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24
25 **IN THE UNITED STATES DISTRICT COURT**
26 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
27 **SOUTHERN DIVISION**
28

UNITED STATES OF AMERICA,

Plaintiff,

v.

STUART CARSON, et al.,

Defendants.

Case No. SA CR 09-00077-JVS

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
SUPPRESS DEFENDANTS'
STATEMENTS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF;
DECLARATIONS OF JESSICA C.
MUNK, DAVID EDMONDS; PAUL
COSGROVE; AND HONG JIANG
CARSON**

Hearing Date: April 2, 2012

Hearing Time: 3:00 p.m.

Courtroom: 10C (Hon. James V. Selna)

Trial Date: June 5, 2012

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE
2 NOTICE THAT on April 2, 2012 at 3:00 p.m. in the courtroom of the Honorable
3 James V. Selna, in the United States District Court for the Central District of
4 California (“Court”), located at 411 West Fourth Street, Santa Ana, California,
5 Defendants David Edmonds, Paul Cosgrove and Hong “Rose” Carson (collectively
6 “Defendants”) will and hereby do move this Court to suppress the Defendants’
7 statements as they were compelled in violation of the Fifth Amendment. Defendants
8 further will seek the setting of an evidentiary hearing, along with appropriate
9 discovery, if the Court determines that there currently is insufficient evidence of state
10 action during Defendants’ interviews.

11 The basis for this Motion is that CCI and its counsel were *de facto* public actors
12 when they implicitly threatened to terminate Defendants’ employment if they did not
13 cooperate and participate in interviews with CCI’s investigators. At the time of the
14 interviews, CCI and IMI were not only in contact with law enforcement authorities
15 regarding the investigation, but were collaborating with the Department of Justice
16 (“DOJ”) in how to conduct the investigation and obtain relevant admissions from the
17 Defendants. CCI compelled the Defendants’ statements with the government’s
18 knowledge, certainly at a minimum with the government’s general encouragement,
19 and with the intent to cooperate with the DOJ. As a matter of fact and law CCI was an
20 agent of the government during the interviews. Thereafter and further to published
21 DOJ memoranda, CCI spared no expense in cooperating with the government by
22 identifying purported culprits and disclosing the fruits of its investigation, including
23 interviews of the Defendants, to the DOJ. Thus, CCI’s actions are “fairly attributable
24 to the government.” CCI compelled the Defendants’ statements under a classic
25 “penalty situation” – CCI required them to answer all questions regardless of their
26 Fifth Amendment right against self-incrimination or be fired. Because CCI was a
27 state actor when it compelled the Defendants’ statements, it violated their Fifth
28 Amendment rights and the statements must be suppressed.

1 This Motion is based on this Notice of Motion, the attached Memorandum of Points
2 and Authorities, the Declarations of Jessica C. Munk, David Edmonds, Paul Cosgrove
3 and Hong Jiang Carson, the files and records of this case and on such other and further
4 argument and evidence as may be presented to the Court at the hearing of this matter.

5 Dated: March 5, 2012

Respectfully submitted:

6
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In 2002, the Department of Justice (“DOJ”) created the Corporate Fraud Task
4 Force to combat white collar corporate malfeasance. Soon after, the DOJ published,
5 in turn, the Thompson, McNulty, and Filip Memoranda, which provide corporations
6 guidance on, and incentives for, government cooperation. The memoranda have been
7 unabashed in extolling the benefits of corporate self-policing followed by full
8 disclosure to the DOJ. The memoranda had the desired effect – private companies
9 became public deputies, investigating and assisting in the prosecution of their
10 employees. Sometimes the corporate conduct promoted by the government exceeds
11 permissible limits.

12 In 2007, corporate counsel for IMI plc and IMI’s wholly-owned United States
13 subsidiary Control Components Inc. (hereinafter collectively referred to as “CCI”),
14 undertook an internal investigation on behalf of its clients and the governments of the
15 United States and the United Kingdom. By summer 2007, the investigators, including
16 Steptoe & Johnson LLP (“Steptoe”), believed a number of CCI employees had
17 violated the Foreign Corrupt Practices Act (“FCPA”). For three managers, David
18 Edmonds (“Edmonds”), Paul Cosgrove (“Cosgrove”) and Hong “Rose” Carson
19 (“Carson”) (collectively “Defendants”), Steptoe and CCI coerced them to submit to
20 interviews about matters at the heart of Steptoe’s investigation at the risk of losing
21 their jobs. Defendants were not told at the time of their interviews that CCI and
22 Steptoe already were convinced of their culpability, were collaborating with the DOJ
23 to obtain their statements and intended to share any statements with prosecuting
24 authorities.

25 CCI’s and Steptoe’s conduct regarding the interviews of Defendants violated
26 their constitutional rights, mandating preclusion of their statements. Under *Garrity v.*
27

1 *New Jersey*,¹ CCI and its counsel as *de facto* public actors could not compel
2 unprotected statements from the Defendants without rendering those statements and
3 their fruits inadmissible as violative of Defendants' Fifth Amendment right against
4 self-incrimination. Thus, Defendants' statements should be suppressed.

5 **II. FACTUAL BACKGROUND**

6 On April 9, 2009, a grand jury returned a 16-count indictment (*see generally*
7 Indictment, Doc. No. 298-1) against six former officials of CCI, alleging they
8 conducted a broad conspiracy to violate the FCPA and the Travel Act. Among the
9 managers indicted were Edmonds, CCI's Vice-President of Worldwide Customer
10 Service from 2000 to 2007; Cosgrove, CCI's Executive Vice President from 2002 to
11 2007 and head of CCI's Worldwide Sales Department from 1992 to 2007; and Carson,
12 CCI's Manager of Sales for China and Taiwan from 2000 to 2002 and CCI's Director
13 of Sales for China and Taiwan from 2002 to 2007.

14 The Indictment followed a two year joint investigation by CCI and the DOJ.
15 Based on discovery and court filings it appears that by the summer of 2007, CCI had
16 initiated an internal investigation into potential improper payments authorized by
17 management to secure business. *See United States v. Control Components, Inc.*, SA
18 CR 09-00162, Memorandum on Behalf of Control Components, Inc. In Support of
19 Rule 11(c)(1)(C) Plea and Agreed-Upon Sentence (hereinafter referred to as "CCI
20 Sentencing Memorandum") at 3 (Doc. No. 11) attached as Exhibit A; *see also United*
21 *States v. Control Components, Inc.*, SA CR 09-00162, Government Sentencing
22 Memorandum at 6-7 (Doc. No. 8) attached as Exhibit B. On August 15, 2007,² IMI
23 formed a Special Committee and authorized Steptoe to cooperate fully with law
24 enforcement. CCI Sentencing Memorandum at 3, 5.

