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' PROPOSED JURY INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On May 18, 2011, this Court entered an Order Denying Defendants' Motion to Dismiss Counts One Through Ten Of The Indictment on the basis that "the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact." 5-18-11 Order (Docket No. 373) at 5. The Court recognized, however, that (1) there needed to be a *legal* yardstick against which this question of fact would be measured by a jury, and (2) Defendants needed to know what that yardstick was sooner rather than later – well in advance of the trial date, not on the eve of the trial as the government suggested. *See* Declaration of Nicola T. Hanna ("Hanna Decl."), Exh. A (5-9-11 Hearing Transcript) at 57:9-11 ("The government anticipates there will be lengthy briefing over the jury instruction going to the definition of 'instrumentality.'). The government and Defendants subsequently stipulated, and the Court ordered, that the parties would submit their proposed "instrumentality" jury instructions and the legal support for those instructions on June 30, 2011, with objections to follow on July 25, 2011, and a hearing to be conducted on August 12, 2011. *See* Docket No. 371. Trial is currently scheduled for June 5, 2012.

Defendants respectfully disagree with the Court's May 18 Order denying their Motion to Dismiss ("the May 18 Order") and continue to believe, as set forth in their Motion to Dismiss (the "Motion") and the supporting Declaration of Professor Michael J. Koehler, that the FCPA does not criminalize payments made to employees of state-owned enterprises ("SOEs"). Defendants reserve all of their rights to challenge the May 18 Order, if necessary, on appeal. Were it not for the existence of the Court's May 18 Order, Defendants would propose a jury instruction that states that "a state-owned enterprise is not a foreign government instrumentality within the meaning of the FCPA, and officers and employees of a state-owned enterprise therefore are not 'foreign officials' under the FCPA." But given the existence of the Court's May 18

Order, and without waiver of their right to challenge all aspects of that Order on appeal, Defendants herein propose a jury instruction that accepts the Court's premise that "state-owned companies may be considered 'instrumentalities' under the FCPA, but whether such companies qualify as 'instrumentalities' is a question of fact." 5-18-11 Order at 13.

In preparing their proposed "instrumentality" jury instruction, Defendants have been guided by three overarching principles:

First, it will not be sufficient to merely provide the jury with a list of non-exclusive, unweighted factors – none of which is dispositive – and ask the jury to "figure it out," as the government seems to suggest. That will provide the jury with no real standard for making an "instrumentality" determination and will be tantamount to giving the jury no instruction at all on the "instrumentality" issue. *See, e.g.*, *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1337 (7th Cir. 1988) (Posner, J.) ("It is not true that the law is what a jury might make out of statutory language. The law is the statute as interpreted. The duty of interpretation is the judge's. Having interpreted the statute he must then convey the statute's meaning, as interpreted, in words the jury can understand.").

Second, in determining an appropriate jury instruction, the Court should not accept any invitation from the government to borrow *wholesale* from an "instrumentality" analysis used under another statute – such as the "organ" prong of the Foreign Sovereign Immunities Act ("FSIA"), a provision the government highlighted at the hearing on Defendants' Motion. *See* Hanna Decl., Exh. A at 60:4-10 ("What [Defendants] did not discuss was the organ prong of the Foreign Sovereign Immunities Act, which discusses at greater length and identifies a number of the factors which the government drew upon in identifying the various factors of what an instrumentality is and which are relevant for determining what an instrumentality of a foreign government is."). The FSIA may provide some guidance (indeed, Defendants have had to consult FSIA case law, because the FCPA legislative history is devoid of

any discussion of SOEs as "instrumentalities," much less any discussion of which SOEs qualify and which do not qualify), but because it is a different statute than the FCPA – the FSIA is a civil statute aimed at determining, *inter alia*, when a foreign entity will be considered to be part of a foreign government for purposes of sovereign immunity – its applicability to interpreting the "instrumentality" provision of the FCPA, a criminal statute that by definition must be strictly construed, is necessarily limited. *Compare USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206 (3d Cir. 2003) (noting with approval that the Ninth Circuit has "developed a *flexible approach* to determine whether an entity qualifies as an organ of a foreign state under the FSIA") (emphasis added) *with United States v. Napier*, 861 F.2d 547, 548 (9th Cir. 1988) ("It has long been settled that penal statutes are to be construed strictly, and that one is not to be subjected to a penalty unless the words of the statute plainly impose it."). *See also United States v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010) (Kozinski, C.J., concurring) ("Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal.").

