

1 THOMAS P. O'BRIEN  
United States Attorney  
2 CHRISTINE C. EWELL  
Assistant United States Attorney  
3 Chief, Criminal Division  
BRUCE H. SEARBY (SBN 183267)  
4 Assistant United States Attorney  
JONATHAN E. LOPEZ (SBN 210513)  
5 Senior Trial Attorney, Fraud Section  
United States Department of Justice  
6 1100 United States Courthouse  
312 North Spring Street  
7 Los Angeles, California 90012  
Telephone: (213) 894-5423  
8 Facsimile: (213) 894-6269  
bruce.searby@usdoj.gov  
9

10 Attorney for Plaintiff  
United States of America  
11

12 UNITED STATES DISTRICT COURT

13 FOR THE CENTRAL DISTRICT OF CALIFORNIA.

14 UNITED STATES OF AMERICA, ) CR No. 08-59(B)-GW  
15 )  
Plaintiff, ) GOVERNMENT'S TRIAL MEMORANDUM;  
16 ) EXHIBIT  
v. ) Trial Date: 8/4/09  
17 ) Trial Time: 9:00 a.m.  
18 )  
GERALD GREEN and )  
19 PATRICIA GREEN, )  
20 Defendants. )  
21 )

22 The United States, by and through its counsel of record,  
23 the United States Attorney for the Central District of  
24 California, and the Fraud Section, United States Department of  
25 Justice, Criminal Division, hereby submits its trial memorandum  
26 in the above-captioned case.

27 ///

28

1 I. STATUS OF THE CASE

2 A. Trial is scheduled to commence on August 4, 2009, at  
3 9:00 a.m., before the Honorable George Wu, United States  
4 District Judge.

5 B. The government estimates that its case-in-chief will  
6 take approximately 13 days.

7 C. The government expects to call 25-30 witnesses in its  
8 case-in-chief, contingent on stipulations to admissibility and  
9 authenticity.

10 D. Trial by jury has not been waived.

11 E. The services of an interpreter will not be necessary;  
12 however, the government is arranging for translators to be  
13 available to translate documents from German and Thai to English  
14 in the event the parties do not stipulate to the necessary  
15 translations.

16 F. Defendants Patricia and Gerald Green are out on bond  
17 awaiting trial.

18 G. The Second Superseding Indictment ("SSI"), which was  
19 returned on March 11, 2009, charges 18 U.S.C. § 371: Conspiracy;  
20 15 U.S.C. § 78dd-2(a)(1), (g)(2)(A): Foreign Corrupt Practices  
21 Act; 18 U.S.C. § 1956(a)(2)(A): Transportation Promotion Money  
22 Laundering; 18 U.S.C. § 1957(a): Transaction Money Laundering;  
23 18 U.S.C. § 1519: Obstruction of Justice; 26 U.S.C. § 7206(1)  
24 False Subscription of a Tax Return; 18 U.S.C. § 2: Aiding and  
25 Abetting and Causing Acts To Be Done; 18 U.S.C. § 981(a)(1)(C),  
26 21 U.S.C. § 853, and 28 U.S.C. § 2461(c): Criminal Forfeiture.  
27 An unconformed copy of the SSI is attached to this memorandum as  
28 Exhibit 1.

1    **II.    STATEMENT OF THE CHARGES**

2           Defendants, who are U.S. citizens and residents, and who  
3 owned and operated several entertainment and advertising-related  
4 businesses in Beverly Hills, California, engaged in a conspiracy  
5 to offer and make corrupt payments to a foreign official and to  
6 money launder, in connection with approximately \$1.8 million in  
7 payments between 2002 and 2006 to secure several lucrative Thai  
8 government contracts. The payments usually took place between  
9 defendants' businesses' Los Angeles-area bank accounts and  
10 overseas accounts in the name of the corrupt foreign official's  
11 daughter or friend.

12           After making bribe payments to the foreign official, which  
13 totaled a large proportion of their businesses' gross revenue,  
14 defendant Patricia Green falsely subscribed tax returns for  
15 those businesses that falsely described the payments as  
16 "commissions." Defendant Patricia Green also falsely stated on  
17 a tax return that a person other than defendants owned the  
18 company.

