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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. STUART CARSON et al., Defendants.	NO. SA CR 09-00077-JVS GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION TO SUPPRESS DEFENDANTS' STATEMENTS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SPECIAL AGENT BRIAN J. SMITH AND ASSISTANT UNITED STATES ATTORNEY DOUGLAS F. McCORMICK Hearing Date & Time: May 14, 2012 9:00 a.m.

Plaintiff United States of America, by and through its attorneys of record, the United States Department of Justice,

Criminal Division, Fraud Section, and the United States Attorney for the Central District of California (collectively, "the government"), hereby files its Opposition to Defendants' Motion to Suppress Statements. This Opposition is based upon the attached memorandum of points and authorities, the Declarations of FBI Special Agent Brian J. Smith and Assistant United States Attorney Douglas F. McCormick attached hereto, the files and records in this matter, as well as any evidence or argument presented at any hearing on this matter.

DATED: April 2, 2012

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On August 16 and 17, 2007, outside counsel for Control Components, Inc. ("CCI," or "the Company") interviewed several of the Company's senior executives, including defendants Hong "Rose" Carson, Paul Cosgrove, and David Edmonds ("defendants"), as part of the Company's internal investigation into whether corrupt payments had been made by the Company and its employees to secure or retain business. One day earlier, CCI had, through counsel, voluntarily disclosed its internal investigation and the underlying concerns to the United States Department of Justice ("the government"). Defendants now ask this Court to suppress statements they made during the interviews, arguing that their participation in the interviews was coerced in violation of their Fifth Amendment rights against self-incrimination. Defendants' Notice of Motion and Motion to Suppress Defendants' Statements (Dkt. #573) ("Defts' Suppression Motion"). Defendants contend that the Company was a state actor at the time of the interviews by virtue of its voluntary disclosure and contemplated cooperation with the government and that their statements were improperly coerced by threats of termination.

Defendants' motion to suppress should be denied. Only state actors can violate a defendant's Fifth Amendment rights, and the evidence shows that the Company's actions were not the result of any pressure or influence from the government sufficient to convert the Company's lawyers to state actors. Nor can defendants show that their statements were involuntary, as the

evidence does not show that defendants were threatened with termination.

II.

BACKGROUND

A. The Government's Principles of Corporate Prosecution

The Justice Department has long had a written policy governing its treatment of corporate wrongdoing. Since the late 1990s, that policy has been memorialized in a series of memoranda written by the Deputy Attorney General, one of the highest-ranking officials in the Department. In 2006, then-Deputy Attorney General Paul J. McNulty wrote a memorandum ("the McNulty Memorandum") to all federal prosecutors in which he updated the government's "Principles of Federal Prosecution of Business Organizations." Declaration of Douglas F. McCormick attached hereto ("McCormick Decl."), Exh. A.[1] Under the McNulty Memorandum, federal prosecutors were instructed that they must consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." Id. at 4. The memorandum elaborates as follows:

> In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including

[1] Earlier versions of the McNulty Memorandum are sometimes called the "Holder Memorandum" or the "Thompson Memorandum," after the Deputy Attorneys General who authored them.

> senior executives.

Id. at 7.

The McNulty Memorandum departed from earlier versions in its discussion of how the government should consider a corporation's advancement of attorney's fees:

> Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, e.g., through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.
>
> Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees.

Id. at 11-12 (emphasis added). The change reflected the Department's response to judicial criticism of the Department's earlier position that potentially penalized corporations that elected to pay the attorney's fees of employees under investigation. See, e.g., United States v. Stein, 435 F. Supp.

2d 330, 362-65 (S.D.N.Y. 2006) ("Stein I").

B. The Company's Voluntary Disclosure

CCI is a wholly-owned subsidiary of IMI plc, an English company publicly traded on the London Stock Exchange. On August 15, 2007, IMI's management informed its Board of Directors of possible improper payments made by CCI. See United States v. Control Components, Inc., Case No. SA CR 09-00162-JVS, Dkt. #11 at 5.[2] IMI's Board of Directors directed a voluntary disclosure of the investigation to the United States Department of Justice as well as authorities in the United Kingdom. Id. That same date, IMI made a voluntary disclosure in which it advised the government of possible FCPA violations by CCI and its employees. See Declaration of Brian M. Heberlig in Support of Motion to Intervene by IMI plc and Control Components, Inc. (Dkt. #104) at 2. (The government has submitted in camera the notes of Mark F. Mendelsohn, then-Deputy Chief of the Department of Justice's Fraud Section, reflecting his summary of IMI's voluntary disclosure.)

