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16 UNITED STATES DISTRICT COURT
 17 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 18 SOUTHERN DIVISION

19 UNITED STATES OF AMERICA,) NO. SA CR 09-00077-JVS
)
20 Plaintiff,) <u>GOVERNMENT'S OPPOSITION TO</u>
) <u>DEFENDANTS' MOTION TO DISMISS THE</u>
21 v.) <u>INDICTMENT; MEMORANDUM OF POINTS</u>
) <u>AND AUTHORITIES</u>
22 STUART CARSON et al.,)
) <u>Hearing Date & Time:</u>
23 Defendants.) May 14, 2012
) 9:00 a.m.
24 _____))

25 Plaintiff United States of America, by and through its
 26 attorneys of record, the United States Department of Justice,
 27 Criminal Division, Fraud Section, and the United States Attorney
 28 for the Central District of California (collectively, "the

1 government"), hereby files its Opposition to Defendants' Motion
2 to Dismiss the Indictment. This Opposition is based upon the
3 attached memorandum of points and authorities, the Declaration of
4 Assistant United States Attorney Douglas F. McCormick and
5 exhibits thereto filed concurrently herewith, the files and
6 records in this matter, as well as any evidence or argument
7 presented at any hearing on this matter.

8 DATED: April 6, 2012

Respectfully submitted,

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18 /s/

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 In their Motion to Dismiss the Indictment ("Defts' Motion to
5 Dismiss"), defendants Stuart Carson, Hong "Rose" Carson, Paul
6 Cosgrove, and David Edmonds assert that the indictment should be
7 dismissed because the cumulative impediments to present a
8 complete defense have deprived them of their due process and
9 Sixth Amendment rights. Defendants allege that these impediments
10 include "(1) Rule 16 discovery tactics precluding defendants
11 access to millions of pages of normally-discoverable evidence;
12 (2) the lack of a meaningful Brady review; (3) CCI's loss of
13 critical documents underlying many of the counts and
14 transactions; (4) defendants' inability to obtain foreign
15 documents and subpoena foreign witnesses; (5) CCI instructing its
16 employees, including key witnesses, not to speak with the
17 defense; and (6) unclear statutes." Defts' Motion to Dismiss at
18 8.

19 Defendants' motion should be denied. Several of defendants'
20 claims, including its Rule 16 claims and its arguments regarding
21 the clarity of the Foreign Corrupt Practices Act ("FCPA") and the
22 Travel Act, have already been addressed and rejected by the
23 Court. Further, the government has gone beyond its discovery
24 obligations in ensuring that defendants receive Brady/Giglio
25 material in the possession of CCI. Defendants' other claims are
26 meritless and thus defendants' motion must fail.

1 II.

2 BACKGROUND

3 Because much of defendants' motion concerns their claim that
4 they have been denied access to documents in CCI's possession
5 and, as a result, no meaningful Brady review has been conducted,
6 below is a summary of the efforts taken by the government that
7 demonstrate the government has gone beyond its discovery
8 obligations to ensure that the defendants receive potential Brady
9 material.

10 In its December 8, 2009 Order, the Court rejected
11 defendants' contention that under Rule 16 of the Federal Rules of
12 Criminal Procedure the government's obligation extends to
13 materials in the possession of a private third party. The Court
14 based its decision in large part on the language in CCI's plea
15 agreement, in which CCI agreed to "disclose to the Department all
16 non-privileged information with respect to the activities of CCI
17 and its affiliates . . . concerning all matters relating to
18 corrupt payments to foreign officials or to employees of private
19 customers . . . and about which the Department . . . shall
20 inquire" and "provide to the Department, upon request, any non-
21 privileged document, record or other tangible evidence relating
22 to such corrupt payment." Court's December 8, 2009 Order
23 ("Order") at 2-3 (emphases supplied).

24 In its Order, the Court indicated that "[t]he fact that the
25 concept of possession extends to federal agencies participating
26 in the Government's investigation is of no benefit to Carson" and
27 made clear that "CCI is not a federal agency and is not part of
28 the investigation." Id. at 4-5. The Court found that the

1 cooperation terms of the Plea Agreement were not as "sweeping and
2 open ended" as those in the Deferred Prosecution Agreement in
3 United States v. Stein, 488 F. Supp. 2d 350, 353 (S.D.N.Y. 2007),
4 which required the disclosure of "all information" in the
5 company's possession. As the Court stated, "[b]y no stretch of
6 the imagination did CCI enter into an agreement allowing the
7 Government to request anything in the possession of CCI." Order
8 at 5. The CCI Plea Agreement only called for the production of
9 information related to corrupt payments.