25
26
27 ¹ 385 U.S. 493 (1967).

28 ² All dates refer to 2007 unless otherwise indicated.

1 On August 15, IMI disclosed the existence of the investigation to the DOJ and
2 the United Kingdom Serious Fraud Office. *Id.*; *see also* IMI August 15, 2007
3 Notification Letter (hereinafter referred to as “Notification Letter”) at 1 attached as
4 Exhibit C. The defense just received from the government emails between it and
5 Steptoe from August 15-17, 2007, which substantiate the collaboration between
6 IMI/CCI and the DOJ. *See* Declaration of Jessica C. Munk (“Munk Dec.”) at ¶¶ 2, 4.
7 In one email, dated August 15, 2007, Steptoe attorney Patrick Norton and Fraud
8 Section Deputy Chief Mark Mendelsohn discuss the status of CCI’s effort to collect
9 evidence for the government. Norton writes, in part:

10 Mark, *I’ve been discussing with IMI’s general counsel the*
11 *feasibility of holding off on their announcement to the London*
12 *Exchange. He doesn’t think it’s doable.* The Company’s Board of
13 Directors, on advice from UK counsel, decided at about 6 PM UK time to
14 issue the release at 7:30 AM in London tomorrow. ... *It’s simply not*
15 *feasible to get UK counsel to opine on this and contact all the Board*
16 *members in time to derail the announcement.*

17 We fully recognize *your and our interest in getting access to*
18 *senior management who may have been involved in the payments* in
19 questions [sic] while [sic] may still be willing to cooperate. To that end,
20 I am now planning to fly to LA this evening or first thing in the morning
21 and to be present when the individuals are informed that they are being
22 suspended pending the investigation. We intend to inform them that the
23 suspension is temporary and we are not prejudging the outcome, *but that*
24 *the company expects them to cooperate with the investigation.* Then I
25 proceed to interview them. This will give our associate in LA time to
26 assemble many, if not all of the relevant documents.
27
28

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

8 Exhibit A at 2 (emphasis added) attached to Munk Dec. at ¶.

9 Norton's email shows that CCI and the government were working together in
10 trying to obtain evidence and that they were clearly strategizing on the timing of IMI's
11 public announcement in order to get Defendants to submit to interviews prior to
12 retaining counsel. This appears to be the tip of the iceberg of communications
13 between CCI and the DOJ showing they were jointly aligned from the outset.³ After
14 Norton interviewed Defendants, he promptly emailed Mendelsohn updating him on
15 their joint effort in obtaining statements from senior management. On August 17,
16 2007 at 1:22 a.m., Norton writes: "Mark, [w]e interviewed five of the senior
17 management at CCI today in very general terms. So far they are being cooperative.
18 We intend to ask more difficult questions tomorrow based on specific documents. If
19 you would like to discuss this, please suggest a time by email" *Id.* These emails
20 confirm that CCI and the DOJ operated in concert. In every meaningful respect, the
21 DOJ and CCI embarked upon a joint investigation.

22
23
24
25 ³ Defendants first requested from the government communications between the
26 government and IMI/CCI from July 1, 2007 to October 31, 2007. In response to the
27 recently disclosed emails, Defendants requested any notes and documents reflecting
28 communications before August 17, 2007, as well as documents reflecting
communications from August 17, 2007 to October 31, 2007. Munk Dec. at ¶¶ 2, 5.

1 The DOJ collaborated on the search terms Steptoe would use to locate
2 documents for each Steptoe interview. Declaration of Brian M. Heberlig In Support
3 of the Opposition of IMI plc and CCI to Defendants' Joint Motion to Compel
4 Discovery (hereinafter referred to as "Heberlig Dec.") at ¶ 13 (Doc. No. 121-2)
5 attached hereto as Exhibit D; Reporter's Transcript of Proceedings (hereinafter
6 referred to as "Rep. Tr."), November 9, 2009 at 49, lns. 3-6. The government
7 represented to the Court that "throughout this process, we've worked with CCI to
8 come up with searches, to -- you know, to forward the investigation." Rep. Tr.,
9 November 9, 2009 at 49, lns. 3-6. Throughout the investigation, CCI provided DOJ
10 with a large volume of documents on a rolling basis; prepared for DOJ an extensive
11 factual summary of alleged improper payments, gifts, travel and entertainment
12 expenses; and facilitated interviews of CCI employees by the government. CCI
13 Sentencing Memorandum at 5-6; Government Sentencing Memorandum at 7.

14 In addition, Steptoe began interviewing "CCI and IMI employees who were
15 identified as having potential knowledge of the improper payments at issue and other
16 relevant issues." Heberlig Dec. at ¶10. CCI also entered into a Confidentiality and
17 Non-Waiver Agreement with DOJ whereby it provided the government with
18 information protected by the attorney-client privilege and work product doctrine –
19 privileges that could only be maintained if there was a joint investigation. *See*
20 Confidentiality and Non-Waiver Agreement attached hereto as Exhibit E. CCI also
21 touted that it provided the DOJ with a "roadmap" for the prosecution of the
22 Defendants in this case. CCI's Sentencing Memorandum at 6. CCI directed its
23 employees to "cooperate fully with the Steptoe and DOJ investigations . . . [and]
24 facilitated cooperation with the DOJ investigation by paying for travel expenses and
25 counsel for employees whom the Department sought to interview" CCI's
26 Sentencing Memorandum at 5-6. Heberlig admits having "hundreds" of conversations
27 with prosecutor Andrew Gentin. Rep. Tr., September 13, 2010 at 42, lns. 17-18.
28

1 When CCI and Steptoe actually commenced the internal investigation is
2 unclear, but Norton's email to the DOJ shows it was before August 15. Steptoe began
3 the interviews of the Defendants on August 16 and questioned them about transactions
4 with specific documents on August 17. These events followed Norton's collaboration
5 with Mendelsohn regarding how to obtain statements from the Defendants. Thus,
6 when these interviews took place, the DOJ had not only been notified of the
7 investigation, but had already teamed up with CCI.⁴ Also, it is patently obvious that
8 CCI had made the decision to cooperate with the government early on, most likely to
9 gain potential benefits as portended by the DOJ Memoranda. Yet the fact of this
10 cooperation and joint effort was never shared with Defendants. CCI and Steptoe had
11 already reached the conclusion that the Defendants had engaged in criminal
12 wrongdoing and the internal investigators intended to gather evidence against the CCI
13 executives. As CCI counsel acknowledged, CCI identified what they believed to be a
14 "known problem" and further believed the "defendants were the cause of the
15 problem." Rep. Tr., April 26, 2010 at 111, Ins. 8-12. When CCI compelled the
16 Defendants to submit to interviews, CCI counsel further acknowledged that the
17 questioners viewed the interviews, not as a fact-gathering exercise, but as an
18 "interrogation." Rep. Tr., April 26, 2010 at 111, Ins. 7-14. The notion that CCI and
19 Steptoe intended to conduct an "interrogation" was never shared with the Defendants.
20