C. August 15-17, 2007: E-mails Between the Company and the Government

Shortly after the Company made its voluntary disclosure, one of its lawyers, Steptoe & Johnson LLP ("Steptoe") partner Patrick M. Norton ("Mr. Norton"), wrote the following e-mail to the aforementioned Mr. Mendelsohn:[3]

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[2] All page references to docketed filings are to the ECF page number at the top of the page, i.e. "Page __ of __."

[3] At the time Mr. Mendelsohn oversaw all of the government's FCPA cases; he left the government in 2010.

Mark,

I've been discussing with IMI's general counsel the feasibility of holding off on their announcement to the London Exchange. He doesn't think it's doable. The Company's Board of Directors, on advice from UK counsel, decided at about 6 PM UK time to issue the release at 7:30 AM in London tomorrow. It's already 9:30 PM in the UK (about 8:30 - 9 when we spoke), and the wheels are in motion. It's simply not feasible to get UK counsel to opine on this and contact all the Board members in time to derail the announcement. There would also be a significant risk of a leak if they tried to do this at the last moment, and that would create other problems.

We fully recognize your and our interest in getting access to senior management who may have been involved in the payments in questions while may still be willing to cooperate. To that end, I am now planning to fly to LA this evening or first thing in the morning and to be present when the individuals are informed that they are being suspended pending the investigation. We intend to inform them that the suspension is temporary and we are not prejudging the outcome, but that the company expects them to cooperate with the investigation. Then I proceed to interview them.

This will give our associate in LA time to assemble many, if not all, of the relevant documents.

I would hope to be able to advise you by the end of the day tomorrow (probably COB PDT) whether the individuals are cooperating or not. If they are, you can then decide whether you wish to send someone from the DOJ or FBI to speak to them. I will also be on-site to help coordinate with the company. If they refuse to cooperate with us, they will presumably refuse to cooperate with you too. In either case, you should have a better idea of what course you wish to take.

If you want to discuss, I expect to be in the office until about 6:15. . . .

Regards,
Pat

McCormick Decl., Exh. B at 2.[4]

Mr. Norton sent Mr. Mendelsohn a second e-mail at 1:22 a.m. on Friday, August 17, 2007, in which he updated Mr. Mendelsohn on the first day of interviews:

> Mark,
>
> We interviewed five of the senior management at CCI today in very general terms. So far they are being cooperative. We intend to ask more difficult questions tomorrow based on specific documents.
>
> If you would like to discuss this, please suggest a time by email, and I[']ll try to break away.
>
> Best regards,
> Pat

Id. at 2-3. Mr. Mendelsohn responded several hours later:

> Thanks, Pat. I will be out of the office on Friday [August 17, 2007]. I suggest we speak early next week, after you have gotten into specifics.

Id. at 3.

D. The Company's Interviews

As reflected in the e-mails between Mr. Norton and Mr. Mendelsohn, Mr. Norton and other Steptoe attorneys conducted interviews of company employees at CCI's corporate headquarters in Rancho Santa Margarita, California, on August 16 and 17, 2007. No FBI agents were present. Declaration of Special Agent Brian J. Smith attached hereto ("Smith Decl."), ¶¶ 2-4. Steptoe attorneys instructed the witnesses that the interviews were

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[4] This e-mail is time-stamped at 4:49 p.m. Eastern Time. It reflects that Messrs. Mendelsohn and Norton had a conversation about one hour earlier, at approximately 3:30 or 4:00 p.m.

confidential and protected by the attorney-client privilege. Declaration of Brian Heberlig (Dkt. #121-2) at 4. Steptoe attorneys also gave so-called Upjohn warnings[5] to each witness indicating that the contents of the interview were privileged, but that the privilege and the decision whether to waive it belonged to IMI, not the employee. Id. Steptoe attorneys also told the witnesses that they represented IMI, not the witness personally. Id.

