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13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION
16

17 UNITED STATES OF AMERICA,)
18 Plaintiff,)

19 v.)

20 GERALD GREEN and PATRICIA)
21 GREEN,)

22 Defendants.)
23)

NO. CR 08-59-GW

SUPPLEMENTAL SENTENCING
INFORMATION RESPONDING
TO GOVERNMENT'S
CONTINUING CITATION TO
OTHER FCPA SENTENCINGS;
EXHIBIT DD

Hearing Date: August 12, 2010
Hearing Time: 2: 30 p.m.

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25 Defendants Gerald Green and Patricia Green hereby jointly file this

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

SUMMARY OF NEW INFORMATION PRESENTED

This Court has previously considered case citations to other FCPA cases and questioned the helpfulness of such citations. Last week, the government filed yet another citation, along with selective and partial documents from the case file in *United States v. Juan Diaz*, CR 09-20346-JEM (Southern District of Florida). The new citation evidences the difficulty in comparing different cases and based upon selective information available. The *Diaz* case in several ways exemplifies why this Court has the duty and discretion to sentence and not the Sentencing Commission and why what a judge did in another place in another case may not be at all similar to what is reasonable and fair here.

Secondly, the duality in the government’s position vis-a-vis the Green’s is evident when one looks at the government’s numerous multimillion dollar settlements/disgorgements non-prison resolutions over the past ten years in really big bribery cases. As in the “top ten” largest settlements list, and even this past weekend’s press release of Tobacco corporations’ multi million dollar settlement, to make the point that bribery is bad. Other punishments, including monetary and cease and desist orders or ways of stopping people from doing business the wrong way, are appropriate and neither justice nor deterrence requires that the Greens go to jail.

II.

WHY IS DIAZ’ NOT APPLICABLE

The government’s citation to the *Diaz* case in several ways exemplifies why this Court has the discretion to impose sentences and not the Sentencing Commission and why what a judge did in another place in another case may not be at all similar to what is reasonable and fair here. *Diaz* exemplifies the disparate treatment the government meets out in FCPA resolutions. *Diaz* was settled on a plea to a one count

1 information to a Title 18 U.S.C. § 371 conspiracy to violate the FCPA. The settlement
2 set the maximum sentence at five years. The plea agreement and the Information filed
3 in the case (CR 09-20346-JEM , Doc. 1) establish that the crime plead to started in
4 2001 and continued through October 2003. The government executed a plea
5 agreement agreeing that the money laundering guidelines in U.S.S.G. §§2S1.1 and
6 2B1.1 would be used. Govt. *U.S. v. Green* Filing CR 377-1, Diaz plea agreement p. 4.

7 This is curious given the change in the guidelines for FCPA cases, applying
8 §2C1.1, became effective November 1, 2002. Yet the government agreed in *Diaz* to
9 apply the section which previously applied, §2S1.1. Thus, by government agreement,
10 Diaz was not saddled with the onerous enhancements which are now applied to the
11 Greens and have resulted in an adjusted level 38 (+2 more than one bribe, +4 official,
12 +2 money laundering, +2 sophisticated means).

13 Here, the same government that applied §2S1.1 to FCPA bribery in the *Diaz*
14 sentencing only a month ago, urges the application of 2C1.1 here. Apparently, the
15 right hand and the left hand of the government do different things. Nothing prevents
16 this Court from considering defendants' overstatement of loss amount as a departure
17 argument or 3553 argument. For instance in *Diaz*:

18 √ that in *Diaz* the money laundering guidelines were used to calculate the
19 range in a FCPA conspiracy case, and not the bribery guideline in 2C1.1.

20 √ that in *Diaz* there were no sentencing pleadings filed, and it appears that
21 there were no objections to the calculations in the PSR or requests for departures or
22 3553 variances other than a request for a role reduction and the parties intend a further
23 sentencing hearing. Thus the 57-month sentence is a place holder – a fictional
24 sentence.¹

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26 ¹ Clearly the 57 month sentence imposed was not the final sentence as a
27 future 5K motion is to be made. The government argued “for purposes of sentencing
28 today we would ask for 57 months.” Govt Green Filing CR 377-2, Diaz transcript at
p.16. The parties and the judge are awaiting completion of cooperation and will return
for the real sentencing after the 5K motion is made.