21 **A. David Edmonds**

22 On August 16, CCI President Ian Whiting ("Whiting") held a company-wide
23 meeting at the headquarters of CCI. Declaration of David Edmonds at 2, ¶ 2. Whiting
24 announced that IMI had launched an investigation into possible irregular payments

25 ⁴ The August 15, 2007 email indicates Norton and Chief Deputy Mendelsohn had
26 additional conversations regarding the investigation and interviewing the Defendants
27 before this exchange. Full disclosure of these communications is needed to get the
28 entire picture of the extent of their joint efforts.

1 and he ordered that “every employee *must fully cooperate* with the investigation and
2 *meet as required with investigators.*” *Id.* (emphasis added). Later that same day,
3 Whiting came into Edmonds’ office and said that he expected Edmonds’ full
4 cooperation. *Id.* at ¶ 3. Edmonds reasonably assumed his job depended on meeting
5 with investigators. *Id.* at ¶ 4. Whiting also told Edmonds that he was not a focus of
6 the investigation and had nothing to worry about. *Id.* at ¶ 3. To fully cooperate as a
7 required condition for continued employment, Edmonds met with Steptoe attorneys
8 Patrick Norton and Andrew Irwin on August 16 and 17. There were also two Ernst &
9 Young investigators present. Edmonds answered the attorneys’ questions. *Id.* at ¶¶ 5-
10 7. During the August 16 and 17 interviews, Edmonds was never informed that his
11 statements could or would be used against him in a criminal proceeding. *Id.* at 3, ¶ 10.
12 After CCI had the information it needed, CCI suspended Edmonds. *Id.* at 2, ¶ 8.

13 **B. Paul Cosgrove**

14 CCI and Steptoe treated Cosgrove similarly. During the afternoon of August
15 16, Whiting approached Cosgrove and directed him to cooperate with the internal
16 investigators. Declaration of Paul Cosgrove at 2, ¶ 2. While Whiting was friendly
17 and never suggested that Cosgrove’s own conduct was at issue, Cosgrove reasonably
18 believed that he had to submit to the interview and that he could be fired if he
19 disobeyed a direct order from the company President to meet with CCI’s counsel. *Id.*

20 On August 16, Cosgrove met as directed with two attorneys from Steptoe and
21 one attorney from Ernst & Young for approximately one hour. *Id.* at ¶ 3. Norton
22 asked Cosgrove to answer general questions about CCI’s commission procedures and
23 Cosgrove was directed to return for an interview the next day. *Id.* At no time did
24 Norton, Whiting or anyone else inform Cosgrove that he was a target of a government
25 investigation and that CCI was not only cooperating with the government, but
26 intended to share his statements with the government. *Id.* at 3, ¶ 6.

1 The following day, Cosgrove returned to meet with CCI attorneys as instructed
2 by Whiting. *Id.* at 2, ¶ 4. CCI attorneys questioned Cosgrove about documents that
3 now underlie this criminal case. *Id.* At the end of the interview, he was suspended.
4 Cosgrove's company security key, office key, smart phone and company credit card
5 were confiscated and he was escorted off CCI's premises. *Id.* at 2-3, ¶ 5. Whiting
6 knew Cosgrove was a *target* of the investigation, yet he *directed* him to speak to CCI
7 attorneys, knowing they would hand over incriminating evidence to the government.
8 Underscoring the nature of the investigation, on the morning of August 17, Cosgrove
9 met two gentlemen that he had never seen before at CCI – one in the front lobby of the
10 building and one who sat near the outside door of the conference room – who he
11 learned only after his interview were FBI agents. *Id.* at 2, ¶ 4.

12 **C. Hong Carson**

13 On August 16, Carson attended a CCI all personnel meeting led by Whiting
14 where she learned that CCI had initiated an investigation of certain company
15 activities. Declaration of Hong Jiang Carson at 1, ¶ 2. Carson was not sure about the
16 specifics surrounding the investigation because Whiting has a thick British accent and
17 used vocabulary that she did not understand as a non-native English speaker. *Id.*

18 On August 17, Carson was in the restroom at CCI when a woman entered, stood
19 outside her stall, and told her to come out. *Id.* Carson asked her to wait and told her
20 she would be out soon. When Carson came out of the stall, Joanne Karimi, the head
21 of Human Resources, was outside of her stall and she realized this was the women
22 who was instructing her to come out. *Id.* Karimi instructed Carson to follow her to a
23 conference room. *Id.* Once they arrived at the conference room, Karimi told Carson
24 to sit down and instructed her not to leave the room. *Id.* at ¶ 3. Karimi sat down and
25 stayed in the conference room with Carson. Shortly thereafter, a person who Carson
26 did not recognize at the time, but later learned was a lawyer involved in the
27

1 investigation, came into the conference room and spoke with Karimi. *Id.* Carson does
2 not recall their entire conversation but remembers the lawyer saying he was going to
3 call the “city” and find a plumber. *Id.* The lawyer stayed only a couple minutes, and
4 Karimi continued to sit in the conference room with Carson. *Id.* Because Carson was
5 a CCI employee, she was nervous and scared that Karimi had escorted her to the
6 conference room and continued to watch her to ensure she did not leave. *Id.* at 1-2, ¶
7 3. Carson believed there would be serious repercussions to her employment,
8 including the possibility of immediate termination, if she did not comply with
9 Karimi’s instructions to stay in the conference room. *Id.* at 2, ¶ 3.