On August 16, 2007, CCI's then-President, Ian Whiting, held an all-personnel meeting at which he informed personnel of the investigation and the interviews. Both Mr. Edmonds and Mrs. Carson describe being present at this meeting. Mr. Edmonds says that "Whiting announced that IMI had launched an investigation into possible irregular payments and he ordered that every employee must fully cooperate with the investigation and meet as required with investigators." Declaration of David Edmonds in Support of Defendants' Motion to Suppress Defendants' Statements (Dkt. #573-3) ("Edmonds Decl."), ¶ 2.[6]

Whiting subsequently met with Mr. Edmonds, Mr. Cosgrove, and Mrs. Carson individually. Mr. Edmonds's declaration states that Mr. Whiting told Mr. Edmonds that "he [Whiting] expected my full cooperation with the investigation." Edmonds Decl., ¶ 3. Mr. Cosgrove states that Mr. Whiting "directed me to cooperate in

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[5] Upjohn Co. v. United States, 449 U.S. 383 (1981).

[6] Mrs. Carson claims that because of Mr. Whiting's British accent and the vocabulary he used, she did not understand "the specifics of the scope of the investigation." Declaration of Hong Jiang Carson ("Carson Decl."), ¶ 2.

CCI's internal investigation and submit to an interview with Steptoe." Declaration of Paul Cosgrove (Dkt. #573-4) ("Cosgrove Decl."), ¶ 2.

At no time did Mr. Whiting or anyone else at IMI or CCI threaten to fire Mr. Edmonds, Mr. Cosgrove, or Mrs. Carson if they did not cooperate with the investigation. Mr. Edmonds's own declaration makes this clear: "Because I was ordered by the President of CCI [Whiting] to cooperate with the investigation and meet as required with investigators, I believed that if I did not do what I was told and cooperate and meet with investigators, I would be fired." Edmonds Decl., ¶ 4 (emphasis added). Likewise, Mr. Cosgrove states that "I believed that if I did not agree to submit to an interview, I could lose my job for disobeying an order from CCI's President." Cosgrove Decl., ¶ 2 (emphasis added).

Mr. Cosgrove states that there were "two gentlemen" he did not recognize at CCI on August 17, 2007, and that he was "later told" that they "were in fact FBI agents." Cosgrove Decl., ¶ 4. Mr. Cosgrove's information is incorrect; no FBI agents were at CCI on August 17, 2007, and, in fact, the FBI's investigation of CCI's activities was not even opened until two months later. See Smith Decl., ¶¶ 2-4.

After describing Mr. Whiting's initial announcement, Mrs. Carson says she was asked to come out of the restroom on the morning of August 17, 2007. Carson Decl., ¶ 2.[7] Mrs. Carson

[7] The indictment alleges that Mrs. Carson was destroying documents related to the internal investigation "by, among other things, taking such documents to the CCI ladies' room, tearing up

describes being asked to go to a conference room where she was subsequently asked to remain. Mrs. Carson says she "felt there would be serious repercussions to [her] employment, including the possibility of immediate termination, if I did not comply with her instructions to stay in the conference room." Carson Decl., ¶ 3. Mrs. Carson then describes being escorted to a second conference room, where she was interviewed by Steptoe lawyers. Id., ¶¶ 4-5. Mrs. Carson says she "do[es] not remember being told that I was going to be meeting with lawyers for the company before being taken to this conference room." Id., ¶ 4. Mrs. Carson states that "at all times during the events described above, including meeting with the lawyers, I felt that I could not leave the company and that if I did not comply with the various requests, I would be fired or suffer negative consequences regarding my CCI [sic]." Id., ¶ 7.

Mr. Whiting's statements to defendants were documented in an identical memorandum he wrote to each of them on August 17, 2007. McCormick Decl., Exhs. C1-C3 ("Whiting Memorandum"). The Whiting Memorandum stated, in pertinent part:

> I write to confirm the conversation we had today. As you and I discussed, IMI has launched an investigation into possible irregular payments associated with certain trading contracts entered into by its Severe Service business. The Company is committed to the highest ethical standards and takes these matters very seriously. We have retained external counsel and other consultants to conduct a thorough, independent investigation.
>
> As someone involved in the Severe Service

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the documents, and flushing them down a toilet." Trial Indictment at 27.

> business, the Company expects you to cooperate fully in this process. Arrangements have been made for you to meet with the investigators. When you do so, please answer all their questions and furnish all information they request. Should the investigators contact you later for further discussions or additional information, please comply promptly. We remind you that you must keep all your discussions with the investigators in the strictest confidence. You should disclose them to no one, inside or outside the Company, without advance permission from Ian Whiting.
>
> This also confirms that you are being suspended, with pay, during the investigation process. Again, we emphasize that this is not a termination of your employment. Nor is it a determination that you have made irregular payments or otherwise behaved unethically. Should there be indications of misconduct, you will be afforded an opportunity to give your side of the story during this phase of the investigation. You will be asked to report back to work once a determination is made that you have not engaged in misconduct. In the event you are found to have engaged in misconduct, you will be subject to disciplinary action, up to and including termination of employment.