1 The *Diaz* sentence, similar to *Stanley's* 87 month sentence (which the government has
2 previously cited) is also a place holder – a fictional sentence as are all the cooperator
3 cases awaiting 5K motions. Since it is not really final, and will be changed, there is
4 yet another reason to conclude that the sentencing in *Diaz* is simply not helpful in the
5 analysis of this case.

6 √ Given the selective and incomplete information known about the Diaz
7 sentencing, this Court cannot compare that case or the fairness of that sentence to what
8 is fair here.

9 More specifically, there is no basis of comparison of the economic benefit of
10 the Green's work to Thailand to the absence of any service provided by Mr. Diaz to
11 Haiti (Diaz set up a phoney company which did no work, and bank accounts to
12 receive and hide the bribe payments). Also, this Court cannot make any comparison of
13 overstatement of loss, or personal offender characteristics, including health
14 considerations, or consider the outright fraud on the Haitian people by the conspirators
15 sale of phone cards that only had 80 minutes of phone time which were sold as having
16 180 minutes time.

17 18 **III.**

19 **TEN HIGHEST FCPA SETTLEMENTS**

20 While the government refuses to consider and address the active role of the
21 Justice Department and the SEC in engaging in settlements with major corporations
22 the decision making that treats such major players so differently for similar, if not
23 identical, conduct, such a position defies logic. The ten highest FCPA settlements
24 ever have occurred within the last five years. They are listed below. Most involve
25 some combination of criminal fines and SEC disgorgement of profits.

26 These ten cases have monetary penalties totaling approximately \$2.8 billion.
27 Of the ten, the six highest occurred within last 20 months and total approximately
28 \$2.67 billion.

1 This trend has begged the question among pundits whether the government's
 2 goal relating to FCPA cases is actually enforcement, or simply putting a price tag on
 3 noncompliance. Do these giant financial penalties actually punish and deter the giants
 4 or, simply establish a cost of doing business and shield top executives culpable in the
 5 most egregious FCPA violations from punishment?

6 Despite the government's repeated assertions regarding increased criminal
 7 prosecution of individuals and the sentences those individuals receive, such examples
 8 are glaringly absent from the list below. In fact, of the ten cases listed, only Titan,²
 9 Willbros,³ and KBR⁴ have resulted in criminal prosecution of individuals potentially
 10 resulting in a term of incarceration.

11 1. *Siemens*: \$800 million in 2008.

12 U.S. v. Siemens Aktiengesellschaft, No. CR-08-367 (D.D.C. 2008).

13 U.S. v. Siemens S.A. (Argentina), No. CR-08-368 (D.D.C 2008).

14 U.S. v. Siemens Bangladesh Ltd., No. CR-08-369 (D.D.C 2008).

15 U.S. v. Siemens S.A. (Venezuela), No. CR-08-370 (D.D.C 2008).

16 SEC v. Siemens Aktiengesellschaft, No. CR-08-02167 (D.D.C. 2008).

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 18 ² *United States v. Head*, No. CR-06-01380 (S.D.Cal. 2006)(in September 2007,
 19 Stephen Lynwood Head was sentenced to six months imprisonment, three years supervised release,
 and a \$5,000 fine).

20 ³ *United States v. Tillery and Novak*, No. CR-080-00022-1, (S.D. Tex. 2008)(Mr.
 21 Novak is still awaiting sentencing and Mr. Tillery is a fugitive from justice); *United States v. Steph*,
 22 No. CR-07-00307 (S.D. Tex. 2007)(In January 2010, Mr .Steph was sentenced to fifteen months
 23 imprisonment, two years supervised release, and a criminal fine of \$2,000.); *United States v. Brown*,
 No. CR-06-00316 (S.D. Tex. 2006)(In January 2010, Mr. Brown was sentenced to one year and one
 day imprisonment, two years supervised release, and a fine of \$17,500).