10 After approximately 30 minutes in the conference room, another woman came
11 in and told Karimi to go to another conference room and Karimi instructed Carson to
12 follow her. *Id.* at ¶ 4. Karimi escorted Carson to another conference room, where she
13 was asked to sit across the table from three lawyers. Carson does not remember being
14 told that she was going to be meeting with lawyers for the company before being
15 taken to this conference room. *Id.* The lawyers questioned Carson in English about
16 various emails and documents, including certain emails she previously reviewed with
17 someone from the company during an audit of commissions in 2004. *Id.* at ¶ 5.
18 Carson answered the questions in English to the best of her memory. At one point
19 during the interview, when she did not remember something, one of the lawyers spoke
20 to her in fluent Mandarin Chinese. *Id.* She was surprised that someone spoke
21 Mandarin Chinese because the entire interview was conducted in English. During the
22 meeting, she was nervous and had difficulty understanding all of the questions asked
23 but believed she had to cooperate with the lawyers. *Id.* She would have felt more
24 comfortable if the interview was conducted in Mandarin Chinese. *Id.*

25 After the lawyers finished questioning Carson, Karimi informed her that she
26 was suspended and instructed her to leave the building immediately. *Id.* at ¶ 6.
27 Carson requested her car keys that were in her office. Karimi had someone fetch the
28

1 keys. She followed Karimi's instructions and left the building. *Id.* Like Edmonds
2 and Cosgrove, Carson was never told that CCI suspected she had engaged in any
3 wrongdoing or that CCI had already informed the government about its investigation.
4 But at all times during the events described above, including meeting with the
5 lawyers, Carson felt that she could not leave CCI and that if she did not comply with
6 CCI's various requests, she would be fired or would suffer negative consequences
7 regarding her employment there. *Id.* at 2-3, ¶ 7.

8 Defendants now move to suppress their compelled interview statements. *See*
9 Summaries of Defendants' statements attached hereto as Exhibits F, G and H.⁵

10 **III. DEFENDANTS' STATEMENTS TO CCI, A GOVERNMENT**
11 **AGENT, MUST BE SUPPRESSED AS COMPELLED IN VIOLATION**
12 **OF DEFENDANTS' FIFTH AMENDMENT RIGHTS**

13 In *Garrity v. New Jersey*, the Supreme Court recognized that the collection of
14 evidence by a state actor through economic compulsion violates the Fifth Amendment
15 privilege against self-incrimination. 385 U.S. at 497-98. The Self-Incrimination
16 Clause provides "[n]o person . . . shall be compelled in any criminal case to be a
17 witness against himself." U.S. CONST. amend. V. This privilege applies in the
18 employment context when employers who are state actors conduct internal
19 investigations. When a state actor expressly or implicitly threatens job loss if a person
20 does not waive his or her Fifth Amendment privilege against self-incrimination, any
21 statement made under threat of that penalty is compelled and inadmissible in a
22 criminal proceeding. *Garrity*, 385 U.S. at 497-500; *United States v. Stein*, 440 F.
23 Supp. 2d 315, 326, 334-35 (S.D.N.Y. 2006) ("*Stein II*"). Here, under two distinct
24 doctrines, CCI and its counsel were *de facto* public actors who elicited statements

25
26 ⁵ It is unclear how the government intends to admit the Defendants' statements as
27 there are currently no witnesses identified on the government's witness list who can
28 testify regarding these statements.

1 from the Defendants through economic coercion. The Fifth Amendment requires that
2 these statements be suppressed along with all leads and evidence derived therefrom.

3 **A. CCI Was A De Facto Public Actor During Defendants' Interviews**
4

5 The question whether conduct by a nominally private actor should be deemed
6 state action is not novel. The federal courts have developed two distinct standards for
7 making this determination, both of which justify the conclusion that CCI and its
8 internal investigators were state actors rendering their August 2007 interrogations of
9 the Defendants state action for purposes of applying Fifth Amendment strictures.

10 **1. CCI Was Acting as a Government Agent In August 2007 When It**
11 **Compelled Statements From Edmonds, Cosgrove and Carson**

12 First, state action exists when an individual or entity is acting as an agent of the
13 State. *See United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994). There are two
14 requirements in order to find an agency relationship with the government: (1) the
15 party performing the intrusive conduct intended to assist law enforcement efforts, and
16 (2) the government's knowledge and acquiescence in the intrusive conduct. *United*
17 *States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981); *United States v. Miller*, 688 F.2d
18 652, 657 (9th Cir. 1982) (finding no agency relationship where there is no evidence
19 government encouraged private citizen to act on its behalf).⁶

20 In *United States v. Walther*, the Ninth Circuit held that an airline employee,
21 who had previously reported suspicious packages to the DEA in exchange for a
22 monetary reward, was an agent of the State when he searched a package and found
23 illegal drugs. 652 F.2d at 790-91, 793. The court reasoned that although the DEA
24 had no knowledge of this particular search, and had not directly encouraged the

25 _____
26 ⁶ While these cases dealt with challenges to the Fourth Amendment, the same test is
27 applicable to determine whether an agency relationship exists with the government in
28 the Fifth Amendment context. *See United States v. Day*, 591 F.3d 679, 683 (4th Cir.
2010).

1 employee to conduct it, it had previously encouraged this type of search, and rewarded
2 him for providing information thereby acquiescing in the activity. *Id.* at 793. The
3 court found unpersuasive the fact that the employee had not made contact with the
4 DEA for approximately two years prior to the challenged search. *Id.* at 793 n.3.

5 By this standard and its application in *Walther*, CCI undoubtedly was an agent
6 for government. From the outset, when CCI counsel interviewed Defendants, after
7 raising the specter of termination (the “intrusive conduct” discussed *infra*), CCI was
8 conducting its investigation as a partner with the government. Even without full
9 discovery regarding the DOJ’s communications with CCI, there is ample evidence that
10 DOJ acquiesced or encouraged CCI’s conduct in compelling the Defendants’
11 statements. Norton refers to their aligned interests: “[w]e **fully recognize your and**
12 **our interest in getting access to senior management who may have been**
13 **involved....**” Exhibit A at 2 (emphasis added) attached to Munk Dec. at ¶ 4. As to
14 whether senior staff are cooperating, Norton writes to Mendelsohn, “[i]f they are, you
15 can then decide whether you wish to send someone from the DOJ or FBI to speak to
16 them. I will also be on-site to help coordinate with the company.” *Id.* It is patent that
17 DOJ and CCI were effectively investigating hand-in-hand when CCI sought
18 statements from the Defendants.