10 On June 4, 2010, defendants wrote in a letter that the
11 government should ask Steptoe & Johnson LLP ("Steptoe"), to make
12 available the 75-million-page electronic database that CCI
13 created during its internal investigation so that a proper Brady
14 review may be conducted. See Exhibit A at 2.¹ At a minimum,
15 defendants stated, the government should request ten categories
16 of material from Steptoe that the defendants believed may contain
17 Brady material. Id. at 2-4.

18 In a June 30, 2010 letter, the government responded that it
19 remained committed to meeting its Brady obligations, that the
20 Court had previously ruled that under Rule 16 the government's
21 obligation does not extend to material in the possession of a
22 private third party, and that the government could not find any
23 authority that extended the government's Brady obligations to
24 information in the possession of a private third-party. The
25 government invited defendants to share any authority that might
26

27 ¹ All citations to Exhibits A through S are citations to the
28 exhibits attached to the Declaration of Assistant United States
Attorney Douglas F. McCormick filed concurrently herewith.

1 provide otherwise. See Exhibit B at 1-2.

2 On August 11, 2010, the defendants provided a draft motion
3 they intended to file in order to compel the government to comply
4 with its Brady/Giglio requirements. See Exhibit C. Defendants
5 wrote in an accompanying letter that the "motion relies on
6 numerous authorities specifying the circumstances under which a
7 prosecutor's Brady/Giglio obligations extend to materials in the
8 possession of third parties." Id. at 1.

9 On September 10, 2010, the government reiterated that it
10 does not have a generalized obligation to conduct a Brady review
11 of materials in the possession of a third-party. The government
12 stated, however, that it "would be contrary to the spirit of
13 Brady and its progeny for the government willfully to ignore the
14 potential existence of exculpatory evidence simply because it is
15 not in our possession." See Exhibit D at 1. To that end, the
16 government invited defendants to follow the procedures identified
17 by the district court in United States v. Cerna, 633 F.Supp.2d
18 1053, 1061 (N.D. Cal. 2009), where the court outlined that a
19 defendant may put the government on notice of potential
20 exculpatory evidence through a "narrowly defined and well
21 directed request . . . explaining why exculpatory material might
22 be found in a certain file." Exhibit D at 2. The government
23 indicated in its letter that many of the broad categories of
24 information sought in defendants' June 4, 2010 letter and in the
25 draft motion would not meet the Cerna standard and invited the
26 defendants to supplement their Brady requests.

27 On November 5, 2010, defendants indicated that they did not
28 "agree that the Cerna procedure satisfies the government's Brady

1 obligation to conduct its own review to identify exculpatory
2 information." See Exhibit E at 1. Defendants proceeded to
3 provide a list of 77 categories of documents which they requested
4 the government obtain from CCI. Id. at 2-10.

5 On November 17, 2010, the government and defendants held a
6 "meet and confer" at which time the parties discussed the 77
7 categories of documents requested by defendants. The government
8 stated that, although it did not believe it was required to do
9 so, it would request certain of the categories of documents from
10 CCI.

11 On November 29, 2010, the government orally requested that
12 CCI produce to the government the interview memoranda prepared by
13 Steptoe summarizing the witness interviews for which Steptoe
14 previously provided complete or partial oral summaries to the
15 government.² The government also requested that Steptoe provide
16 additional oral summaries of the witness interviews conducted by
17 Steptoe that were not previously summarized for the government.

18 On November 30, 2010, the government requested that CCI make
19 production of all transaction-related documents for the charged
20 payments and the thirty additional transactions previously
21 identified by the government. See Exhibit F at 1-2. The request
22 included, but was not limited to, the following documents for
23 each of the relevant transactions: "the project file, project
24 management file, order package, bid documents, technical
25 specifications, purchase order, any email communications
26 regarding specifications or commissions, Customer Order Review

27
28 ² The government subsequently sent letters to the defendants
describing the statements given by the witnesses to Steptoe.

1 Board ('CORB') documents, third-party agreement and approval
2 forms, and payment records." Id. at 1. The government also
3 requested (1) the production of any forensic image taken of any
4 laptop computer, desktop computer, PDA, or cellular telephone
5 used by the defendants and (2) any correspondence between CCI and
6 its affiliates or anyone acting on CCI's behalf and any third-
7 party representative in which such representative denied or
8 rejected allegations of any improper or corrupt payment. Id. at
9 2.

10 On December 9, 2010, CCI declined the government's request
11 that it produce to the government the interview memoranda
12 prepared by Steptoe summarizing the witness interviews for which
13 Steptoe previously provided complete or partial oral summaries to
14 the government. See Exhibit G. CCI indicated that the
15 government was not legally entitled to hard copies of the
16 interview memoranda at issue based on the express terms of the
17 Non-Waiver Agreement and the Plea Agreement. Id. at 3.