Third, in determining the correct "instrumentality" jury instruction, the goals and structure of the FCPA must be considered. The FCPA is aimed at combating foreign bribery, but it is *not* a general commercial anti-bribery statute. Rather, the FCPA is aimed at preventing the special harm caused by the bribery of foreign *government* officials. Accordingly, Congress criminalized payments only to a "foreign official," a term expressly and narrowly defined in pertinent part as an "officer or employee of a foreign government or any department, agency, or instrumentality thereof." The Court should provide the jury with an "instrumentality" instruction that accurately reflects Congress's desire to criminalize payments made to foreign *government* officials, not payments made to employees of a company that is not, in both form and substance, actually part of the foreign government.

II.
PROPOSED "FOREIGN OFFICIAL"/ "INSTRUMENTALITY" JURY INSTRUCTION

Defendants propose that the Court adopt the following jury instruction, the text of which is also attached hereto as Exhibit A:

* * *

The FCPA does not criminalize all payments made to foreign nationals, but only corrupt payments made to a "foreign official." Therefore, in order for a defendant to be found guilty of an FCPA violation, the government must, among other things, prove beyond a reasonable doubt that the intended recipient of the corrupt payment at issue was a "foreign official" at the time of the alleged payment.

The term "foreign official" means any officer or employee of a foreign government (or any department, agency, or instrumentality thereof), or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.

A "state-owned" business enterprise may, under certain circumstances, qualify as an "instrumentality" of a foreign government. On the other hand, not all "state-owned" business enterprises qualify as "instrumentalities" of a foreign government. It is up to you to determine, weighing all of the evidence, whether a particular business enterprise is or is not an "instrumentality" of a foreign government, and whether the officers and employees of that enterprise therefore are – or are not – "foreign officials" under the statute.

To conclude that a business enterprise is an "instrumentality" of a foreign government, you must conclude beyond a reasonable doubt that the business enterprise is part of the foreign government itself. In order to conclude that a business enterprise is part of the foreign government itself, you must find that the government has established, beyond a reasonable doubt, each of the following four elements:

First, the foreign government itself directly owns at least a majority of the business enterprise's shares.

Second, the foreign government itself controls the day-to-day operations of the business enterprise, including the appointment of key officers and directors (who themselves may be government officials); the hiring and firing of employees; the financing of the enterprise through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties; and the approval of contract specifications and the awarding of contracts.

Third, the business enterprise exists for the sole and exclusive purpose of performing a public function traditionally carried out by the government. A "public function" is a function that benefits only the foreign government (and its citizens), not private shareholders. A business enterprise that exists to maximize profits rather than pursue public objectives does not perform a public function and therefore is not a foreign government instrumentality.

Fourth, employees of the business enterprise are considered to be public employees or civil servants under the law of the foreign country.

If the government fails to prove each of these four elements beyond a reasonable doubt for the "state-owned" business enterprise at issue in a particular count, and therefore fails to prove that the intended recipient of the alleged corrupt payment was a "foreign official," you must find the defendant "not guilty" on that count.

A business enterprise is not a foreign government instrumentality if it is a mere subsidiary of a state-owned company. To qualify as a foreign government instrumentality, the business enterprise must, as set forth above, be directly and majority owned by the foreign government itself. Therefore, an employee of a business enterprise that is merely a subsidiary of another entity that is majority owned by the foreign government is not an employee of a foreign government instrumentality and is not a "foreign official."

A business enterprise that 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,

is not a foreign government instrumentality, and its employees therefore are not "foreign officials."

III.
INDIVIDUAL COMPONENTS OF PROPOSED INSTRUCTION

Set forth below are the individual components of Defendants' proposed instruction and the legal authority in support of each component.

A. Paragraph One

1. Text

"The FCPA does not criminalize all payments made to foreign nationals, but only corrupt payments made to a 'foreign official.' Therefore, in order for a defendant to be found guilty of an FCPA violation, the government must, among other things, prove beyond a reasonable doubt that the intended recipient of the corrupt payment at issue was a 'foreign official' at the time of the alleged payment."