19           Following the search in this case of defendants' businesses  
20 pursuant to a federal warrant, defendant Gerald Green understood  
21 that the investigation regarded the payments for the foreign  
22 official, and soon engaged in an obstruction of justice to  
23 explain or substantiate the corrupt payments by reference to  
24 other projects he had pursued in Thailand. As part of this  
25 plan, defendant Gerald Green instructed subordinates to  
26 manufacture documents.

1 III. SUMMARY OF THE EVIDENCE

2 The government expects to prove the facts set forth below,  
3 among others, at trial.

4 A. Conspiracy, Bribery, and International Transfers of  
5 Funds To Promote Bribery

6 Defendants Gerald and Patricia Green routinely agreed to,  
7 and arranged, payments from a group of Beverly Hills businesses,  
8 which they owned and controlled,<sup>1</sup> for the benefit of Juthamas  
9 Siriwan ("Juthamas"), the Governor of the Tourism Authority of  
10 Thailand ("TAT"). The payments, which totaled approximately  
11 \$1.8 million over more than four years were in connection with  
12 Juthamas' award of, and support for, TAT and TAT-related  
13 contracts for promotion of tourism that resulted in  
14 approximately \$14 million in revenue to defendants' businesses.

15 The corrupt payments took place by transfers into the  
16 overseas bank accounts of Juthamas' daughter, Jittisopa Siriwan  
17 ("Jittisopa"), aka "Jib," Juthamas' friend, Kitti  
18 Chambundabongse ("Kitti"), and occasionally by cash delivery to  
19 Juthamas in person. Defendants owed Juthamas these corrupt  
20 payments as a variable percentage of revenue on TAT-related  
21 contracts and subcontracts including, but not limited to, the  
22 Bangkok International Film Festival ("BKKIFF"), the Thai

23 \_\_\_\_\_  
24 <sup>1</sup> Defendants' businesses included: Film Festival  
25 Management, Inc. ("FFM"); SASO Entertainment ("SASO"); Artist  
26 Design Corp. ("Artist Design"); International Fashion Consultant,  
27 Inc. ("IFC"); Flying Pen, Inc. ("Flying Pen"); and entities doing  
28 business as "Creative Ignition," "Ignition," and "International  
Festival Consultants." The "Green Businesses" also included  
Festival of Festivals ("FOF"), a business entity belonging to an  
associate of defendants, but in the name of which defendants did  
business and received and transferred funds.

1 Privilege Card, calendars, a book, a website, public relations  
2 consulting, a video, and a logo.

3 Defendant Gerald Green held the relationship with Juthamas  
4 and negotiated with her the budgets and other details of the  
5 various TAT contracts, including contracts where defendants'  
6 businesses took the role of "subcontractor" to other companies  
7 that formally held the contract with TAT. Defendants inflated  
8 the budgets of these budgets to allow for the payments to  
9 Juthamas, the official approving and promoting these same  
10 contracts.

11 Defendant Patricia Green, the wife and co-owner, was in  
12 charge of day-to-day operations of defendants' businesses and  
13 implemented defendant Gerald Green's plans to make the corrupt  
14 payments.

15 In planning and making the bribe payments for the benefit  
16 of Juthamas, defendants referred to them in discussions as  
17 "commission" payments. When defendant Gerald Green instructed  
18 that it was time to make a "commission" payment, defendant  
19 Patricia Green and another employee, Susan Shore ("Shore"),  
20 would look to see which of the businesses had the money  
21 available for any given payment. Defendant Patricia Green made  
22 all the 40 or more wire transfers and cashiers check  
23 transactions at the bank herself, and she planned and tracked  
24 these payments. These payments for Juthamas often followed  
25 promptly upon the receipt into the Green Businesses of TAT or  
26 TAT-related revenues.

27 Defendants' planning and budgeting for the corrupt payments  
28 for Juthamas was documented extensively in their handwritten

1 notes and memoranda, budget drafts, and internal documents  
2 prepared by defendants, Shore, and other employees and close  
3 associates. The actual payments for Juthamas themselves were  
4 reflected in the Green Businesses' bank records and other  
5 accounting records, as well as in handwritten notes and  
6 schedules tracking amounts paid and still owing.