19 CCI spared no effort in fully cooperating with the DOJ. Upon becoming
20 concerned about improper payments, CCI hired Steptoe to conduct an internal
21 investigation. CCI Sentencing Memorandum at 3, 5. CCI worked in concert with
22 DOJ: it shared investigative results with DOJ, including providing key documents and
23 summaries of the employee interviews; it made witnesses available for DOJ to
24 interview around the world; responded to DOJ’s numerous requests for information;
25 and it provided DOJ with a detailed “roadmap” for its prosecution. *Id.* at 1, 5-6.
26 Defendants’ interviews were among CCI’s many investigative acts on behalf of DOJ.
27

1 Not only were CCI and the DOJ working in concert during the investigation,
2 but the DOJ knew it had created a powerful incentive for CCI to compel statements
3 from its employees through promulgation of the Thompson and McNulty Memoranda
4 discussed below. DOJ rewards corporations that assist in a criminal investigation,
5 disclose all relevant evidence and findings, and “identify the culprits within the
6 corporation, including senior executives.” See U.S. DEP’T OF JUSTICE, UNITED STATES
7 ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL, McNulty Memorandum §
8 VII, ¶ A (December 12, 2006). By bestowing the prospect of significant benefits on
9 corporations that follow cooperation edicts, the DOJ invites companies to join forces
10 turning them into state actors for constitutional purposes. See *United States ex rel.*
11 *Sanney v. Montanye*, 500 F.2d 411, 413, 415 (2d Cir. 1974), *cert. denied*, 419 U.S.
12 1027 (1974) (finding state action where at police request a private employer
13 administered a polygraph and asked the employee questions about a murder).

14 It would be anomalous indeed for DOJ now to contend that CCI was not acting
15 at its behest by August 16. In dismissed Count 16 of the Indictment, the grand jury
16 alleged that on or about August 17, Carson tore up documents and flushed them down
17 the toilet at CCI prior to her interview with Steptoe, and that this conduct obstructed a
18 federal investigation in violation of 18 U.S.C. § 1519 (“Destruction, alteration, or
19 falsification of records in Federal investigations and bankruptcy.”) See Indictment at
20 35. Given that the statute requires an intent to “impede, obstruct, or influence” a
21 government investigation, DOJ – at least at the time of the Indictment – believed CCI
22 was conducting its investigation on the government’s behalf as of August 17. DOJ’s
23 dismissal of this count does not affect this assessment.

24 Furthermore, when DOJ interviewed Dean Capper, the former CFO of CCI,
25 Capper was in possession of personal notes and emails that he maintained at CCI.
26 The FBI collected some of these documents, but instructed Capper to turn over the
27 remaining documents to Steptoe. See Capper’s Proffer Statement at CCI_163 attached
28

1 hereto as Exhibit I. Clearly the DOJ and Steptoe were working together for DOJ to
2 instruct a witness to turn over documents relevant to an investigation to Steptoe.

3 In sum, not only did the government have knowledge of the intrusive conduct
4 before it occurred, but CCI compelled the Defendants' statements in order to assist the
5 government. Thus, both elements of the *Walther* test are met and CCI was acting as
6 an agent for the government when it compelled the Defendants' statements.

7
8 **2. There Is a Close Nexus Between DOJ's and CCI's Coercion of
Defendants' Making CCI's Actions Fairly Attributable to DOJ**

9 There is a second distinct doctrinal basis for concluding CCI was a state actor.
10 When there is "a sufficiently close nexus between the State and the challenged action
11 of the regulated entity so that the action of the latter may be fairly treated as that of the
12 State itself" the private entity's actions are "fairly attributable" to the government and
13 constitute state action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson*
14 *v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). The "close nexus" test is
15 satisfied when the State has either: (1) "exercised coercive power over a private
16 decision or [(2)] *has provided such significant encouragement, either overt or*
17 *covert*, that the choice by the private actor must in law be deemed to be that of the
18 State[.]" *Stein II*, 440 F. Supp. 2d at 334 (emphasis added). As applied here, when
19 employee statements are compelled by internal investigators acting to facilitate
20 government guidance and interests, the compulsion is fairly attributable to the
21 government within the meaning of the Fifth Amendment. *See id.* at 334-35, 337
22 (relying on *Sanney v. Montanye*, 500 F.2d at 415).

23 In *United States v. Stein*, KPMG was under investigation for involvement in
24 marketing fraudulent tax shelters. *United States v. Stein*, 435 F. Supp. 2d 330, 338-39
25 (S.D.N.Y. 2006) ("*Stein I*").⁷ KPMG and decided to cooperate with DOJ. *Id.* at 339.

26
27 ⁷ *Stein I* addressed whether KPMG's cutting off of attorneys' fees for its employees
28 violated their Sixth Amendment right to counsel.

1 In light of the Thompson Memorandum, KPMG committed to do anything it could to
2 cooperate with DOJ's investigation in order to avoid indictment, including
3 encouraging its employees to cooperate. *Id.* at 341-42, 345-46; *Stein II*, 440 F. Supp.
4 2d at 320. In *Stein II*, the court addressed whether KPMG was a state actor when it
5 pressured its employees to surrender their Fifth Amendment rights and proffer to the
6 government. 440 F. Supp. 2d at 320.⁸ The court looked to the Thompson
7 Memorandum and the DOJ's actions to determine whether there was a "close nexus"
8 between the government and the challenged action by KPMG – specifically, KPMG's
9 use of economic threats to coerce proffer statements. *Id.* at 334-35.

10 In concluding KPMG's conduct was state action, the court focused on, and was
11 troubled by, the Thompson Memorandum's criteria for assessing a corporation's
12 cooperation and those criteria's influence on KPMG. The court was concerned not
13 only with the legal fees provision that was addressed in *Stein I*, but additional criteria
14 that the DOJ may consider in assessing the corporation's cooperation:

15 In gauging the extent of the corporation's cooperation, the prosecutor
16 may consider the corporation's willingness to identify the culprits within
17 the corporation, including senior executives; to make witnesses available;
18 to disclose the complete results of its internal investigation; and to waive
19 attorney-client and work product protection.

20 *Id.* at 319 (quoting U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL,
21 CRIMINAL RESOURCE MANUAL, § 9-162, § VI, ¶ A (January 2003)) (emphasis
22 omitted). The court also referenced the associated commentary, which states: "One
23 factor a prosecutor may weigh in assessing the adequacy of a corporation's
24 cooperation is the *completeness of its disclosure* including, if necessary, a waiver of
25 the attorney-client and work product protections" *Id.* at 319-20 (quoting *Id.* at §
26

27 ⁸ A portion of the relevant facts were addressed in *Stein I*.