2. Authority

This paragraph sets forth a clear statement of law that the government does not and cannot dispute, *i.e.*, that the FCPA anti-bribery provisions proscribe payments made only to a "foreign official." The government similarly cannot dispute that "foreign official" is an element of the offense that the government must prove beyond a reasonable doubt. *See* 15 U.S.C. § 78dd-2(a).

B. Paragraph Two

1. Text

"The term 'foreign official' means any officer or employee of a foreign government (or any department, agency, or instrumentality of that government), or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality."

2. Authority

This paragraph comes directly from the relevant portions of the FCPA's definition of "foreign official," *see* 15 U.S.C. § 78dd-2(h)(2)(A), and is the same

instruction given to the jury in *United States v. Aguilar*, Case No. CR 10-1031 (C.D. Cal.). *See* Hanna Decl., Exh. B.[1]

C. Paragraph Three

1. Text

"A 'state-owned' business enterprise may, under certain circumstances, qualify as an 'instrumentality' of a foreign government. On the other hand, not all 'state-owned' business enterprises qualify as 'instrumentalities' of a foreign government. It is up to you to determine, weighing all of the evidence, whether a particular business enterprise is or is not an 'instrumentality' of a foreign government, and whether the officers and employees of that enterprise therefore are – or are not – 'foreign officials' under the statute."

2. Authority

This paragraph reflects the Court's holding in its May 18 Order. *See, e.g.*, 5-18-11 Order at 5 ("[T]he Court concludes that the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact."); *id.* at 13 ("[S]tate-owned companies may be considered 'instrumentalities' under the FCPA, but whether such companies qualify as 'instrumentalities' is a question of fact."); *id.* at 14 ("[T]he ordinary meaning of 'instrumentality' indicates that state-owned companies could fall under the ambit of the FCPA. Whether such companies do, in fact, qualify as an instrumentality is a question of fact.").

D. Paragraph Four, First Sentence

1. Text

"To conclude that a business enterprise is an 'instrumentality' of a foreign government, you must conclude beyond a reasonable doubt that the business enterprise is part of the foreign government itself."

---

[1] Defendants disagree with the portion of the instruction in *United States v. Aguilar* stating, "An 'instrumentality' of a foreign government can include certain state-owned or state-controlled companies." Hanna Decl., Exh. B.

2. Authority

In *Hall v. American National Red Cross*, 86 F.3d 919 (9th Cir. 1996), the Ninth Circuit stated:

> [C]ourts sometimes use the phrase "agency or instrumentality" when they are actually asking whether a particular institution is part of the government itself. . . . 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.

Id. at 921. In its May 18 Order, this Court said that it did "not discern any tension between" *Hall's* language (which the Court described as dicta) "and the Court's conclusion that state-owned companies could be an 'instrumentality' of a foreign government" because "some state-owned companies are undoubtedly 'part of the government.'" 5-18-11 Order at 10 n. 9. The word "instrumentality" in the FCPA is contained in what the *Hall* court characterized as a "general, inclusionary definition," and there is no evidence that Congress intended the word "instrumentality" in the FCPA to extend to entities that were not "part of the government itself." Accordingly, the jury instruction should reflect this standard.

This instruction is appropriate for two additional reasons. First, the terms that precede "instrumentality" in the statute – "department" and "agency" – are both indisputably "part of the government itself"; "instrumentality" should not be construed in a manner that is fundamentally different than those terms. *See* Order at 7 ("The Court agrees that the meaning of 'instrumentality' should be considered both within the context of the preceding terms of the FCPA and in view of the FCPA as a whole."); *United States v. Williams*, 553 U.S. 285, 294 (2008) (stating that "the commonsense

canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated"); *see also* Defendants' Motion to Dismiss ("2-28-11 Mot.") at 12-15.[2] Second, as explained in Defendants' Motion to Dismiss, there is overwhelming support in both the text and structure of the FCPA and the legislative history that the statute was aimed at preventing improper payments to traditional government officials. *See* 2-28-11 Mot. at 16-30. Indeed, the terms "foreign government official," "foreign public official," and "foreign official" were used interchangeably throughout the legislative history. *See id*. at 26-27. Defendants disagree that the term "foreign official" extends to employees of stated-owned companies, but if it does, it must extend only to employees of those companies that are actually "part of the foreign government itself."