7 Both defendants, as well as their co-conspirators Juthamas  
8 and Jittisopa, engaged in various patterns of deception to hide  
9 the bribery from others, including the Thai government and later  
10 the United States government. The conspirators hid the amount  
11 of business Juthamas was corruptly directing to defendants, and  
12 evaded Thai government fiscal controls meant to check Juthamas'  
13 authority to approve TAT payments by splitting up the  
14 performance of large contracts for the BKKIFF among different  
15 Green Businesses. Defendants gave the misleading appearance of  
16 there being separate and distinct businesses, among other  
17 things, by use of dummy addresses, telephone numbers, and  
18 nominee "directors" and "presidents" for use in communications  
19 with other TAT officials. In reality, all companies operated  
20 out of the same business offices with the same personnel.

21 To hide the extent of business Juthamas was corruptly  
22 directing to defendants, the conspirators also recruited  
23 different prime contractors of their choosing, and then arranged  
24 referral fees from the prime contractors to the Green Businesses  
25 -- part of which was to be paid over to Juthamas. The  
26 conspirators then attempted to keep secret from other Thai  
27 authorities defendants' subcontracting arrangement on the  
28 project. In still other cases, defendants and Juthamas arranged

1 for a third-party company to act as a mere pass-through billing  
2 conduit for funds intended for defendants' businesses.

3 Juthamas secretly controlled several overseas nominee bank  
4 accounts into which defendants transferred the bribes, located  
5 in the United Kingdom, the Isle of Jersey, and Singapore. From  
6 some of these accounts, defendants' money then flowed to  
7 accounts in Switzerland also held in Jittisopa's name but  
8 controlled by Juthamas.

9 Neither Jittisopa nor Kittti had done any work as employees  
10 or contractors of defendants' businesses on the TAT contracts  
11 that would explain why accounts in their names had received \$1.8  
12 million in defendants' funds, which they concealed on their  
13 income taxes.

14 Once Juthamas stepped down as Governor of the TAT in late  
15 2006, defendants stopped getting new TAT contracts and had  
16 difficulty collecting amounts they claimed to be owed for the  
17 2007 BKKIFF. Juthamas, acting as an "advisor" to the TAT,  
18 assisted in a plan to have TAT officials pay off defendants'  
19 claim through a phony third-party transaction with a Thai  
20 company that acted as a pass-through for funds going to  
21 defendants.

22 Defendants understood that their bribery of Juthamas was  
23 unlawful in a variety of ways. Defendants knew that, by  
24 agreeing to pay bribes amounting to a large percentage of the  
25 revenue from the contracts Juthamas negotiated and approved for  
26 the expenditure of public funds, defendants were assisting  
27 Juthamas in secretly taking state funds for her own purposes.  
28 As set forth above, defendants attempted to cover the bribery up

1 at the time of these contracts with secretive and fraudulent  
2 behavior. Defendants in some instances prepared sham invoices  
3 to explain the flow of money to them, part of which was flowing  
4 back to Juthamas. Defendants, through their review of  
5 contractual language relating to the FCPA and other documents,  
6 also had specific notice that payments to a Thai official in  
7 connection with a contract would be corrupt and unlawful.  
8 Defendant Patricia Green lied about the nature of these payments  
9 during an IRS audit of one of the tax returns they filed  
10 deducting the payments as "commissions." Finally, defendants  
11 immediately sought to cover up the payments after the  
12 government's investigation in this case became known to them, as  
13 discussed further below.

14 **B. Transfer of \$19,800 In Criminally-Derived Property**

15 Defendants' course of criminal conduct included reinvesting  
16 some of the proceeds from their illegally-obtained contracts  
17 into a Bangkok-based business venture called "Consultasia, Ltd."  
18 in which defendant Gerald Green was a partner. The funds for  
19 the 2004 wire transfer of \$19,800 charged in this case came from  
20 defendants' subcontract with a United States-based public  
21 relations firm, for whom defendants had corruptly obtained --  
22 through Juthamas -- a prime contract with TAT.

23 **C. False Subscription of Tax Returns**

24 Defendant Patricia Green participated in the preparation of  
25 corporate tax returns that took unlawful tax deductions for the  
26 bribes by calling them "commissions." In this manner,  
27 defendants reduced corporate tax liabilities, used tax-free  
28 income to pay the bribes to the Governor, obtained tax refunds,

1 and thus increased their profits from their businesses.