Id. (emphases added). The government is aware of no evidence that suggests that defendants have claimed, at least prior to this motion to suppress, that the Whiting Memoranda's description of Mr. Whiting's interactions with defendants is inaccurate.

III.

ARGUMENT

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. For Fifth Amendment protections to apply in the context of a corporate internal investigation, two elements must be satisfied:

First, only "state actors" can violate a defendant's Fifth

Amendment rights; the Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be "fairly attributable" to the government. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002).

Second, the statements taken must be compelled. See Fisher v. United States, 425 U.S. 391, 399 (1976) ("[T]he Court has never on any ground . . . applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which . . . did not involve compelled testimonial self-incrimination of some sort.") (emphasis added); see also id. at 408 ("[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating.").

A. Neither the Company Nor Its Lawyers Were State Actors at the Time of Defendants' Interviews

Defendants cite two different lines of cases for determining that CCI and Steptoe were state actors when they conducted interviews of defendants as part of their internal investigation. Deft's Suppression Motion at 17-18, 20-21. As part of the first, defendants cite Ninth Circuit cases -- e.g., United States v. Reed, 15 F.3d 928 (9th Cir. 1994), United States v. Miller, 688 F.2d 652 (9th Cir. 1982), and United States v. Walther, 652 F.2d 788 (9th Cir. 1981) -- involving the application of Fourth Amendment principles to private party searches. Defts' Suppression Motion at 17-18. Those cases stand for the

proposition that "the government cannot knowingly acquiesce in and encourage directly or indirectly a private citizen to engage in activity which it is prohibited from pursuing where that citizen has no motivation other than the expectation of reward for his or her efforts." Walther, 652 F.2d at 793.

While defendants correctly cite United States v. Day, 591 F.3d 679, 683 (4th Cir. 2010), for the proposition that "regardless of whether the Fourth or Fifth Amendment is at issue, we apply the same test to determine whether a private individual acted as a Government agent," Deft's Suppression Motion at 17 n. 6, the cases analyzing whether a private entity's conduct should be considered "state action" for purposes of the Fifth Amendment have engaged in a different analysis. See, e.g., United States v. Stein, 541 F.3d 130, 146-47 (2d Cir. 2008); United States v. Ferguson, 2007 WL 4240782 (D. Conn. Nov. 30, 2007). Those cases have looked to whether the government has become so pervasively entangled in private activity that purportedly private conduct should be attributed to the state or the government has encouraged or facilitated the challenged activity.

Under this line of cases, actions of a private entity are attributable to the State if "there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); accord Defts' Suppression Motion at 20 (noting that this line of cases is a "second distinct doctrinal basis" for finding state action). This close nexus requirement is not satisfied by evidence that the government merely approves of or

acquiesces in the initiatives of the private entity. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 547 (1987). "The purpose of the [close-nexus requirement] is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). Such responsibility is normally found when the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Id. "A nexus of state action exists between a private entity and the state when the state exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with significant encouragement, either overt or covert, or when the private actor operates as a willful participant in joint activity with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with governmental policies." Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir. 2005) (emphases added and internal quotation marks omitted). Furthermore, "the transformation of a private entity into a state actor 'requires a nexus between the state and the specific conduct of which plaintiff complains.'" Ferguson, 2007 WL 4240782, at *6 (emphasis in original) (citations omitted) (cooperating company was not a state actor where, unlike Stein II, there were no meetings between prosecutors and the company to determine how best to pressure employees into cooperation and no government-approved threats that hinged the payment of legal fees

on cooperation with the government).

While the Ninth Circuit has not addressed what test should be applied when determining whether a private entity is a state actor for Fifth Amendment purposes, it has adopted a nexus analysis in other, non-Fourth Amendment contexts. When it affirmed a district court's dismissal of a Religious Freedom Restoration Act ("RFRA") claim, the Ninth Circuit held that plaintiff failed to satisfy the "state action" requirement of the RFRA because governmental compulsion in the form of a generally applicable law, without more, could not transform every private entity that followed the law into a state actor. Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 841 (9th Cir. 1999). Rather, the Court held, the plaintiff must establish some other nexus sufficient to make it fair to attribute liability to the private entity. Id.; see also Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1295 (9th Cir. 1987) (holding that private telephone company was state actor when it terminated services of another company at direction of county attorney because county attorney threatened to bring charges if it refused).