E. Paragraph Four, Second Sentence

1. Text

"In order to conclude that a business enterprise is part of the foreign government itself, you must find that the government has established, beyond a reasonable doubt, each of the following four elements:"

2. Authority

As explained in additional detail in the four paragraphs that follow, this instruction proposes that the government be required to prove four things to establish that a business enterprise is an "instrumentality" within the meaning of the FCPA: (1) ownership; (2) control; (3) public function, and (4) public-employee status. These four elements are the hallmarks of government "departments" and "agencies" – which are owned by governments, controlled by governments, exist for the sole and exclusive purpose of performing public functions, and whose employees are considered to be

---

[2] Defendants are aware that the Court did not accept the *noscitur a sociis* argument made in their Motion to Dismiss and held that excluding SOEs from the definition of "instrumentality" would "impermissibl[y] narrow[] a statute intended to mount a broad attack on government corruption." Order at 8. As the Court recognized, however, the FCPA is aimed at *government* corruption.

public employees – and they should similarly define government "instrumentalities." Indeed, the Court's May 18 Order recognized the importance of each of these factors. *See, e.g.*, 5-18-11 Order at 7 (noting that a business enterprise may qualify as an "instrumentality" when "a monetary investment **[ownership]** is combined with additional factors that objectively indicate that the entity is being used **[control]** as an instrument to carry out governmental objectives **[public function]**"); *id.* at 5 (noting the "foreign state's characterization of the entity and its employees" as a factor that "bear[s] on the question of whether a business entity constitutes a government instrumentality"). The government also has recognized the importance of these factors. *See* Hanna Decl., Exh. C (U.S. Response to OECD Questions Concerning Phase I, at § A.1.1) ("Among the factors that [the Department of Justice] 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.").

F. Paragraph Five

1. Text

"***First***, the foreign government itself directly owns at least a majority of the business enterprise's shares."

2. Authority

No business enterprise that is not at least directly majority owned by a foreign government should qualify as a government "instrumentality." There is authority for this standard in the OECD Convention's definition of "public enterprise," which recognizes that a government will be considered to exercise a "dominant influence" over an enterprise, *inter alia*, "when the government or governments hold the majority of the enterprise's subscribed capital . . . ." *See* Hanna Decl., Exh. D (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents) at 15, ¶ 14. A direct majority-

ownership standard is also supported by the Foreign Sovereign Immunities Act's definition of "agency or instrumentality of a foreign state," which means "an organ of a foreign state or political subdivision thereof, *or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof*." 28 U.S.C. § 1603(b) (emphasis added). *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003) ("The better rule is the one supported by the statutory text and elementary principles of corporate law. A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares."). Finally, although it has brought a handful of FCPA cases involving entities with less than majority government ownership (*see* Motion to Dismiss at 8-9), the government appears to have generally recognized the majority-ownership threshold in its enforcement actions. *See, e.g.*, Docket No. 335 at Exh. I. *Compare* 15 U.S.C. § 78m(b)(6) ("Where an issuer . . . holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, . . . the issuer [shall] proceed in good faith to use its influence . . . to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls.").

G. Paragraph Six

1. Text

"***Second***, the foreign government itself controls the day-to-day operations of the business enterprise, including the appointment of key officers and directors (who themselves may be government officials); the hiring and firing of employees; the financing of the enterprise through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties; and the approval of contract specifications and the awarding of contracts."

2. Authority

Majority ownership should be a necessary but by no means sufficient condition for "instrumentality" status under the FCPA. A high degree of control in the daily operations of the enterprise also should be required. This will effectuate the goal of

the FCPA, which is not to criminalize all overseas bribery but rather to prevent the special harm presented by the bribery of foreign *government* officials. *See* 2-28-11 Mot. at 23-26. When the daily operations of a business enterprise are managed by a foreign government, this goal may be implicated (accepting, for the sake of argument, the Court's premise that an SOE can be an FCPA "instrumentality"). But the goal is not implicated when a business enterprise merely has a foreign government as one of many shareholders.

