (Government Opposition, p. 7), it also provided less. In many instance the year but not the date the payment is provided. (E.g., Government Opposition, Ex. 1, line 1.) In a number of instances, recipients of the payments are identified only as “FIC’s”—presumably “friends in court”—of a particular entity. (E.g., id., Ex. 1, line 28 (“Fujian Pacific FIC(s)”).) The absence of detail is particularly troubling where a payment relates to a specific count in the Indictment. (E.g., id., Ex. 1, lines 28, 79, 80, 94, 160, 221.)

Within 20 days, the Government shall supplement the chart with the particulars ordered by the Court. Where it cannot do so after a good faith effort, it shall file a declaration to that effect.

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F. Statements of Non-Testifying Co-Conspirators.

Acknowledging that statements of testifying co-conspirators would be governed by the Jencks Act and its separate timetable for production (Memorandum, p. 42), Carson seeks now the statements of non-testifying co-conspirators made during the course of the conspiracy. The courts have recognized that this is a proper subject for Rule 16 production. United States v. Payden, 613 F. Supp. 800, 820 (S.D. N.Y. 1983); United States v. DeFabritus, 605 F.Supp. 1538, 1548 (S.D.N.Y.1985); United States v. Turkish, 458 F.Supp. 874, 882 (S.D.N.Y.1978), aff'd, 623 F.2d 769 (2d Cir.1980).

The Government makes no response to this request, and the Court orders production within twenty days.

G. Preservation of Agent/Investigator's Notes.

Carson asks for an order directing that the Government preserve for trial the notes of any agent or investigator. The Court so orders. United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976).

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