18 On December 14, 2010, CCI declined the government's request
19 that it provide any additional oral summaries of the witness
20 interviews conducted by Steptoe that were not previously
21 summarized for the government. See Exhibit H. CCI indicated
22 that any open invitation to the government to receive such
23 summaries as part of CCI's cooperation expired no later than the
24 time the Plea Agreement was entered. Id.

25 On December 15, 2010, the government wrote a letter to the
26 defendants stating that it had requested that CCI produce the
27 materials specified in its November 30, 2010 letter. See Exhibit
28 I. The government also informed the defendants that Steptoe had

1 declined the government's oral request to produce the interview
2 memoranda and additional oral summaries. Id. at 2.

3 On January 14, 2011, counsel for Hong "Rose" Carson wrote a
4 letter to the government requesting that the government ask CCI
5 to produce an additional eight categories of material that
6 counsel believed constituted exculpatory evidence. See Exhibit
7 J.

8 On January 21, 2011, in response to the government's
9 November 30, 2010 letter, Steptoe produced to the government (1)
10 a hard drive consisting of 424,497 documents of transaction-
11 related documents; (2) the hard drives and other devices of
12 defendants Hong "Rose" Carson, Paul Cosgrove, David Edmonds, and
13 Flavio Ricotti (CCI did not possess forensic images of any of
14 Stuart Carson's computers or devices); and (3) a compact disc
15 containing over 15,000 pages of project file documents. See
16 Exhibit K. With respect to the third category, Steptoe indicated
17 that it was unable to locate project file documents for several
18 of the transactions. Id. at 3. The government produced the
19 above-referenced materials to the defendants on January 27, 2011,
20 together with Steptoe's explanatory letter.

21 On March 18, 2011, in further response to the government's
22 November 30, 2010 letter, Steptoe produced to the government over
23 5,000 pages of additional project file documents, commission
24 payment records, and agent correspondence. See Exhibit L.
25 Steptoe indicated that it had been unable to locate commission
26 payment records for approximately seventeen of the thirty
27 additional transactions. (Steptoe had previously produced
28 commission payment records for all of the charged transactions.)

1 The government produced the above-referenced materials to the
2 defendants on March 23, 2011, together with Steptoe's explanatory
3 letter.

4 On March 23, 2011, the government explained to the defense
5 its responses to each of the nearly 100 Brady requests made in
6 defendants' November 5, 2010 letter and Ms. Carson's January 14,
7 2011 letter, and indicated it would be requesting that CCI
8 produce several additional categories of documents. See Exhibit
9 M.

10 On March 29, 2011, the government requested from Steptoe the
11 production of twenty-eight categories of documents, which were
12 largely derived from defendants' prior Brady requests. See
13 Exhibit N. The government also requested that Steptoe identify
14 any evidence that caused it to have doubt as to whether any of
15 the transactions at issue were consummated or were improper. Id.
16 at 5.

17 On April 5, 2011, in further response to the government's
18 November 30, 2010 letter, Steptoe produced to the government over
19 17,000 pages of documents of additional project files and agent
20 correspondence. See Exhibit O. Steptoe indicated it had been
21 unable to locate project files for seven of the charged
22 transactions and thirteen of the thirty additional transactions.
23 Id. at 2. The government produced the above-referenced materials
24 to the defendants on April 7, 2011, together with Steptoe's
25 explanatory letter.

26 On April 14, 2011, Steptoe responded to the government's
27 March 29, 2011 letter containing the additional 28 document
28 requests. See Exhibit P. Steptoe explained that it would not be

1 able to produce responsive documents for several of the requested
2 categories on the grounds that the requests (1) fell outside of
3 the scope of the plea agreement cooperation clause; (2) called
4 for privileged materials; (3) called for documents in the
5 possession of IMI; or (4) were otherwise vague. Id. at 2-4.
6 Steptoe indicated that CCI would be willing to comply with any
7 revised requests that did not fall into these categories. Id. at
8 4.

9 On May 5, 2011, the government informed the defendants of
10 Steptoe's refusal to waive the attorney-client privilege and
11 attorney work-product doctrine with respect to certain material
12 and invited the defendants to seek an order from the Court to the
13 extent defendants believed Steptoe's invocation of the privilege
14 was improper. See Exhibit Q. Similarly, the government invited
15 the defendants to seek an order from the Court to the extent they
16 believed that the limitation regarding the documents in IMI's
17 possession was improper. Id. at 2.

18 On May 13 and 17, 2011, the government engaged in additional
19 discussions with Steptoe concerning the requests for categories
20 of documents that Steptoe originally indicated it would not
21 produce, and Steptoe agreed to comply with several of these
22 requests.