The Ninth Circuit's decision in *Patrickson v. Dole Food Company, Inc*., 251 F.3d 795 (9th Cir. 2001), which was subsequently affirmed by the Supreme Court, is instructive. *Patrickson* concerned, *inter alia*, whether certain Israeli companies – the so-called "Dead Sea Companies" – were organs of the Israeli government for purposes of the FSIA. The Dead Sea Companies argued that they *were* government organs:

> The Dead Sea Companies argue that . . . the Companies were government organs created by Israel for the purpose of exploiting the Dead Sea resources owned by the government. The Dead Sea Companies were classified as "government companies" under Israeli law, which gave the government certain privileges reflecting its ownership stake. The government had the right to approve the appointment of directors and officers, as well as any changes in the capital structure of the Companies, and the Companies were obliged to present an annual budget and financial statement to various government ministries. The government could constrain the use of the Companies' profits as well as the salaries of the directors and officers.

Id. at 808. The Ninth Circuit disagreed that the entities were government instrumentalities, however, noting that this type of control was "not considerably different from the control a majority shareholder would enjoy under American corporate law." *Id.* "[T]he Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies

wholly owned by the government of Israel. The Companies could sue and be sued, and . . . the Companies [did not] exercise any regulatory authority[.]" *Id.* The Court concluded that "[t]hese factors support the district court's view of the Companies as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives. Although the question is close, we hold that the Dead Sea Companies were not organs of the Israeli government, but indirectly owned commercial operations, which do not qualify as instrumentalities under the FSIA." *Id.*

The importance of a high degree of government control in determining instrumentality status has also been recognized by the Supreme Court and the Ninth Circuit in the context of the Federal Tort Claims Act ("FTCA"). The FTCA "is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976). In *Orleans*, the issue was whether "a community action agency funded under the Economic Opportunity Act of 1964 [was] a federal instrumentality or agency for purposes of [FTCA] liability." *Id.* at 809. Noting that the issue turned "not [on] whether the community action agency receiv[ed] federal money and [was required to] comply with federal standards and regulations, but [on] whether its *day-to-day operations [were] supervised by the Federal Government*" (*id.* at 815) (emphasis added), the Supreme Court concluded that the entity was not a "federal agenc[y] or instrumentalit[y]," nor were its "employees federal employees within the meaning of the [FTCA]." *Id.* at 819; *see also id.* at 816 n.5 ("[T]he issue in this case is whether or not there was day-to-day control of a program[.]"). Ninth Circuit FTCA case law is in accord. *See, e.g.*, *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005) ("The critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the 'detailed physical performance' and 'day to day operations' of the contractor.") (quoting *Hines v. United States*, 60 F.3d 1442, 1446 (9th Cir. 1995)). Accordingly, an entity should not be considered a foreign

government "instrumentality" under the FCPA unless the foreign government itself controls the day-to-day operations of the business enterprise.

It is similarly important that the concept of control extend to the actual involvement of the government in the approval of contract specifications and the awarding of contracts – *i.e.*, in the activities that allegedly prompted the corrupt payments. Simply put, if the government has control of these matters, the policies of the FCPA are furthered by criminalizing payments made to influence these decisions; if the government does not have control of these matters, however, any alleged bribery is akin to commercial bribery, which the FCPA simply does not criminalize.

Finally, both this Court and Judge Matz have recognized the importance of control to any "instrumentality" determination. *See* 5-18-11 Order at 5 (noting the "foreign state's degree of control over the entity" as a factor that "bear[s] on the question of whether a business entity constitutes a government instrumentality"); Hanna Decl., Exh. E (4-20-11 *Aguilar* Order) at 9 (suggesting that in a government instrumentality "[t]he key officers and directors of the entity are, or are appointed by, government officials," and "[t]he 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"); *see also California v. NRG Energy Inc*., 391 F.3d 1011, 1026 (9th Cir. 2004), *vacated in part and remanded on other grounds in PowerEx Corp. v. Reliant Energy Servs*., 551 U.S. 224 (2007) (finding that PowerEx was not an "organ" under the FSIA in part because it "was not run by government appointees," and because of its "high degree of independence").