2 Two of the businesses owned and operated by defendants that  
3 made such payments were Film Festival Management, Inc. ("FFM")  
4 and SASO Entertainment ("SASO"). Defendant Patricia Green  
5 falsely subscribed SASO's federal income tax return for the tax  
6 year 2004 claiming that \$303,074 in "commissions" were  
7 deductible from SASO's gross income. In addition, defendant  
8 Patricia Green signed FFM's federal income tax return for the  
9 tax year 2004, which deducted \$140,503 in false "commission"  
10 claims. Defendant Patricia Green subscribed that return not by  
11 using her own name but forging the name "Eli Boyer." The return  
12 also falsely claimed that Eli Boyer was the sole owner of FFM.

13 From her familiarity with the inner workings of the Green  
14 Businesses, defendant Patricia Green understood that the  
15 payments for Juthamas were not for real "commissions," such as  
16 monies that are paid to third parties for obtaining business on  
17 behalf of their companies, but were instead amounts paid to the  
18 very same official awarding the contract. Despite this  
19 knowledge, defendant Patricia Green lied about the nature of the  
20 payments for Juthamas during a 2007 IRS audit of the income tax  
21 return SASO had filed for 2004, characterizing them as expenses  
22 in Thailand that SASO incurred for providing the services  
23 contracted for by the TAT.

24 **D. Obstruction of Justice**

25 As set forth more fully in the government's application to  
26 the Court to make a crime/fraud exception determination, also  
27 filed today, defendant Gerald Green attempted to coordinate a  
28 false exculpatory story to explain the corrupt payments for

1 Juthamas. Grasping that the bribe payments for Juthamas were  
2 the reason for the FBI search of his business offices, defendant  
3 Gerald Green attempted to substantiate the payments by  
4 attributing them to work Jittisopa and Kittti had done on other,  
5 non-TAT projects that defendant Gerald Green had pursued in  
6 Thailand. Defendant Patricia Green assisted her husband in  
7 launching this plan. This obstructive plan soon resulted, among  
8 other things, in defendant Gerald Green's alteration of film  
9 budgets by requesting that they be re-dated to 2005 and 2006,  
10 which corresponded with the dates of payments for Juthamas.

11 **IV. PERTINENT LAW**

12 **A. 18 U.S.C. § 371: Conspiracy**

13 **1. Essential Elements**

14 To prove a violation of 18 U.S.C. § 371, the following  
15 elements must be proved beyond a reasonable doubt:

16 First, beginning in or around 2002, and ending in or  
17 around 2007, there was an agreement between two or more  
18 persons to commit at least one crime as charged in the  
19 second superseding indictment; and

20 Second, the defendants became a member of the  
21 conspiracy knowing of at least one of its objects and  
22 intending to help accomplish it; and

23 Third, one of the members of the conspiracy performed  
24 at least one overt act for the purpose of carrying out the  
25 conspiracy, with all [jurors] agreeing on a particular  
26 overt act that you find was committed.

27 See Ninth Circuit Criminal Jury Instruction No. 8.16 (2003).

28 **2. Proof of Agreement**

The essence of the crime of conspiracy is the agreement.  
United States v. Falcone, 311 U.S. 205, 210 (1940). The  
government need not prove direct contact between co-conspirators  
or the existence of a formal agreement. United States v. Boone,

1 951 F.2d 1526, 1543 (9th Cir. 1992). Instead, an agreement  
2 constituting a conspiracy may be inferred from the acts of the  
3 parties and other circumstantial evidence indicating concert of  
4 action for accomplishment of a common purpose. United States v.  
5 Becker, 720 F.2d 1033, 1035 (9th Cir. 1983); United States v.  
6 Penagos, 823 F.2d 346, 348 (9th Cir. 1987); United States v.  
7 Abushi, 682 F.2d 1289, 1293 (9th Cir. 1982).