Defendants rely heavily on the district court's conclusion in United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) ("Stein II"), that the government's conduct coerced defendants into making statements they otherwise would not have made. See Deft's Suppression Motion at 24 ("Just as in Stein II, there was a clear and close nexus between DOJ and the coercion of Defendants, making CCI and Steptoe state actors."). But Stein II is readily distinguishable.

Stein II's suppression of defendants' statements followed its decision in Stein I, where it found that the government violated the Sixth Amendment rights of KPMG's employees by pressuring KPMP not to pay employees' legal fees in the context of the government's criminal investigation. 435 F. Supp. 2d at 367-69. In Stein I, the district court found that various statements made and actions taken by the government, coupled with the treatment of attorney's fees in the Thompson Memorandum, effectively coerced KPMG to abandon its longstanding practice of indemnifying employees through the advancement of legal defense costs. Id. at 365.[8]

When considering whether to suppress defendants' statements, Stein II relied explicitly on the its earlier factual findings: "Here, the government quite deliberately precipitated KPMG's use of economic threats to coerce the proffer statements in question." 440 F. Supp. 2d at 334. Stein II's analysis cited not only the Thompson Memorandum but also the government's threats to consider KPMG's failure to cut off attorney's fees for uncooperative employees as well as the government's practice of reporting uncooperative employees to KPMG "in circumstances in which there was no conceivable reason for doing so except to facilitate the firing threats that ensued." Id. at 335.

It is clear from the district court's opinion that the court's holding relied on much more than just the Thompson

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[8] KPMG's willingness to cooperate manifested itself in other ways, too. For instance, its outside counsel told the government it would recommend to employees law firms who understood that cooperation was the best way to proceed, 435 F. Supp. 2d at 345 n.54, a fact the district court called "quite disturbing."

Memorandum:

> The Moving Defendants . . . point to the Thompson Memorandum, which quite specifically tells a company under investigation, as was KPMG, that a failure to ensure that its employees tell prosecutors what they know may contribute to a decision to indict, and, in this case, likely destroy the company. And they point also to the USAO's close involvement in KPMG's decision making process by, among other things, pointedly reminding KPMG that it would consider the Thompson Memorandum in deciding whether to indict, saying that payment of employee legal fees would be viewed "under a microscope," and reporting to KPMG the identities of employees who refused to make statements in circumstances in which the USAO knew full well that KPMG would pressure them to talk to prosecutors. . . .
>
> . . . This Court finds that the government, both through the Thompson Memorandum and the actions of the USAO, quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights.

Id. at 336-37 (emphasis added).

The first critical distinction between Stein II and these circumstances is straightforward. In Stein II, the statements in question were made to the government directly, which made it far easier for the district court in Stein II to conclude there was state action. Here, by comparison, the government was not present when the interviews were conducted, and defendants must persuade the Court that the Company's lawyers were state actors.

But more essentially, there is no evidence here that anyone from the government "deliberately coerced" or "significantly encouraged" anything with respect to the Company's own internal investigation and its interviews of its own employees. The e-mails between Mr. Norton and Mr. Mendelsohn do not demonstrate

either a close nexus between Steptoe/CCI and the government or the kind of governmental coercion or encouragement present in Stein II. This conclusion is underscored in the Whiting Memorandum. To be sure, the Whiting Memorandum confirms that IMI has launched an investigation because "[t]he Company is committed to the highest ethical standards" and IMI takes the matter seriously. McCormick Decl., Exh. C1 at 1. The e-mails confirm that Steptoe/CCI was conducting the investigation and interviews for its own purposes.

Shortly after making the voluntary disclosure, Mr. Norton's first e-mail informs the government that (1) IMI was going ahead with a planned press release despite apparent government concerns about its timing; (2) the company would be temporarily suspending certain employees and then interviewing them, without any direction or input from the government over which employees would be interviewed or the appropriateness of the actions; and (3) the company would inform the government the following day whether the suspended employees were cooperating so that "you should have a better idea of what course you wish to take." McCormick Decl., Exh. B at 2. The text of the e-mail itself does not suggest a close nexus. Mr. Norton uses the pronoun "our" to describe CCI's actions and "your" to describe the government's. See id.