23 On June 10 and August 18, 2011, in response to the
24 government's March 29, 2011 letter with the twenty-eight
25 additional categories, Steptoe produced a total of over 2,300
26 pages of documents to the government. See Exhibits R & S.
27 Steptoe also provided explanations for what was and was not
28 produced for almost all of the categories in its accompanying

1 letters. Id. The government subsequently produced the above-
2 referenced materials to the defendants together with Steptoe's
3 explanatory letters.

4 **III.**

5 **ARGUMENT**

6 The Court should deny Defendants' Motion to Dismiss.
7 Defendants have failed to show how any one of the "impediments"
8 they allege have deprived them of their due process and Sixth
9 Amendment rights. The government has gone beyond its discovery
10 obligations in ensuring that defendants receive potential Brady
11 material in the possession of CCI. The Court has already ruled
12 that the FCPA and the Travel Act are not void for vagueness.
13 With regard to their access to evidence claims, the defendants
14 have failed to show that the government has engaged in bad faith
15 or that any act or omission alleged can be attributed to the
16 government. Further, the defendant have not demonstrated that
17 any of the missing evidence would have been material and
18 favorable to the defense.

19 **A. The Government Has Gone Beyond Its Discovery Obligations To**
20 **Ensure That The Defendants Receive Potential Brady Material**

21 Defendants assert that their Brady rights have been
22 "eviscerated" as a result of their inability to obtain alleged
23 Brady material in the possession of CCI. This assertion is
24 baseless. While there is no authority that extends the
25 government's Brady obligations to information in the possession
26 of a private third-party, as demonstrated above the government
27 has nonetheless made every effort to ensure that the defendants
28 receive potential Brady material in the possession of

1 CCI/Steptoe.

2 Relying in part on United States v. Fort, 472 F.3d 1106,
3 1118 (9th Cir. 2007), the Court has previously held that the
4 government's Rule 16 obligations do not extend to materials in
5 the possession of CCI. Other courts have similarly held that the
6 government's Brady obligations do not extend to information in
7 the possession of a private third-party, even where such a third-
8 party is cooperating with the government's investigation. See
9 United States v. Graham, 484 F.3d 413, 417 (6th Cir. 2007)
10 ("Brady clearly does not impose an affirmative duty upon the
11 government to take action to discover information which it does
12 not possess"); United States v. Tadros, 310 F.3d 999, 1005 (7th
13 Cir. 2002) (government does not have duty to gather potential
14 Brady material from third party and tender it to the defendant);
15 United States v. Josleyn, 206 F.3d 144, 152-54 (1st Cir. 2000)
16 ("While prosecutors may be held accountable for information known
17 to police investigators, we are loath to extend the analogy from
18 police investigators to cooperating private parties who have
19 their own set of interests"); see also United States v. Riley,
20 657 F.2d 1377, 1386 (8th Cir. 1981) ("While Brady requires the
21 Government to tender to the defense all exculpatory evidence in
22 its possession, it establishes no obligation on the Government to
23 seek out such evidence.").

24 A district court in this circuit recently affirmed this
25 principle. In United States v. Zinnel, 2011 WL 6825684 (E.D.
26 Cal.) (slip copy), the court overruled a prior decision of a
27 magistrate judge holding that the government should produce Brady
28 and Giglio materials in the possession of a private trustee in a

1 bankruptcy fraud prosecution. The court found that the
2 government should produce information for purposes of Rule 16 and
3 Brady/Giglio "only to the extent that information is deemed
4 accessible to the prosecution. Access is deemed present only
5 with respect to materials actually in the possession of the
6 federal government." Id. at *1. The court found that physical
7 possession was the dispositive factor and that "the government
8 has no duty to produce information beyond what it actually has."
9 Id.; see also United States v. Hsieh Hui Mei Chan, 754 F.2d 817,
10 824 (9th Cir. 1985) (government "has no duty to volunteer
11 information that it does not possess or of which it is unaware").

12 Despite this clear precedent, the government invited the
13 defendants to follow the procedures identified by the district
14 court in United States v. Cerna, where the court outlined how a
15 defendant may put the government on notice of potential
16 exculpatory evidence:

17 Where a prosecutor has a specific reason to suspect
18 that Brady material may reside at a source, of course,
19 the prosecutor must inquire. . . . A related factor
20 can be a narrowly defined and well directed request by
21 defense counsel explaining why exculpatory material
22 might be found in a certain file. . . . [A] well-framed
23 and well-timed letter may heighten the diligence due
24 from a prosecutor by informing him or her of
25 circumstances the prosecutor could not reasonably be
26 expected to know.

27 633 F. Supp. 2d at 1061.