8 There must be at least two persons involved in the  
9 conspiracy. Becker, 720 F.2d at 1035; United States v.  
10 Sangmeister, 685 F.2d 1124, 1126 (9th Cir. 1982). It makes no  
11 difference whether the other person is another defendant or even  
12 named in the indictment. Rogers v. United States, 340 U.S. 367,  
13 375 (1951) ("identity of the other members of the conspiracy is  
14 not needed, inasmuch as one person can be convicted of  
15 conspiring with persons whose names are unknown").

### 16 3. Knowledge

17 In order to establish a defendant's membership in a  
18 conspiracy, the government must prove that the defendant knew of  
19 the conspiracy and that he intended to join it and to accomplish  
20 the object of the conspiracy. See United States v. Esparza, 876  
21 F.2d 1390, 1392 (9th Cir. 1989). A defendant may become a  
22 member of a conspiracy without knowing all of the details of the  
23 unlawful scheme and without knowing all of the members.  
24 Blumenthal v. United States, 332 U.S. 539, 557 (1947). The  
25 government must show that the defendant knew of his connection  
26 to the charged conspiracy. United States v. Federico, 658 F.2d  
27 1337, 1344 (9th Cir. 1981), overruled on other grounds, United  
28 States v. De Bright, 730 F.2d 1255, 1259 (9th Cir. 1984) (en

1 banc); United States v. Smith, 609 F.2d 1294, 1299 (9th Cir.  
2 1979).

3 A defendant's knowledge of a conspiracy need not be proved  
4 by direct evidence; circumstantial evidence is sufficient.  
5 United States v. Hayes, 190 F.3d 939, 946 (9th Cir. 1999), aff'd  
6 en banc, 231 F.3d 663, 667 n.1 (9th Cir. 2000), cert. denied,  
7 121 S.Ct. 1388 (2001). Generally, this knowledge can be  
8 inferred from the defendant's own acts and statements. United  
9 States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990).

10 **4. Participation in the Conspiracy**

11 The government has the burden of proving beyond a  
12 reasonable doubt that a conspiracy did exist and that each  
13 defendant was a member of the conspiracy charged. United States  
14 v. Friedman, 593 F.2d 109, 115 (9th Cir. 1979); United States v.  
15 Peterson, 549 F.2d 654, 657 (9th Cir. 1977). The government  
16 need not prove that all the persons alleged to have been members  
17 of the conspiracy actually participated in the conspiracy.  
18 United States v. Reese, 775 F.2d 1066, 1071 (9th Cir. 1985).  
19 The general test is whether there was one overall agreement to  
20 perform various functions to achieve the objectives of the  
21 conspiracy. See United States v. Arbelaez, 719 F.2d 1453, 1457  
22 (9th Cir. 1983).

23 Once the existence of a conspiracy is shown, evidence  
24 establishing beyond a reasonable doubt a defendant's connection  
25 with the conspiracy -- even if the connection is slight -- is  
26 sufficient to convict him of knowing participation in the  
27 conspiracy. United States v. Boone, 951 F.2d 1526, 1543 (9th  
28 Cir. 1991); United States v. Stauffer, 922 F.2d 508, 514-15 (9th

1 Cir. 1990); United States v. Ramirez, 710 F.2d 535, 548 (9th  
2 Cir. 1983).

3 The government need not prove that each coconspirator knew  
4 the identities or roles of all other participants. The  
5 government must show that each defendant knew, or had reason to  
6 know, the scope of the criminal enterprise and that each  
7 defendant knew, or had reason to know, that the benefits to be  
8 derived from the operation were probably dependent upon the  
9 success of the entire venture. Abushi, 682 F.2d at 1293; United  
10 States v. Perry, 550 F.2d 524, 528-29 (9th 1977).

11 B. 15 U.S.C. § 78dd2(a): Bribery of a Foreign Official

12 1. Statutory Language

13 Section 78dd-2(a) of Title 15 of the United States Code  
14 (Foreign Corrupt Practices Act or "FCPA"), prohibits making use  
15 of the mails or any means or instrumentality of interstate  
16 commerce willfully and corruptly in furtherance of a payment -  
17 or offer, promise or authorization of payment - or offer, gift,  
18 promise to give, authorization of the giving of anything of  
19 value - to any foreign official for the purpose of:

20 (A) (i) influencing any act or decision of  
21 such foreign official in her official  
22 capacity, or (ii) inducing such foreign  
23 official to do or omit to do any act in  
24 violation of the lawful duty of such  
25 official, or (B) inducing such foreign  
26 official to use her influence with a foreign  
27 government or instrumentality thereof to  
28 affect or influence any act or decision of  
such government or instrumentality, in order  
to assist [the person or company making the  
payment] in obtaining or retaining business  
for or with, or directing business to, any  
person.