1 VI, ¶ B). The court noted that the Thompson Memorandum made clear that a
2 company's failure to ensure its employees disclose whatever they knew, regardless of
3 their individual rights and concerns, might weigh in favor of indictment. *Id.* at 334-
4 35. The court found significant that the prosecutor knew that KPMG would pressure
5 any employee who refused to talk and even notified KPMG when employees were
6 uncooperative. *Id.* at 335. Thus, the court held that the government, through the
7 Thompson Memorandum and the actions of DOJ, "*deliberately coerced*" KPMG to
8 pressure its employees to surrender their Fifth Amendment rights, creating a "clear
9 nexus" between the government and the coercion. *Id.* at 337 (emphasis added). On
10 this basis the court held that KPMG's actions constituted state action and, therefore,
11 the coerced statements must be suppressed. *Id.* at 338.

12 The McNulty Memorandum, with minor changes, identifies the same factors as
13 the Thompson Memorandum for assessing a corporation's cooperation.⁹ Although the
14 McNulty Memorandum no longer considers the advancement of legal fees (addressed
15 in *Stein I*) in weighing cooperation, the McNulty Memorandum, like the Thompson
16 Memorandum before it, contains numerous factors which entice a corporation's
17 cooperation. Thus, the McNulty Memorandum in relevant part provides:

18 In gauging the extent of the corporation's cooperation, the prosecutor
19 may consider, among other things, whether the corporation made a
20 voluntary and timely disclosure, and the corporation's willingness to
21 provide relevant evidence and to identify the culprits within the
22 corporation, including senior executives.

23
24 ⁹ On December 12, 2006, Deputy Attorney General Paul J. McNulty released revised
25 guidelines concerning the Principles of Federal Prosecution of Business Organizations
26 ("McNulty Memorandum"), replacing the Thompson Memorandum. The McNulty
27 Memorandum was in effect when the statements Defendants seek to suppress were
28 compelled.

1 § VII, ¶ A. It further “encourages corporations . . . to conduct internal investigations
2 and *disclose their findings* to the appropriate authorities.” *Id.* at ¶ B (emphasis
3 added). It states that waiver of attorney-client and work product protections is not a
4 prerequisite in finding a corporation cooperated, but then emphasizes that “a
5 company’s disclosure of privileged information may permit the government to
6 expedite its investigation . . . [and] *disclosure of privileged information may be*
7 *critical in enabling the government to evaluate the accuracy and completeness of*
8 *the company’s voluntary disclosure.*” *Id.* (emphasis added). If a legitimate need
9 exists, prosecutors may seek waivers of certain attorney-client privileged information
10 including copies of key documents, witness statements and interview memoranda
11 regarding the misconduct. *Id.* at ¶ B 2. If a request for such privileged material is
12 made, the prosecutor may consider a corporation’s response to such waiver in
13 assessing cooperation. *Id.* A prosecutor may also consider whether a corporation is
14 shielding culpable employees by entering into joint defense agreements. *Id.* at ¶ B 3.

15 By rewarding corporations that assist in a criminal investigation by disclosing
16 not only relevant evidence but findings that provide a prosecutorial roadmap, the DOJ
17 manifestly encourages corporations to join its team. Like KPMG, CCI was induced to
18 cooperate fully with the government in order to avoid indictment or receive a
19 substantially reduced penalty.¹⁰ With the guidance of sophisticated federal criminal
20 practitioners at Steptoe, CCI precisely navigated the DOJ roadmap. The Thompson
21 and McNulty memoranda provided a compelling incentive for CCI to extract
22 statements from its employees. Knowing it would turn over to the DOJ the fruits of
23

24 ¹⁰ IMI completely escaped liability and was never indicted. CCI pled guilty to three
25 counts (one count conspiracy to violate the FCPA and the Travel Act and two
26 substantive counts of the FCPA) with a substantially reduced penalty of \$18,200,000,
27 a mere fraction of the company’s gross revenue. Government’s Sentencing
28 Memorandum at 8; *United States v. Control Components, Inc.*, SA CR 09-00162, Plea
Agreement at 2-3, 11 (Doc. No. 7) attached hereto as Exhibit J.

1 the interrogations and after coordinating with the DOJ, CCI identified purported
2 culprits within the corporation and ordered them to meet with investigators without
3 regard to their Fifth Amendment right against self-incrimination. After compelling
4 statements from Edmonds, Cosgrove and Carson under the threat of termination, as
5 discussed *infra*, CCI promptly provided DOJ with these statements. *See* CCI's
6 Sentencing Memorandum at 5. Just as in *Stein II*, there was a clear and close nexus
7 between DOJ and the coercion of Defendants, making CCI and Steptoe state actors.

8 In conclusion, the government exercised coercive power over CCI and at the
9 very least significantly encouraged CCI's actions. Under both tests, therefore, CCI's
10 actions during the August 2007 interviews are fairly attributable to the government
11 and constitute state action.

12
13 **B. Defendants' August 2007 Interview Statements Were the Product of the**
14 **Threat of Termination and Thus Meet the Fifth Amendment Standard**
15 **for an Improperly Compelled Statement**

16 In *Garrity v. New Jersey*, the Supreme Court held that threatening police
17 officers with termination if the police officers did not waive their constitutional right
18 against self-incrimination and answer incriminating questions violated the Fifth
19 Amendment and rendered their statements inadmissible. 385 U.S. at 497-500. The
20 court reasoned that the choice between the threat of one's livelihood or self-
21 incrimination is the equivalent to "a choice between the rock and the whirlpool"
22 which disables an individual from making a free and rational choice. *Id.* at 496-97.
23 Because economic coercion induced the waiver of the privilege, the statements were
24 compelled in violation of the Fifth Amendment. *Id.* at 497-98.

25 Since *Garrity*, courts have expanded this principle, finding other sanctions,
26 including loss of contracts, loss of political office or the right to run for political
27 office, and revocation of probation, to constitute coercion within the meaning of the
28 Fifth Amendment. *United States v. Frierson*, 945 F.2d 650, 658 (3d Cir. 1991) (citing

1 *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-08 (1977) (finding Fifth Amendment
2 violation when the State divested defendant of his state political party office for
3 refusing to waive his constitutional immunity before a grand jury); *Sanitation Men v.*
4 *Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968) (finding Fifth Amendment
5 violation when city employees were discharged for invoking their privilege against
6 self-incrimination); *Gardner v. Broderick*, 392 U.S. 273, 276-79 (1968) (holding a
7 police officer cannot be discharged for failing to waive Fifth Amendment rights
8 against self-incrimination without immunity while testifying before a grand jury)).