28 After several rounds of discussion with the defendants, in
accordance with Cerna, the government requested materials from
CCI in November 2010 and March 2011. As indicated above, as a
result of these requests, CCI produced (1) all transaction-
related documents for the charged payments and the thirty

1 additional transactions in CCI's possession, including the
2 project files; (2) forensic images of the defendants' computers
3 and other devices; (3) correspondence with third-party
4 representatives in which the representative denied or rejected
5 allegations of any improper or corrupt payments; and (4) over
6 2,300 pages of documents responsive to the government's March 29,
7 2011 letter containing twenty-eight additional categories of
8 materials. The government, in turn, produced this material to
9 the defendants.

10 Despite this painstaking approach taken by the government to
11 ensure that defendants receive potential Brady material,
12 defendants nonetheless claim that their Brady rights have been
13 "eviscerated." Defts' Motion to Dismiss at 28. Contrary to
14 defendants' assertion, the facts set forth above together with
15 the attached correspondence demonstrate that the government has
16 gone above and beyond its obligations to ensure that it has
17 complied with both the law and the spirit of Brady and its
18 progeny.

19 **B. The Documents CCI Has Been Unable To Locate**

20 Defendants assert that they have been prejudiced because CCI
21 has been unable to locate (1) the project files for the
22 transactions underlying seven of the charged counts and (2) the
23 project files and commission payment records for several of the
24 additional thirty transactions. The government does not possess
25 these records either, and there is no allegation that the
26 government has lost any material.

27 In California v. Trombetta, 467 U.S. 479, 489 (1984), the
28 Supreme Court held that for destruction or loss of evidence to

1 constitute a constitutional violation, "the evidence must both
2 possess an exculpatory value that was apparent before the
3 evidence was destroyed, and be of such a nature that the
4 defendant would be unable to obtain comparable evidence by other
5 reasonably available means." In Arizona v. Youngblood, 488 U.S.
6 51, 58 (1988), the Court further held that where lost or
7 destroyed evidence is deemed to be only potentially exculpatory,
8 as opposed to apparently exculpatory, the defendant must show
9 that the evidence was destroyed in bad faith. The government's
10 duty to preserve material evidence is limited to evidence it has
11 gathered. Trombetta, 467 U.S. at 488-90.

12 Here, defendants cannot meet these standards. There cannot
13 be any governmental bad faith because there is no showing that
14 the government played any role in CCI's failure to maintain the
15 records. See, e.g., United States v. Estrada, 453 F.3d 1208,
16 1213 (9th Cir. 2006) (no due process violation where no showing
17 that government knew or intended for evidentiary material to be
18 sold by third party); United States v. Booth, 309 F.3d 566, 574
19 (9th Cir. 2002) (no bad faith failure to preserve evidence where
20 government did not take possession of computer hard drives but
21 only informed third party vendors - who later erased the drives -
22 that it did not need copies of the information on the hard drives
23 and where there was nothing about the hard drives that would have
24 made their allegedly exculpatory nature apparent to the
25 government); United States v. Castro, 887 F.2d 988, 999 (9th Cir.
26 1989) (defendant may not claim violation of due process rights
27 regarding missing evidence in absence of action by government).
28 Further, there is no basis to believe that the unavailable

1 material has any exculpatory value.

2 **C. Defendants' Inability To Access Foreign Third-Party Records**

3 Defendants assert that due to issues of sovereignty, they
4 have been unable to access documents in the possession of foreign
5 entities. Specifically, they claim they have been unable to
6 obtain bank records from Malaysia because of banking/privacy laws
7 and that China has denied their letter rogatory. Defendants
8 compare their lack of ability to obtain foreign records with that
9 of the government, who can use various mutual legal assistance
10 treaties to obtain evidence from overseas.

11 Similar claims have been made in other criminal prosecutions
12 and courts have uniformly rejected them. For example, in United
13 States v. Clarke, 767 F. Supp. 2d 12, 70-72 (D.D.C. 2011), a
14 defendant asserted that he was denied due process of law where
15 Trinidad failed to provide any documents in response to his
16 letter rogatory seeking documents. The court stated that the
17 right to compulsory process only extends to those areas within
18 the territorial power of the United States courts and that a
19 defendant's inability to obtain foreign documents is not a bar to
20 criminal prosecution. Id. at 71 (citing United States v. Sensi,
21 879 F.2d 888, 889 (D.C. Cir. 1989)); see also United States v.
22 Mejia, 448 F.3d 436, 444-45 (D.C. Cir. 2006) (defendants'
23 inability to obtain tapes and transcripts from Costa Rica did not
24 give rise to a violation of their Sixth Amendment rights).