1                   2.    Corruptly and Willfully

2           A person acts "corruptly" as required for a criminal  
3 violation of the FCPA if he or she acts voluntarily and  
4 intentionally, with an improper motive of accomplishing either  
5 an unlawful result, or a lawful result by some unlawful method  
6 or means. The term "corruptly" is intended to connote that the  
7 offer, payment, and promise was intended to influence an  
8 official to misuse her official position. A person acts  
9 "willfully" as required for a criminal violation of the FCPA if  
10 he or she acts deliberately and with the intent to do something  
11 that the law forbids, that is, with a bad purpose to disobey or  
12 disregard the law. A defendant need not be aware of the  
13 specific law and rule that his or her conduct may be violating.  
14 But he or she must act with the intent to do something that the  
15 law forbids. Overall, it is only necessary that a defendant  
16 intends those wrongful actions, and that the actions are not the  
17 product of accident or mistake. United States v. Bryan, 524 U.S.  
18 at 184, 191-92 (1998); United States v. Tarallo, 380 F.3d 1174,  
19 1188 (9th Cir. 2004); United States v. Kay, 513 F.3d 432 (5th  
20 Cir. 2007) see 15 U.S.C. § 78dd-2(a)(1), 78ff(a).

21           C.    18 U.S.C. § 1956(a)(2)(A): International  
22                   Transportation Promotion Money Laundering

23           To prove a violation of 18 U.S.C. § 1956(a)(2)(A), the  
24 following elements must be proved beyond a reasonable doubt:

25                   First, the defendants transported money from a  
26 place in the United States, namely, Los Angeles  
27 County, to places outside the United States; and  
28

1           Second, the defendants acted with the intent to  
2 promote the carrying on of unlawful activity, that is,  
3 bribery of a foreign official in violation of the  
4 FCPA.

5 See Ninth Circuit Model Jury Instructions No. 8.122 (2003)  
6 [Transporting Funds to Promote Unlawful Activity].

7           D.    18 U.S.C. § 1957(a): Transactions In Criminally-  
8               Derived Property

9           Title 18, United States Code, Section 1957(a) provides in  
10 pertinent part:

11           (a) Whoever, in any of the circumstances set forth in  
12 subsection (d), knowingly engages or attempts to  
13 engage in a monetary transaction in criminally  
14 derived property of a value greater than \$10,000  
15 and is derived from specified unlawful activity,

16 [is guilty of an offense against the laws of the United States].

17           (d) The circumstances referred to in subsection (a) are-  
18 (1) that the offense under this section takes place in  
19 the United States or in the special maritime and  
20 territorial jurisdiction of the United States; or

21               (2) that the offense under this section takes place  
22 outside the United States and such special  
23 jurisdiction, but the defendant is a United States  
24 person (as defined in section 3077 of this title:  
25 United States national, permanent resident, any person  
26 within the United States, a sole proprietorship  
27 composed of nationals or permanent resident aliens, a  
28 corporation organized under the laws of the United  
29 States).

30           E.    26 U.S.C. 7206(1): False Subscription of a Tax Return

31           To prove a violation of 26 U.S.C. 7206(1), the following  
32 elements must be proved beyond a reasonable doubt:

33               First, the defendant made and signed a tax return  
34 for the year 2004 that she knew contained false  
35 information as to a material matter;

36               Second, the return contained a written  
37 declaration that it was being signed subject to the  
38 penalties of perjury; and

1            Third, in filing the false tax return, the  
2 defendant acted willfully.

3 See Ninth Circuit Model Jury Instructions No. 9.37 (2003)

4 [Filing False Tax Return].