24 ⁴ *United States v. Stanley*, No. CR-08-597 (S.D. Tex. 2008)(On September 3, 2008,
 25 Mr. Albert Jack Stanley pleaded guilty to one count of conspiring to violate the FCPA and one count
 26 of wire and mail fraud. According to his plea agreement he faces up to seven years contingent on
 27 the cooperation he provides the government while he continues his release on bail.) *United States v.*
 28 *Tesler and Chodan.*, No. CR-09-00098 (S.D. Tex. 2009)(On February 17, 2009, the DOJ filed an
 eleven-count indictment under seal against Mr. Jeffrey Tesler and Mr. Wojciech Chodan alleging
 one count of conspiring to violate the anti-bribery provisions of the FCPA and ten substantive counts
 of violating the anti-bribery provisions of the FCPA. The British police arrested Tesler on March 5,
 2009. There is an outstanding warrant for Chodan's arrest.)

1 2. *KBR / Halliburton*: \$579 million in 2009.

2 SEC v. Halliburton Co. and KBR, Inc., No. CV-09-0399 (S.D. Tex. 2009).

3 U.S. v. Kellogg Brown & Root LLC, No. CR-09-00071 (S.D. Tex. 2009).

4 3. *BAE*: \$400 million in 2010.⁵

5 U.S. v. BAE Systems, No. CR-10-00035 (D.D.C. 2010).

6 4. *Snamprogetti Netherlands B.V. / ENI S.P.A.*: \$365 million in 2010.

7 SEC v. ENI, S.p.A. and Snamprogetti Netherlands, B.V., No. CV-10-02414,
8 (S.D. Tex. 2010)

9 DOJ Press Release 10-780, July 7, 2010

10 SEC Litigation Release No. 21588, July 7, 2010

11 5. I: \$338 million in 2010.

12 SEC v. Technip, No. CV-10-02289, (S.D. Tex. 2010)

13 DOJ Press Release 10-751, June 28, 2010

14 SEC Litigation Release No. 21578, June 28, 2010

15 6. *Daimler AG*: \$185 million in 2010.

16 DOJ Press Release 10-360, April 1, 2010

17 SEC Press Release 2010-51, April 1, 2010

18 7. *Baker Hughes*: \$44.1 million in 2007.

19 SEC v. Baker Hughes Inc., No. CV-07-01408 (S.D. Tex. 2007).

20 U.S. v. Baker Hughes Servs. Int'l, Inc., No. CR-07-129 (S.D. Tex. 2007).

21 U.S. v. Baker Hughes Inc., No. CR-07-130 (S.D. Tex. 2007).

22 8. *Willbros*: \$32.3 million in 2008.

23 U.S. v. Willbros Group, Inc. and Willbros Int'l, Inc., No. CR-08-0287 (S.D.
24 Tex. 2008).

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27 ⁵ BAE was not explicitly charged with FCPA liability in the information filed by the
28 DOJ. However, according to the statement of offense, BAE made payments to advisors through
offshore shell companies even though “there was a high probability that part of the payments would
be used in order to ensure that [BAE] was favored in the foreign government decisions regarding the
sales of defense articles.”

1 SEC v. Willbros Group, Inc., et al., No. CR-08-01494 (S.D. Tex. 2008).

2 9. *Chevron*: \$30 million in 2007.⁶

3 Matter resolved through deferred prosecution agreement (Nov. 2007).

4 SEC v. Chevron Corp., No. CV-07-10299 (S.D.N.Y. 2007).

5 10. *Titan Corporation*: \$28.5 million in 2005.

6 U.S. v. Titan Corp., No. CR- 05-314 (S.D. Cal. 2005).

7 SEC v. Titan Corp., No.CV-05-0411 (D.D.C. 2005).

8

9 Yet another example of this duality in the government's treatment in FCPA
10 cases appeared in last Sunday's New York Times coverage of the justice department
11 settlement of bribery allegations that involved two American tobacco companies
12 (including Universal) together adopting compliance programs and paying nearly \$30
13 million to settle charges that they bribed foreign officials to win lucrative overseas
14 tobacco sales contracts. Bobby Elkin, Jr., an employee of Dimon, a subsidiary of
15 Alliance, one of the tobacco companies, plead guilty to a 371 conspiracy with a 5 year
16 cap, and as a cooperator is expected to get a 5K, but is yet to be sentenced. See Exh.
17 DD, Attached News Article and DOJ Press Release.

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IV.

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CONCLUSION

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⁶ Of the \$30 million settlement, \$20 million went to the U.S. Attorney's Office intended for the Development Fund of Iraq, \$5 million to the New York County District Attorney's Office, and \$2 million to the United States Office of Foreign Asset Control.