25 **D. Denial Of Access To Witnesses**

26 Citing a December 2008 e-mail from the then-general counsel
27 of CCI to CCI employees, defendants assert that the government
28 has benefitted from steps CCI has taken to inhibit defendants'

1 ability to interview witnesses. Specifically, defendants claim
2 that sixteen months after the government's investigation began
3 but before the case was indicted CCI employees were influenced by
4 CCI's then-general counsel not to talk to defense investigators
5 and, thus, CCI actively prevented defendants from speaking to
6 individuals potentially with exculpatory information. The
7 defendants also claim that many of the percipient witnesses are
8 in foreign jurisdictions and not subject to any compulsory
9 process.

10 Both sides have the right to interview witnesses before
11 trial. United States v. Black, 767 F.2d 1334, 1337 (9th Cir.
12 1985). Although unjustifiable government interference with a
13 defendant's right of access to a witness is improper, "no right
14 of a defendant is violated when a potential witness freely
15 chooses not to talk." United States v. Arboleda, 929 F.2d 858,
16 868 (1st Cir. 1991). "Unless a witness' refusal to speak to the
17 defense was caused by action on the part of an agent of the
18 prosecution, there is no denial of access by the government."
19 Id.; see also United States v. Hoffman, 832 F.2d 1299, 1303-04
20 (1st Cir. 1987) (finding of interference with Sixth Amendment
21 rights requires causal connection between government action and
22 defendant's inability to obtain witness).

23 Here, the government did not direct or have knowledge of the
24 admonition given to CCI employees by its then-general counsel.
25 As a result, there is no causal connection between government
26 action and the defendants' ability to interview witnesses. See
27 Workman v. Bell, 178 F.3d 759, 771 (6th Cir. 1998) (no denial of
28 due process where witness's boss told her not to give any

1 statements to defense lawyers where there was no evidence the
2 prosecution contacted the witness's boss); Arboleda, 929 F.2d at
3 868 (defendant failed to establish the necessary causal link
4 between the government's conduct and any denial of access to the
5 witness).

6 Defendants' claim that they have been denied constitutional
7 rights as a result of being unable to subpoena foreign witnesses
8 must also fail. "It is well-settled that a defendant's inability
9 to subpoena foreign witnesses is not a bar to criminal
10 prosecution." United States v. Sensi, 879 F.2d at 899; see also
11 United States v. Zabaneh, 837 F.2d 1249, 1259-60 (5th Cir. 1988)
12 ("It is well established . . . that convictions are not
13 unconstitutional under the Sixth Amendment even though the United
14 States courts lack power to subpoena witnesses (other than
15 American citizens) from foreign countries."). Moreover, as in
16 Sensi, defendants did not use all the means at their disposal,
17 such as seeking court permission to depose non-voluntary
18 witnesses residing overseas, to obtain the needed testimony. See
19 United States v. Sensi, 879 F.2d at 899.

20 **E. The FCPA Is Not Void For Vagueness**

21 Defendants assert that portions of the FCPA are obscurely
22 written and a key term at issue in this case - "instrumentality"
23 - is not defined in the statute. They claim that the "Lay
24 Person's Guide to the FCPA Statute" was not published until 1994,
25 that there has been insufficient public education about the Act,
26 and that the FCPA Opinion Procedure has only yielded 33 opinions
27 about whether prospective conduct would conform to DOJ's
28 enforcement policies.

1 Defendants' claims are simply a rehashing of the void-for-
2 vagueness arguments they previously made in their Motion to
3 Dismiss Counts One Through Ten of the Indictment. See Dkt. #317
4 at 51-59.³ In its Order Denying Defendants' Motion, the Court
5 found that "the statutory language of the FCPA is clear, that the
6 statutory scheme is coherent and consistent, and that resort to
7 the legislative history of the FCPA is unnecessary." See Dkt.
8 #373 at 11-12. The Court further found that "[a]fter considering
9 the text, structure, history, and purpose of the FCPA, the Court
10 finds that there is no 'grievous ambiguity or uncertainty in the
11 statute' such that the Court must 'simply guess as to what
12 Congress intended'" and that "the ordinary meaning of
13 'instrumentality' indicates that state-owned companies could fall
14 under the ambit of the FCPA." Id. at 14 (internal citation
15 omitted).

16 **F. The Travel Act Is Not Void For Vagueness**

17 Defendants claim that prosecution under the Travel Act
18 raises similar issues to those arising under the FCPA and that
19 the Department has improperly broadened the application of the
20 statute to apply it to foreign commercial bribery.

21 These claims are a rehashing of the void-for-vagueness
22 arguments that were made by defendants in their Motion to Dismiss
23 Counts One, Eleven, Twelve and Fourteen of the Indictment. See
24 Dkt. #376 at 30-31. In its Order Denying Defendants' Motion, the
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26
27 ³ Defendants admit as much and indicate they are reiterating
28 the issues only to "reinforce the overall fundamental unfairness
in DOJ's recent and overly broad interpretations of these
statutes." Defts' Motion to Dismiss at 19, n.22.