5            F.    18 U.S.C. § 1519: Creating False Entry In a Document  
6                    In a Federal Investigation

7            Title 18, United States Code, Section 1519 provides in  
8 part:

9                    Whoever knowingly alters, destroys, mutilates,  
10                    conceals, covers up, falsifies, or makes a false  
11                    entry in any record, document, or tangible object  
12                    with the intent to impede, obstruct, or influence  
13                    the investigation or proper administration of any  
14                    matter within the jurisdiction of any department  
15                    or agency of the United States or any case filed  
16                    under title 11, or in relation to or  
17                    contemplation of any such matter or case, shall  
18                    be fined under this title, imprisoned not more  
19                    than 20 years, or both.

20 V.    EVIDENTIARY ISSUES

21            A.    Summary Charts

22            The government will elicit summary testimony from  
23 witnesses, including but not limited to Susan Shore, IRS-CI  
24 Special Agent Steven Berryman, and FBI Special Agent Elizabeth  
25 Rivas, who have reviewed accounting records, bank records, hotel  
26 records, and other evidence in this case.

27            Federal Rule of Evidence 1006 provides that:

28                    The contents of voluminous writings, recordings, or  
photographs which cannot conveniently be examined in  
court may be presented in the form of a chart, summary,  
or calculation. The originals, or duplicates, shall be  
made available for examination or copying, or both, by  
the parties at reasonable time and place. The court  
may order that they be produced in court.

1 A chart or summary may be admitted as evidence where the  
2 proponent establishes that the underlying documents are  
3 voluminous, admissible, and available for inspection. See  
4 United States v. Meyers, 847 F.2d 1408, 1411-12 (9th Cir. 1988);  
5 United States v. Johnson, 594 F.2d 1253, 1255-57 (9th Cir.  
6 1979). While the underlying documents must be admissible, they  
7 need not be admitted. See Meyers, 847 F.2d at 1412; Johnson,  
8 594 F.2d at 1257 n.6. Summary charts need not contain the  
9 defendant's version of the evidence and may be given to the jury  
10 while a government witness testifies concerning them. See  
11 United States v. Radseck, 718 F.2d 233, 239 (7th Cir. 1983);  
12 Barsky v. United States, 339 F.2d 180, 181 (9th Cir. 1964).

13 Charts may be referred to during opening statement. The  
14 purpose of an opening statement is to acquaint the jury with the  
15 substance and theory of the case and to outline the forthcoming  
16 proof so that the jurors may more intelligently follow the  
17 testimony. See, e.g., United States v. Zielie, 734 F.2d 1447,  
18 1455 (11th Cir. 1984) (relying on United States v. Dinitz, 424  
19 U.S. 600, 612 (1976)). A summary witness may rely on the  
20 analysis of others where she has sufficient experience to judge  
21 another person's work and incorporate it as her own. The use of  
22 other persons in the preparation of summary evidence goes to the  
23 its weight, not its admissibility. United States v. Soulard,  
24 730 F.2d 1292, 1299 (9th Cir. 1984); see Diamond Shamrock Corp.  
25 v. Lumbermens Mutual Casualty Co., 466 F.2d 722, 727 (7th Cir.  
26 1972) ("It is not necessary . . . that every person who assisted  
27 in the preparation of the original records or the summaries be  
28 brought to the witness stand").

1 The government will produce to the defense draft summary  
2 charts that are anticipated to be the basis of some of its  
3 witnesses' testimony. The government will also seek the  
4 admission into evidence of some of those summary charts.  
5 Additionally, the government has produced to the defense the  
6 underlying bank, accounting, hotel, and other records used to  
7 prepare the summary charts, tables and spreadsheets.

8 The introduction of summary witness testimony and summary  
9 schedules has been approved by the Ninth Circuit in tax cases,  
10 United States v. Marchini, 797 F.2d 759, 756-766 (9th Cir.  
11 1986); United States v. Greene, 698 F.2d 1364, 1367 (9th Cir.  
12 1983); Barsky v. United States, 339 F.2d 180 (9th Cir. 1964). A  
13 summary witness may be used to help the jury organize and  
14 evaluate evidence which is factually complex and fragmentally  
15 revealed in the testimony of a multitude of witnesses. See  
16 United States v. Baker, 10 F.3d 1374, 1411 (9th Cir. 1983).