H. Paragraph Seven

1. Text

"***Third,*** the business enterprise exists for the sole and exclusive purpose of performing a public function traditionally carried out by the government. A 'public function' is a function that benefits only the foreign government (and its citizens), not

private shareholders. A business enterprise that exists to maximize profits rather than pursue public objectives does not perform a public function and therefore is not a foreign government instrumentality."

2. Authority

To qualify as a foreign government instrumentality under the FCPA, an enterprise should be required to exist for the sole and exclusive purpose of performing a public function traditionally carried out by the government. *See, e.g.*, *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) ("In determining whether an entity is an organ [under the FSIA], we consider whether the entity 'engages in a public activity on behalf of the foreign government.'") (quoting *Patrickson*, 251 F.3d at 807). Companies that exist to increase profits and maximize shareholder value cannot be considered to be performing a public function, even if they have some component of government ownership. *See, e.g.*, *NRG Energy Inc.*, 391 F.3d at 1026 (holding that a power company was not an instrumentality under the organ prong of the FSIA where the entity "acted not in the public interest, but rather as an independent commercial enterprise pursuing its own profits," and "any profits and losses from its sales of power are solely the responsibility of PowerEx and are in no way guaranteed or subsidized by the [Canadian] government"); *Patrickson*, 251 F.3d at 808 (Israeli corporations indirectly owned by the Israeli government were not "instrumentalities" under the organ prong of the FSIA where the companies were "independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives."); *cf. EOTT Energy*, 257 F.3d at 998 ("Favoring organ status is that it appears Ireland acquired [the entity] not for profit-making purposes, but to serve the public interest.").

This Court has recognized the importance of a "public function" requirement. *See, e.g.*, 5-18-11 Order at 7 ("The Court also agrees that the term 'instrumentality' was intended to capture entities that are not 'departments' or 'agencies' of a foreign government, but nevertheless carry out governmental functions or objectives."). So

has Judge Matz. *See* Hanna Decl., Exh. E at 9 (suggesting that a government instrumentality will be an "entity [that] is widely perceived and understood to be performing official (*i.e.*, governmental) functions." So has the government. *See* Opposition to Defendants' Motion to Dismiss (Docket No. 332) at 16 (contending that "instrumentality" should be construed to mean an entity "though which a government achieves an end or purpose or carries out the functions or policies of the government"). The OECD Convention is also in accord. *See* Hanna Decl., Exh. D, Art. I, ¶ 4(a) (defining "foreign public official" to mean, *inter alia*, "any person exercising a *public function* for a foreign country, including for a . . . *public enterprise*") (emphasis added).

Finally, like the other components of Defendants' proposed "instrumentality" jury instruction, a "public function" requirement must exist to comply with the Due Process Clause of the United States Constitution because such a requirement serves to put the world on notice that a particular entity is a government entity and its employees thus "foreign officials" (again accepting, solely for purposes of argument, the premise of the Court's May 18 Order). *See, e.g.*, *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (The Due Process Clause of the United States Constitution requires that "fair warning . . . be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").

I. Paragraph Eight

1. Text

"***Fourth***, employees of the business enterprise are considered to be public employees or civil servants under the law of the foreign country."

2. Authority

Because the FCPA is aimed at combating public, not private, corruption, foreign nationals who are not considered to be public employees in their own countries should not be considered to be "foreign officials" under the FCPA. *See, e.g.*, Hanna Decl., Exh. F (FCPA Opinion Procedure Release No. 10-03 (Sept. 1, 2010)) (concluding that

a consultant that was a "registered agent of a foreign government" did not qualify as a "foreign official" under the disclosed facts and relying in part on local law to reach this conclusion; "As a matter of local law, the Consultant and its employees are not employees or otherwise officials of the foreign government, and the Requestor has secured a local law opinion that it is permissible for the Consultant to represent both the foreign government and the Requestor at the same time."); *see also Patrickson*, 251 F.3d at 808 (holding that the Dead Sea Companies were not FSIA instrumentalities where, *inter alia*, "their employees were not treated as civil servants"); *id.* (contrasting outcome in another FSIA case where the entity, a Mexican oil refinery, was determined to be an organ where it was "entirely owned by the government; controlled by government appointees; employed only public servants; and had the exclusive responsibility for refining and distributing Mexican government property") (citing *Corporacion Mexicana de Servicios Martimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996)).