Mr. Norton then informed the government the following night that he had interviewed five of the senior managers and that Steptoe intended to ask more difficult questions of the employees the following day based on specific documents. Id. Rather than asking the government for approval to conduct the interviews or asking for specific questions or areas of inquiry, Mr. Norton

simply indicated that he would be available if the government wanted to discuss the matter further. Id. at 3. Mr. Mendelsohn responded the following morning that he would be out of the office on Friday and suggested they speak early next week, after Steptoe had gotten into specifics. Id.

These e-mails show no nexus between the Company and the government. Instead, they show a company in cooperative mode informing the government of what is transpiring in its internal investigation. See, e.g., Ferguson, 2007 WL 4240782, at *5 (company's efforts to cooperate with the government do not transform company into an arm of the state). At no time did the government direct the actions of Steptoe/CCI. The government did not instruct the company who to interview or what questions to ask. In fact, the government provided no direction or instruction as to the conduct of the interviews. See, e.g., id. at *6 (cooperating company was not a state actor in absence of "coercive" actions taken by government).

Defendants contend (Defts' Suppression Motion at 19) that it is inconsistent for the government to contend that Steptoe/CCI were not state actors at the time of their interviews, because the government once charged Mrs. Carson with a violation of 18 U.S.C. § 1519 for conduct (the toilet-flushing incident) that occurred within the same time frame. But § 1519 does not require the existence of a pending investigation, see United States v. Yielding, 657 F.3d 688, 711 (8th Cir. 2011) ("The statue . . . does not allow a defendant to escape liability for shredding documents with intent to obstruct a foreseeable investigation . . . just because the investigation has not yet commenced."), and

numerous cases have concluded that there is no "nexus" requirement that the obstructive conduct be tied to a pending or imminent proceeding or matter, see United States v. Moyer, --- F.3d ---, 2012 WL 639277, at *11 (3rd Cir. Feb. 29, 2011). Thus, the now-dismissed count, which alleged that Mrs. Carson's obstructive conduct occurred "in . . . contemplation of" a federal investigation, does not somehow turn Steptoe/CCI into state actors.

Without the type of coercive conduct present in Stein II, defendants are left with only the Company's voluntary disclosure coupled with the McNulty Memorandum's guidance to federal prosecutors to consider a corporation's cooperative efforts. Finding "state action" on these facts alone would be unprecedented and unwarranted, the effect of which would be to turn the cooperating company into a government agent in every case. There is no precedent for such an outcome.

B. Defendants' Statements Were Not Involuntary

Nor is there any merit to defendants' claim that their statements were coerced. Even by their own version of events, defendants cannot demonstrate that their statements were compelled and were thus involuntary. Defendants' motion to suppress should fail for this separate, independent reason.

Defendants' compulsion argument relies principally on Garrity v. New Jersey, 385 U.S. 493 (1967), and its progeny. In Garrity, the New Jersey Attorney General questioned several police officers during an investigation of alleged fixing of traffic tickets. Id. at 494. Before being questioned, each officer was warned that he could invoke his Fifth Amendment

privilege against self-incrimination and refuse to answer, but that if he did so, he could be fired pursuant to a state statute that required complete candor of its officers. Id. Prosecutors subsequently used the officers' responses to prosecute them for conspiracy to obstruct the administration of traffic laws. Id. The officers appealed their convictions on the ground that their statements had been coerced. Id. at 495. The Supreme Court held that the test for coercion was "whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer." Id. at 496 (internal quotations marks and citations omitted). The Court analogized the loss of a government job to forfeiture of property protected by the Fourteenth Amendment, and held that the threat of losing one's livelihood could prevent a person from making a free and rational choice to invoke the constitutional right against self-incrimination. Id. at 497 (being faced with the "option to lose their means of livelihood or to pay the penalty of self-incrimination . . . is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'") (citation omitted).

It is clear, however, that to constitute compulsion, defendants must demonstrate that they faced a "clear-cut" choice between asserting their right against self-incrimination or suffering economic hardship. See United States v. Ferguson, 2007 WL 4240782, at *7 (D. Conn.) (finding defendant's statement was not involuntary where letter from defendant's employer "did not contain overt threats to cooperate at the risk of serious personal consequences; rather, the letter only informed him that (1) [the employer] would consider disciplining employees who

failed to cooperate, and (2) [the employer] would reexamine its obligations, under its by-laws, to pay non-cooperating employees' legal fees") (emphasis in original).