9 In *Stein II*, the court addressed whether certain pre-indictment statements
10 made by the defendants were coerced in violation of the Fifth Amendment.
11 Relying on *Garrity*, the defendants moved to suppress their proffer statements
12 made to the government arguing they were coerced by KPMG under the threat
13 of a “penalty” in violation of their Fifth Amendment rights. Specifically, the
14 defendants argued that their statements were coerced by KPMG conditioning
15 payment of their legal fees, and in some cases, their continued employment
16 upon their cooperation. *Stein II*, 440 F. Supp. 2d at 326.

17 The district court denied the motion with respect to a number of the defendants
18 for their failure to present sufficient facts that, if proved, would demonstrate their
19 statements were coerced. *Id.* at 326-27. However, the court held two of the
20 defendants’ proffer statements were coerced because one defendant only agreed to
21 proffer to the government after KPMG threatened to terminate him and the other
22 defendant felt compelled to return to government proffer sessions to avoid KPMG
23 cutting off payment of his legal fees. *Stein II*, 440 F. Supp. 2d at 330-33. The court
24 reasoned that although KPMG typically paid its employees’ legal fees in connection
25 with legal matters arising from their employment, under government pressure KPMG
26 capped and conditioned the legal fees on the employees’ cooperation with prosecutors.
27 *Id.* The government immediately notified KPMG when its employees were
28

1 uncooperative. KPMG told the USAO that it would not pay legal fees for any
2 employee who would not cooperate or who invoked the Fifth Amendment. KPMG
3 often encouraged employees to cooperate with DOJ and “be prompt, complete, and
4 truthful” but also threatened to cease payment of attorney fees and if necessary
5 terminate employees if they refused to cooperate. *Id.* at 323-24. The court suppressed
6 the proffer statements holding the statements were coerced in violation of the Fifth
7 Amendment. *Id.* at 318-19, 330-33.

8 The economic coercion need not be explicit; statements made under an implicit
9 threat of a “penalty” are equally compelled under the Fifth Amendment. *Minnesota v.*
10 *Murphy*, 465 U.S. 420, 435 (1984); *see also United States v. Swanson*, 635 F.3d 995,
11 1006-07 (7th Cir. 2011) (Manion, J., concurring) (Judge Manion noted that the arrest
12 warrant provided an implicit threat of a “penalty” and took the form of “if you want
13 bond, you must produce incriminating evidence”). The threat of the penalty must be
14 subjectively believed and that belief objectively reasonable under the circumstances.
15 *See United States v. Friedrich*, 842 F.2d 382, 395 (D.C. Cir. 1988); *McKinley v. City*
16 *of Mansfield*, 404 F.3d 418, 436 (6th Cir. 2005); *United States v. Vangates*, 287 F.3d
17 1315, 1321-22 (11th Cir. 2002). In determining whether the belief was objectively
18 reasonable, courts examine “the totality of the circumstances surrounding the
19 testimony.” *Vangates*, 287 F.3d at 1322.

20 In *United States v. Saechao*, the Ninth Circuit held that requiring a probationer
21 to “answer all reasonable inquiries” or face revocation of his probation violated his
22 Fifth Amendment right against self-incrimination and his statements were thus
23 compelled by a “classic penalty situation.” 418 F.3d 1073, 1075 (9th Cir. 2005). The
24 Court accordingly affirmed the district court’s order suppressing the statements and
25 the fruits of the unlawful conduct. *Id.* The Ninth Circuit reasoned that requiring
26 *answers to all* inquiries, the probation condition provided no exception for the
27 invocation of the Fifth Amendment and thus, prohibited a probationer’s ability to
28

1 exercise the right to remain silent without being subject to a penalty. *Id.* at 1079. The
2 Court distinguished Saechao’s probation condition from the probation conditions in
3 *Minnesota v. Murphy*, 465 U.S. 420 (1984). *Id.* at 1078. In *Murphy*, the Supreme
4 Court held that Murphy’s statements were not compelled under threat of a penalty
5 because the probation conditions did not actually require him to answer his probation
6 officer’s inquiries. 465 U.S. at 427. Accordingly, the Court concluded that Murphy
7 could not have been objectively or subjectively “deterred from claiming the privilege
8 by a reasonably perceived threat of revocation.” *Id.* at 438-39. Distinguishing
9 *Murphy*, the Ninth Circuit noted that Murphy’s probation conditions only required
10 him to “be truthful with his probation officers in all matters,” and did not require him
11 to respond to his probation officer’s questions or face revocation of his probation.
12 *Saechao*, 418 F.3d at 1078. Unlike *Murphy*, it was objectively reasonable for Saechao
13 to believe that if he invoked his Fifth Amendment right and not answer *all* reasonable
14 inquiries, he would face revocation of his probation and thus, was compelled by threat
15 of penalty to answer incriminating questions. *Id.*; *see also Swanson*, 635 F.3d at 997,
16 1005 (Manion, J., concurring) (concurring opinion noting defendant’s statements and
17 gun should be suppressed on the grounds that the condition in the arrest warrant for
18 possession of a firearm without a valid Firearm Owner’s Identification card that
19 required defendant to turn over all guns in his possession to the police as a condition
20 of bond created a penalty situation whereby if defendant exercised his Fifth
21 Amendment rights, he would be punished by being denied bail).

22 Like *Stein II*, *Saechao* and *Swanson*, Defendants were required to “*fully*
23 *cooperate* with the investigation and *meet as required with investigators*” or face what
24 they reasonably believed would be the penalty of termination from their employment.
25 Declaration of David Edmonds at 2, ¶ 2. (emphasis added). There was an obvious,
26 severe implicit threat – CCI implicitly threatened Defendants with termination of
27 employment if they did not participate in interviews with CCI’s investigators.
28

1 Undisclosed to Defendants was their employer's intention to provide the substance of
2 their statements directly to DOJ as part of a complete cooperation effort. Defendants
3 subjectively believed that it was a condition of their employment, under penalty of
4 termination for failure to comply, to answer the questions of the CCI interrogators.
5 Declaration of David Edmonds at 2, ¶ 4; Declaration of Paul Cosgrove at 2, ¶ 2; and
6 Declaration of Hong Jiang Carson at 2-3, ¶ 7. Their belief was objectively reasonable
7 under the circumstances – a major investigation by outside counsel, persistent
8 demands by CCI's President that they fully cooperate, and assurances in some cases
9 that they themselves were not in any personal jeopardy as long as they cooperated.