1 Court found that the text of both the Travel Act and California's
2 Commercial Bribery Statute were clear and provided adequate
3 notice to defendants that they could be applied to a commercial
4 bribe consummated outside of California. See Dkt. #440 at 13.
5 Further, the Court held that "cases such as [United States v.
6 Welch, 327 F.3d 1081 (10th Cir. 2003)] demonstrate that the
7 Travel Act is not being 'dusted off' and employed arbitrarily."
8 Id.

9 **G. The Defendants Have Not Been Denied The Right To Present A
10 Complete Defense**

11 Defendants assert that the cumulative impact of impediments
12 to present a complete defense warrant dismissal as a due process
13 violation. Defts' Motion to Dismiss at 19. They argue that the
14 Supreme Court has held that fundamental fairness requires the
15 right to present a defense, including access to evidence, in a
16 variety of settings. Id. at 20. Specifically, they claim that
17 their constitutional rights to develop and present a complete
18 defense has been infringed due to lack of access to documents and
19 witnesses and the government's failure to conduct a meaningful
20 Brady review. Id. at 23.

21 In United States v. Valenzuela-Bernal, 458 U.S. 858, 866-67
22 (1982), the Supreme Court rejected the "conceivable benefit" test
23 previously used by the Ninth Circuit in favor of a test that
24 required the defendant to show how the missing testimony was both
25 material and favorable to his defense. The Ninth Circuit has
26 indicated that in the case of a missing witness "the defendant
27 must make an initial showing that the Government acted in bad
28 faith and that this conduct resulted in prejudice to the

1 defendant's case." United States v. Dring, 930 F.2d 687, 693
2 (1991) (emphasis in original); United States v. Medina-Villa, 567
3 F.3d 507, 517 (9th Cir. 2009) (same); United States v. Gastelum-
4 Almeida, 298 F.3d 1167, 1174 (9th Cir. 2002) (same). Due process
5 is not violated "unless a material witness's unavailability is
6 attributable to unilateral government action." United States v.
7 Gonzalez, 617 F.2d 1358, 1363 (9th Cir. 1980). There can be no
8 violation of the defense's right to present evidence "unless some
9 contested act or omission can be attributed to the sovereign."
10 Hoffman, 832 F.2d at 1303. To prevail under the prejudice prong,
11 the defendant must at least make "a plausible showing that the
12 testimony of the deported witnesses would have been material and
13 favorable to his defense, in ways not merely cumulative to the
14 testimony of available witnesses." Valenzuela-Bernal, 458 U.S.
15 at 873.

16 Similarly, in cases of lost or missing evidence, the Supreme
17 Court has made clear that the defendant must make a showing of
18 bad faith by the government and prejudice. See Arizona v.
19 Youngblood, 488 U.S. at 55-57; California v. Trombetta, 467 U.S.
20 at 488-89; United States v. Lovasco, 431 U.S. 783, 789-90 (1977).

21 Defendants cannot show that any of the missing evidence is
22 due to an act or omission on the part of the government or to the
23 government's bad faith. They also fail to show that the missing
24 evidence or witnesses are favorable and material to their case.
25 The cases they cite in support of their claim all involve direct
26 governmental conduct where the missing evidence was material and
27 favorable to the defendants, circumstances which are not present
28 here.

1 Defendants cite to Roviaro v. United States, 353 U.S. 53
2 (1957), where the government withheld the identity of an
3 informer-eyewitness from the defense. The Supreme Court found
4 that, on the facts present, the defendants had made the required
5 showing of materiality with regard to a missing witness who was
6 central to the case:

7 This is a case where the Government's informer was the
8 sole participant, other than the accused in the
9 transaction charged. The informer was the only witness
10 in a position to amplify or contradict the testimony of
11 government witnesses. Moreover, a government witness
12 testified that [the informer] denied knowing petitioner
13 or ever having seen him before. We conclude that,
14 under these circumstances, the trial court committed
15 prejudicial error in permitting the Government to
16 withhold the identity of its undercover employee in the
17 face of repeated demands by the accused for his
18 disclosure.

19 Id. at 64-65 (emphases supplied). Defendants attempt to compare
20 these stark facts with those in their own case, arguing that the
21 missing project files and commission payment records "define the
22 very transactions the government seeks to claim were not bona
23 fide." Defts' Motion to Dismiss at 24. Defendants also argue
24 that, unlike the defendant in Roviaro, they were not present at
25 the alleged crime. Id. at 25.