Although a direct threat of termination may not be necessary, the defendant must have believed the statements to be compelled on threat of loss of job and this belief must have been objectively reasonable. United States v. Vangates, 287 F.3d 1315, 1321-22 (11th Cir. 2002); accord Stein II, 440 F. Supp. 2d at 328 ("an individual claiming that a statement was compelled in violation of the Fifth Amendment must adduce evidence both that the individual subjectively believed that he or she had no real choice except to speak and that a reasonable person in that position would have felt the same way"). Thus, "the defendant must have subjectively believed that he was compelled to give a statement upon threat of loss of job [and] this belief must have been objectively reasonable at the time the statement was made." Vangates, 287 F.3d at 1322.

Here, there is no evidence to show that defendants had an objectively reasonable belief that they faced a "clear-cut choice" between asserting their rights or suffering economic hardship. Defendants' own declarations do not demonstrate that anyone threatened them with termination if they did not cooperate with the internal investigation. None of the defendants describe being threatened with termination by Mr. Whiting. The Whiting Memorandum is consistent with defendants' own declarations in that it does not overtly threaten defendants' employment. It rather states, "the Company expects you to cooperate fully in [the investigation]," and asks defendants to "please answer all

[the investigators'] questions and furnish all information they request." McCormick Decl., Exh. C1 at 1. The only reference to termination in the Whiting Memorandum assures defendants that they are not being terminated and that if indications of misconduct are found, defendants would be allowed to present their side of the story. Id. Nor were defendants threatened with nonpayment of legal fees.[9]

Defendants' claims of coercions are thus analogous to the claims rejected by the district court in Ferguson, 2007 WL 4240782, where a defendant claimed that his statements were involuntary because "he feared losing his job if he did not cooperate." Id. at *7. Defendant relied on a letter from his employer which informed him that non-cooperation "may result . . . in a reassessment by [the Company] of the factors governing whether it is obligated to indemnify [defendant] for [his] reasonable legal expenses," then noted that such indemnification was condition on the Company's obligations as set forth in its by-laws. Id. at *5. The district court concluded that this letter "did not force [defendant] to choose between asserting his rights and losing his job," and thus rejected defendants' motion to suppress his statements. Id. at *7; see also United States v. Waldon, 363 F.3d 1103 (11th Cir. 2004) (holding that defendant's belief that he would be fired from sheriff's department if he did not testify was not objectively reasonable because department

[9] Defendants cannot claim that the McNulty Memorandum created such a threat: unlike the Thompson Memorandum, the McNulty Memorandum expressly disclaims consideration of the company's payment of attorney's fees.

regulations did not require testimony under threat of sanctions but only reflected a general expectation that officers would cooperate and testify).

United States v. Saechao, 418 F.3d 1073 (9th Cir. 2005), is inapposite. Saechao involved a probationer whose probation terms compelled him to "truthfully answer all reasonable inquiries" from his probation officer or face revocation. Id. at 1075. On these facts, the Ninth Circuit had little difficulty concluding that "[defendant] did not have the luxury of remaining silent without violating the conditions of his probation." Id. at 1078. Here, by contrast, there has been no showing of employment terms or other provisions that would compel defendants to answer the investigators' questions. All defendants have shown is a request from their supervisor to cooperate with the investigation, and nothing more.

Almost forty years ago, the Second Circuit recognized that the rule against involuntary confessions did not preclude scenarios where defendants had to make difficult choices regarding whether to cooperate with an internal investigation: "To be sure, [defendant's] position was not a particularly pleasant one. But the rule excluding involuntary confessions does not protect against hard choices when a person's serious misconduct has placed him in a position where these are inevitable." United States v. Solomon, 509 F.2d 863, 872 (2d Cir. 1975) (Friendly, J.). Over the years, this idea has been reiterated in several different cases rejecting claims of Garrity compulsion. See, e.g., Aguilera v. Baca, 510 F.3d 1161, 1171-73 (9th Cir. 2007) (rejecting deputies' Fifth Amendment claim

because there was no evidence that deputies were compelled to answer questions; "[i]t is of no moment that refusing to answer the investigators' questions could have resulted (and, in fact, did result) in [deputies'] reassignment"); United States v. Stein, 233 F.3d 6, 16 (1st Cir. 2000)(finding no Garrity issue where attorney claimed she was compelled to answer questions before state bar; court reasoned that although she faced risk of disbarment, it was not automatic); United States v. Bowers, 739 F.2d 1050, 1056 (6th Cir. 1984) (holding Garrity not implicated when employee not told he would lose job if he did not submit to interview).