10 The circumstances relating to Edmonds are illustrative. On August 16, after
11 CCI President Whiting directed all CCI employees, including Edmonds, to fully
12 cooperate and meet *as required* with investigators, Whiting came into Edmonds'
13 office and again reiterated, privately that he expected Edmonds' *full cooperation*.
14 Declaration of David Edmonds at 2, ¶ 3. Whiting also assured Edmonds that he was
15 not a focus of the investigation and therefore had nothing to worry about. *Id.* The
16 following day, Lisa Choklos, Whiting's assistant, called Edmonds on his cell and
17 directed him to immediately return to CCI and meet a second time with investigators.
18 *Id.* at ¶ 6. When Edmonds returned, he was promptly escorted to the interview room
19 to meet with Steptoe attorneys. *Id.* at ¶ 7. Edmonds was subsequently questioned
20 regarding numerous emails and documents, many of which, in part, now make-up the
21 Indictment against him. *Id.*; *see also* Exhibit F. After approximately an hour of
22 questioning, CCI suspended Edmonds. Declaration of David Edmonds at 2, ¶ 8.

23 Like the defendant in *Stein II*, Edmonds met with CCI investigators
24 because his job was conditioned on him cooperating and answering their
25 questions. It was objectively reasonable for Edmonds to believe he would be
26 terminated if he did not cooperate when CCI ordered him, multiple times and in
27 multiple ways, to cooperate fully with the investigators. At no time did Steptoe
28

1 inform Edmonds that he was free to refuse to answer any statements or could
2 invoke his Fifth Amendment right against self-incrimination. *Id.* at 3, ¶ 9.
3 Edmonds was thus left with a choice between a rock and a whirlpool – he could
4 either meet with investigators and risk incriminating himself or be fired. Thus,
5 Edmonds’ statements on August 16 and 17 were the product of economic
6 coercion and should be suppressed in violation of his Fifth Amendment rights.

7 Similarly, Cosgrove was personally instructed by CCI’s President to
8 cooperate with CCI’s attorneys on August 16. Declaration of Paul Cosgrove at
9 2, ¶ 2. Cosgrove was not given a choice of whether or not to meet with CCI’s
10 attorneys. Further, he was not told that he was a target of an investigation CCI
11 was conducting for the government and that CCI intended to share his
12 statements with the government. *Id.* at 3, ¶ 6.

13 Like Edmonds, Cosgrove was suspended immediately after providing
14 CCI’s attorneys with requested information. Had he known he was going to be
15 suspended prior to the interviews, Cosgrove would not have felt compelled to
16 speak in order to keep his job. *Id.* at 3, ¶ 7. Accordingly, Cosgrove’s
17 statements on August 16 and 17 resulted from economic coercion and use of
18 these statements violates his Fifth Amendment rights.

19 Finally, Carson was similarly not given a choice of whether or not to
20 meet with CCI’s attorneys. Carson believed that if she did not do what CCI
21 told her to do, she would be terminated. Declaration of Hong Jiang Carson at 3,
22 ¶ 7. It was objectively reasonable for Carson to believe she would be
23 terminated if she did not meet with the attorneys as ordered by CCI. First,
24 Carson was ordered out of the restroom by the head of human resources, and
25 then escorted to a conference room where she was instructed to stay while being
26 watched by CCI personnel. She was then escorted to another conference room
27 where she was questioned by attorneys regarding various emails and
28

1 documents. Not only does Carson not recall being informed that she was going
2 to be questioned by the attorneys, but she was also never informed that she
3 could choose not to answer their questions and that CCI had already informed
4 the government about its investigation. *Id.* at 2, ¶¶ 4, 7. Also, the interview
5 was conducted in English. As a non-native English speaker, Carson had
6 difficulty understanding many of the questions, but reasonably believed that if
7 she did not cooperate and answer the attorneys' questions, she would be fired or
8 would suffer negative consequences regarding her employment. *Id.* at 2-3, ¶¶ 5,
9 7. Carson was suspended after providing the attorneys with the requested
10 information. Similar to Edmonds and Cosgrove, CCI coerced Carson with the
11 implicit threat of termination if she did not meet with and answer the questions
12 of the attorneys. Thus, her statements were compelled by economic coercion
13 and should be suppressed in violation of the Fifth Amendment.
14

15 **C. Alternatively, Defendants Have Made A Sufficient Showing To Obtain**
16 **Discovery To Further Review The Extent To Which The Interview**
17 **Statements Are The Result Of Government Coercion**

18 If this Court believes that Defendants have made an insufficient showing of
19 state action by CCI, Defendants should be afforded a reasonable opportunity to take
20 discovery on this issue and subpoena witnesses to an evidentiary hearing to provide
21 the Court with additional facts. Specifically, Defendants request the notes taken by
22 the internal investigators during the interviews of them as well as all of the documents
23 and records that reflect CCI's and Steptoe's communications with the government
24 prior to the dates of their interviews or within a couple months thereafter to assess the
25 joint investigative effort. To date, the defense has received limited documentation
26 relating to the interactions amongst CCI and DOJ. The concerted actions described in
27 CCI's plea agreement and sentencing memoranda as well as various statements by
28 Steptoe partner Brian Heberlig during litigation in this case, are telling. However,

1 there is undoubtedly more evidence of interactions relevant to applying the two legal
2 tests discussed above. Further discovery therefore is justified if the Court deems
3 Defendants showing of state action by CCI inadequate. Thereafter, to the extent
4 necessary, the Defendants request an evidentiary hearing.
5

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court should grant this motion to suppress, or in
8 the alternative, order discovery, and if necessary, hold a further evidentiary hearing on
9 Defendant's request for suppression.
10

11
12 Dated: March 5, 2012

Respectfully submitted:

13
14 LAW OFFICES OF DAVID W. WIECHERT

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, Danielle Dragotta, am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 115 Avenida Miramar, San Clemente, CA 92672.

On March 5, 2012, I served the foregoing document described as **DEFENDANTS’ NOTICE OF MOTION AND MOTION TO SUPPRESS DEFENDANTS’ STATEMENTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS OF JESSICA C. MUNK, DAVID EDMONDS; PAUL COSGROVE; AND HONG JIANG CARSON** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed and sent as follows:

SEE ATTACHED SERVICE LIST

- BY MAIL:** I caused such envelope(s) to be deposited in the mail at San Clemente, California with postage thereon fully prepaid to the office of the addressee(s) as indicated on the attached service list. I am “readily familiar” with this firm’s practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.
- BY E-MAIL** I caused a courtesy copy to be transmitted by email to the email address of the offices of the addressee(s) as indicated on the attached service list.
- BY PERSONAL SERVICE:** I caused such envelope to be hand-delivered to the offices of the addressee(s) as indicated on the attached service list.
- FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction service was made.

Executed on March 5, 2012 at San Clemente, California.

Danielle Dragotta

Danielle Dragotta

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