J. Paragraph Nine

1. Text

"If the government fails to prove each of these four elements beyond a reasonable doubt for the 'state-owned' business enterprise at issue in a particular count, and therefore fails to prove that the intended recipient of the alleged corrupt payment was a 'foreign official,' you must find the defendant 'not guilty' on that count."

2. Authority

This provision makes clear that if the government cannot establish the criteria necessary to prove that a business enterprise is an "instrumentality" of a foreign government, the defendant(s) must be acquitted of that particular FCPA count.

K. Paragraph Ten

1. Text

"A business enterprise is not a foreign government instrumentality if it is a mere subsidiary of a state-owned company. To qualify as a foreign government instrumentality, the business enterprise must, as set forth above, be directly and majority owned by the foreign government itself. Therefore, an employee of a business enterprise that is merely a subsidiary of another entity that is majority owned by the foreign government is not an employee of a foreign government instrumentality and is not a 'foreign official.'"

2. Authority

The first two sentences of this paragraph are rooted in the holding of the United States Supreme Court in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). *Dole Food*, which concerned whether the Dead Sea Companies discussed above were FSIA "instrumentalities," held that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares." *Id.* at 477. The holding in *Dole Food* was based not only on the express language of the FSIA – an "agency or instrumentality of a foreign state," means "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b) – but also on basic principles of corporate law concerning the separate identities of a parent corporation and its subsidiary corporations. *See Dole Food Co.*, 538 U.S. at 474 ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); *id.* at 475 ("An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest … A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have

legal title to the subsidiaries of the subsidiary."); *see also United States v. Bennett,* 621 F.3d 1131, 1136 (9th Cir. 2010) ("As early as 1926, the Supreme Court recognized that '[t]he owner of the shares of stock in a company is not the owner of the corporation's property'…While the shareholder has a right to share in corporate dividends, 'he does not own the corporate property.'") (quoting *R.I. Hosp. Trust Co. v. Doughton*, 270 U.S. 69, 81 (1926)).

By the same token, the employees of a subsidiary corporation generally are not considered to be employees of the parent corporation. *See, e.g.*, *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 453 (9th Cir. 2011) ("[T]here is a strong presumption that a parent company is not the employer of its subsidiary's employees.") (quoting *Laird v. Capital Cities/ABC, Inc*., 68 Cal. App. 4th 727, 737 (1998)); *Ass'n of Mexican-American Educators v. California*, 195 F.3d 465, 482 (9th Cir. 1999) ("It is well established that a parent company will not usually be considered the 'employer' under Title VII for the employees of its subsidiary."); *Johnson v. Flowers Indus., Inc*., 814 F.2d 978, 980 (4th Cir.1987) ("A parent company is the employer of a subsidiary's personnel only if it controls the subsidiary's employment decisions or so completely dominates the subsidiary that the two corporations are the same entity.").

For each of these reasons, a mere subsidiary of a state-owned company should not be considered to be an "instrumentality" of a foreign government for purposes of the FCPA. In other words, an "instrumentality of an instrumentality" should not count. As the Ninth Circuit explained in 1995, eight years before the Supreme Court's decision in *Dole Food*, in the FSIA context:

> [The FSIA] provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. *To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far*

> *down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision.* Although such a broad view of sovereign immunity may very well be desirable, we cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion.

Gates v. Victor Fine Foods, 54 F.3d 1457, 1462 (9th Cir. 1995) (emphasis added). A similar rationale should limit the definition of "instrumentality" in the FCPA because Congress purposely limited the anti-bribery provisions of the FCPA to "foreign officials." Thus, even if "instrumentalities" *can* include SOEs (and their employees can be "foreign officials"), there is no indication in the text of the FCPA or its legislative history that companies owned by instrumentalities – *i.e.*, "instrumentalities of instrumentalities" – may themselves qualify as "instrumentalities." Moreover, if a contrary rule were adopted, there would be no logical stopping point. *Cf. Skilling v. United States*, 561 U.S. ___, 130 S. Ct. 2896, 2933 (2010) ("[W]e resist the Government's less constrained construction absent Congress' clear instruction otherwise. . . . If Congress desires to go further . . . it must speak more clearly than it has.").