The district court's conclusions in Stein II are consistent with these cases. The district court concluded that it should suppress statements made by two defendants who were expressly threatened with termination and/or nonpayment of legal fees by KPMG if they refused to cooperate with the government. Id. at 331 ("The Court finds that [defendant 1] made the statements at the proffer sessions because KPMG threatened to fire him and cut off payment of his legal fees if he did not [cooperate].") & 332 ("KPMG coerced his appearance [at proffer sessions with the government] by conditioning payment of his legal fees on his appearance and cooperation.").

Because there is no evidence to support an objectively reasonable belief that lack of cooperation with the internal investigators would result in termination, the Court should conclude that defendants' statements were not compelled. For this reason, defendants' Fifth Amendment rights were not violated by the Steptoe interviews.

IV.

CONCLUSION

For the foregoing reasons, defendants' motion to suppress should be denied.

DECLARATION OF BRIAN J. SMITH

I, Brian J. Smith, declare as follows:

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI"). I am currently assigned to the Washington Field Office ("WFO") and focus on investigations of violations of United States law, particularly those involving foreign bribery. I am the lead Special Agent in the case of United States v. Stuart Carson, et al., Case No. SA CR 09-00077-JVS.

2. I have reviewed the FBI's case file for the investigation of corrupt payments at Control Components, Inc. ("CCI"), to determine if there were FBI agents present at CCI on August 16 and/or 17, 2007. The case file reflects that the FBI opened its investigation of CCI and its executives after FBI headquarters received an e-mail summary on or about October 16, 2007, from an attorney in the Fraud Section in Washington, DC. The FBI opened its investigation on October 19, 2007; the case file does not reflect any earlier activity. There is nothing in the case file that reflects a lead or other request being made to the Los Angeles Division of the FBI to send Special Agents to CCI in August 2007.

3. I queried the FBI's Automated Case System ("ACS"), a database of the FBI's investigative activity, to see if ACS contained any information about FBI activity at CCI in August 2007. My ACS query returned no information indicating that there were FBI Special Agents present at CCI in August 2007. I also spoke to Supervisory Special Agent Johannes Vandenhoogen, who supervises a white-collar/corruption squad of agents in the Santa Ana Resident Agency ("SARA"). SSA Vandenhoogen reviewed control

files at SARA and found no reference to any involvement by FBI agents at CCI in August 2007.

4. From my review of the case file and other internal records kept by the FBI, there were no FBI agents at CCI on the dates in question.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED: April 2, 2012

BRIAN C. SMITH, Special Agent
Federal Bureau of Investigation

DECLARATION OF DOUGLAS F. McCORMICK

I, Douglas F. McCormick, declare as follows:

1. I am an Assistant United States Attorney in the United States Attorney's Office for the Central District of California. I am one of the attorneys representing the government in this matter.

2. Attached hereto as Exhibit "A" is a copy of an undated memorandum issued in December 2006 by then-Deputy Attorney General Paul J. McNulty regarding "Principles of Federal Prosecution of Business Organizations." This memorandum, often called the McNulty Memorandum for short, was in effect in August 2007 at the time of CCI's voluntary disclosure.

3. Attached hereto as Exhibit "B" is a copy of a letter written by the prosecution team to defendants' counsel in response to Mr. Edmonds's counsel's request for "all documents reflecting communications between the Department of Justice . . . and CCI, IMI, or its agents . . . for the period July 1, 2007, and October 31, 2007." The government's letter confirmed what it had previously told Mr. Edmonds's counsel in person: that it would produce documents reflecting communications between the Department of Justice and CCI's outside counsel, Steptoe & Johnson LLP, for the time period of August 15, 2007, through August 17, 2007. The letter then re-prints the text of three e-mails between Steptoe & Johnson LLP's Patrick Norton and Mark F. Mendelsohn, who at the time was Deputy Chief of the Fraud Section in Washington, DC.

4. Attached as Exhibits C1, C2, and C3, respectively, are true and correct copies of memoranda written on August 17, 2007,

by CCI's then-President, Ian Whiting, to defendants Paul Cosgrove, David Edmonds, and Hong Carson, respectively. Each of these copies contains the document control number used in this case to reflect that it has been previously disclosed to defendants' counsel.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED: April 2, 2012

DOUGLAS F. McCORMICK