26 The facts of Roviaro are a far cry from those in this case.
27 In Roviaro, the informer was the sole participant, other than the
28 accused, in the transaction and had denied knowing the defendant
or having seen him before. As a result, the Court found that the
defendant had made the requisite materiality showing. In
defendants' case, the missing records are a small subset of the
millions of pages of produced documents. The defendants possess
the key documents - the e-mails and relevant commission payment

1 records - for each charged transaction.⁴ The hard copy project
2 files, while providing further background on the projects
3 themselves and their commercial terms, are not central to the
4 issue of whether the defendants violated the FCPA or Travel Act.
5 Unlike the missing witness in Roviaro, there is no indication
6 that any missing records would be material and favorable to the
7 defendants or any basis to believe the government's actions led
8 to the records not being maintained.

9 Defendants' reliance on United States v. Stever, 603 F.3d
10 747 (9th Cir. 2010), is also misplaced. In Stever, the
11 government indicated it possessed reports concerning Mexican drug
12 trafficking organizations ("DTOs") operating in the vicinity of
13 the marijuana plants on defendant's property but refused to
14 produce the reports. The trial court upheld the government's
15 refusal and also ruled that it would not permit the defendant to
16 put on evidence regarding Mexican DTOs or who else might have
17 been involved in growing the plants. In reversing the
18 conviction, the appeals court held that because of these rulings
19 the defendant "could not make his defense in any form" as the
20 court "excluded the sole evidence of an issue that constituted a
21 major part of the attempted defense. . . . [The defendant] was,
22 quite literally, prevented from making his defense. . . . Having
23 denied [the defendant] the opportunity to explore this discovery
24 avenue, the district court declared a range of defense theories

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27 ⁴ Because the government does not intend to prove that the
28 additional thirty transactions are themselves violations of the
FCPA or Travel Act, the missing records with respect to these
transactions are even less relevant.

1 off-limits, without considering in any detail the available
2 evidence it was excluding." Id. at 757 (emphasis in original).

3 Thus, Steuer primarily involved an erroneous evidentiary
4 ruling. The appeals court made clear that "when evidence is
5 excluded on the basis of an improper application of the
6 evidentiary rules, due process concerns are still greater because
7 the exclusion is unsupported by any legitimate state
8 justification." Id. at 755. The evidence unavailable to the
9 defendant constituted the sole evidence related to his defense
10 and prevented the defendant from making his defense at all. As
11 indicated above, these facts do not at all equate with the
12 missing evidence in the Carson case. Further, the missing
13 evidence the defendants allude to has never been in the
14 possession of the government.

15 Similarly, defendants' reliance on United States v.
16 Montgomery, 998 F.2d 1468 (9th Cir. 1993), is inapposite. In
17 Montgomery, the court found that the government failed to use
18 reasonable efforts to produce a confidential informant.
19 According to the court, the government "did absolutely nothing to
20 (1) locate the informant, (2) ensure that it would be able to
21 locate the informant when necessary, or (3) notify the informant
22 that he must be available for an interview" by a certain date.
23 Id. at 1474. As a result, the informant fled and was unavailable
24 to the defendants. The court found that the informant's
25 testimony was material and favorable to the defendant's case.
26 Specifically, the court found that:

27 [The informant's] testimony was crucial to [the
28 defendant's] entrapment defense. [The informant] was at
the center of the alleged conspiracy and instrumental

1 to the drug transactions. [The informant] provided all
2 the information which the DEA possessed concerning [the
3 defendant] and the alleged conspiracy. In addition,
4 [the informant] was in contact with [the defendant]
5 pursuant to DEA instructions, with the intent of
6 soliciting a sale of drugs.

7 Id. at 1478. As in Roviaro, the informant was the central figure
8 in the drug transactions at issue. Further, the court, while
9 making reference to matters about which the informant "might
10 testify," had the benefit of the informant's actual testimony at
11 his own sentencing hearing and his subsequent testimony at
12 defendant's hearing pursuant to 18 U.S.C. § 2255 and thus had a
13 basis to believe that the informant's testimony would be material
14 and favorable. Id. at 1472.

15 As is the case with Roviaro and Stever, the facts of
16 Montgomery are not analogous to those present here. The missing
17 witnesses or evidence in these three cases all constituted the
18 key piece of evidence for the defendants. In all three cases,
19 the courts found that (1) the act or omission was caused by the
20 government and that (2) the missing evidence was material and
21 favorable. Defendants cannot succeed on either of these two
22 prongs.

23 IV.

24 CONCLUSION

25 The Court has already denied defendants' void-for-vagueness
26 arguments concerning the FCPA and the Travel Act. The government
27 has gone beyond its obligations to ensure that defendants receive
28 possible Brady material in the possession of CCI. Defendants'
lack of access to evidence claims must fail because the
government had no role in causing the missing evidence and the

1 defendants cannot demonstrate that such evidence is material and
2 favorable to the defense. Accordingly, Defendants' Motion to
3 Dismiss should be denied.

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