Finally, the last sentence of this proposed paragraph reflects the logical outcome of the first two sentences: If a business enterprise that is merely a subsidiary of another entity that is majority owned by a foreign government is not an "instrumentality" under the FCPA, its employees by definition are not "foreign officials."

L. Paragraph Eleven

1. Text

A business enterprise that 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,

is not a foreign government instrumentality, and its employees therefore are not "foreign officials."

2. Authority

This language comes from Paragraph 15 of the Commentaries to the OECD Convention, which states that "[a]n official of a public enterprise shall be deemed to perform a public function unless 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." Hanna Decl., Exh. D at 15, ¶ 15. In its Opposition to Defendants' Motion to Dismiss, the government argued that instrumentality "should be interpreted to comply with U.S. treaty obligations." Docket No. 332 at 28.

IV.
CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court adopt their proposed "foreign official"/"instrumentality" jury instruction.

Dated: June 30, 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/Kenneth M. Miller
Kenneth M. Miller

Attorneys for Defendant PAUL COSGROVE

LAW OFFICES OF DAVID W. WIECHERT

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

Attorneys for Defendant DAVID EDMONDS

Exhibit A

DEFENDANTS' PROPOSED "FOREIGN OFFICIAL" / "INSTRUMENTALITY" JURY INSTRUCTION

The FCPA does not criminalize all payments made to foreign nationals, but only corrupt payments made to a "foreign official." Therefore, in order for a defendant to be found guilty of an FCPA violation, the government must, among other things, prove beyond a reasonable doubt that the intended recipient of the corrupt payment at issue was a "foreign official" at the time of the alleged payment.

The term "foreign official" means any officer or employee of a foreign government (or any department, agency, or instrumentality thereof), or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.

A "state-owned" business enterprise may, under certain circumstances, qualify as an "instrumentality" of a foreign government. On the other hand, not all "state-owned" business enterprises qualify as "instrumentalities" of a foreign government. It is up to you to determine, weighing all of the evidence, whether a particular business enterprise is or is not an "instrumentality" of a foreign government, and whether the officers and employees of that enterprise therefore are – or are not – "foreign officials" under the statute.

To conclude that a business enterprise is an "instrumentality" of a foreign government, you must conclude beyond a reasonable doubt that the business enterprise is part of the foreign government itself. In order to conclude that a business enterprise is part of the foreign government itself, you must find that the government has established, beyond a reasonable doubt, each of the following four elements:

First, the foreign government itself directly owns at least a majority of the business enterprise's shares.

Second, the foreign government itself controls the day-to-day operations of the business enterprise, including the appointment of key officers and directors (who themselves may be government officials); the hiring and firing of employees; the

financing of the enterprise through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties; and the approval of contract specifications and the awarding of contracts.

Third, the business enterprise exists for the sole and exclusive purpose of performing a public function traditionally carried out by the government. A "public function" is a function that benefits only the foreign government (and its citizens), not private shareholders. A business enterprise that exists to maximize profits rather than pursue public objectives does not perform a public function and therefore is not a foreign government instrumentality.

Fourth, employees of the business enterprise are considered to be public employees or civil servants under the law of the foreign country.

If the government fails to prove each of these four elements beyond a reasonable doubt for the "state-owned" business enterprise at issue in a particular count, and therefore fails to prove that the intended recipient of the alleged corrupt payment was a "foreign official," you must find the defendant "not guilty" on that count.

A business enterprise is not a foreign government instrumentality if it is a mere subsidiary of a state-owned company. To qualify as a foreign government instrumentality, the business enterprise must, as set forth above, be directly and majority owned by the foreign government itself. Therefore, an employee of a business enterprise that is merely a subsidiary of another entity that is majority owned by the foreign government is not an employee of a foreign government instrumentality and is not a "foreign official."

A business enterprise that 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, is not a foreign government instrumentality, and its employees therefore are not "foreign officials."

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2011, I electronically filed the foregoing **DEFENDANTS' PROPOSED JURY INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** 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

Nathaniel Edmonds — nathaniel.edmonds@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

/s/Nicola T. Hanna
Nicola T. Hanna