17 **B. Evidence of the Routine Practices**

18 Evidence of the habit or routine practice, whether  
19 corroborated or not, and regardless of the presence of  
20 eyewitnesses, is relevant to prove that the conduct on a  
21 particular occasion was in conformity with that habit or routine  
22 practice. Fed. R. Evid. 406. In this case, the existence of  
23 bribery-related activities on a routine basis is probative of  
24 the conspiracy.

25 **C. Chain of Custody**

26 The test of admissibility of physical objects connected with  
27 the commission of a crime requires a showing that the object is  
28 in substantially the same condition as when the crime was

1 committed (or the object seized). Factors to be considered are  
2 the nature of the article, the circumstances surrounding its  
3 preservation and custody and the likelihood of intermeddlers  
4 tampering with it. There is, however, a presumption of  
5 regularity in the handling of exhibits by public officials.  
6 United States v. Kaiser, 660 F.2d 724, 733 (9th Cir. 1981),  
7 cert. denied, 455 U.S. 956 (1982), overruled on other grounds,  
8 United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir. 1984)  
9 (en banc).

10 If the trial judge finds that there is a reasonable  
11 possibility that the piece of evidence has not changed in a  
12 material way, he has discretion to admit the evidence. Kaiser,  
13 660 F.2d at 733.

14 The government is not required, in establishing chain of  
15 custody, to call all persons who may have come into contact with  
16 the piece of evidence. Gallego v. United States, 276 F.2d 914,  
17 917 (9th Cir. 1960).

18 **D. Authentication and Identification**

19 "The requirement of authentication or identification as a  
20 condition precedent to admissibility is satisfied by evidence  
21 sufficient to support a finding that the matter in question is  
22 what its proponent claims." Fed. R. Evid. 901(a).

23 Rule 901(a) only requires the government to make a prima  
24 facie showing of authenticity or identification "so that a  
25 reasonable juror could find in favor of authenticity or  
26 identification." United States v. Chu Kong Yin, 935 F.2d 990,  
27 996 (9th Cir. 1991), cert. denied, 511 U.S. 1035 (1994); See  
28 also United States v. Blackwood, 878 F.2d 1200, 1202 (9th Cir.

1 1989); United States v. Black, 767 F.2d 1334, 1342 (9th Cir.),  
2 cert. denied, 474 U.S. 1022 (1985).

3 Once the government meets this burden, "[t]he credibility or  
4 probative force of the evidence offered is, ultimately, an issue  
5 for the jury." Black, 767 F.2d at 1342.

6 **E. Certified Public Records**

7 At trial, the government intends to introduce certified  
8 public records into evidence, including immigration records.

9 These records are self-authenticating. F.R.E. 902(4).

10 Moreover, such public records are not hearsay. F.R.E. 803(8).

11 **F. Co-conspirator Statements**

12 A statement is not hearsay if it is "a statement by a  
13 co-conspirator of a party during the course and in furtherance  
14 of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

15 For Rule 801(d)(2)(E) to apply, it is not necessary that the  
16 declarant be charged with the crime of conspiracy; any "concert  
17 of action creates a conspiracy for purposes of the evidence  
18 rule." United States v. Portac. Inc., 869 F.2d 1288, 1294 (9th  
19 Cir. 1989), cert. denied, 498 U.S. 845 (1990).

20 A statement can be a co-conspirator declaration even if it  
21 is subject to alternative interpretations. Garlington v.  
22 O'Leary, 879 F.2d 277, 284 (7th Cir. 1989).

23 For a statement to be admissible under Rule 801(d)(2)(E),  
24 the offering party must establish that: (a) the statement was in  
25 furtherance of the conspiracy; (b) it was made during the life  
26 of the conspiracy; and (c) the defendant and declarant were  
27 members of the conspiracy. Bourjaily v. United States, 483 U.S.  
28 171, 175 (1987); United States v. Smith, 893 F.2d at 1578.

1 The offering party has the burden of proving these  
2 foundational facts by a preponderance of the evidence.  
3 Bourjaily, 483 U.S. at 176; United States v. Schmit, 881 F.2d  
4 608, 610 (9th Cir. 1989); United States v. Gordon, 844 F.2d  
5 1397, 1402 (9th Cir. 1988).

6 Whether the offering party has met its burden is to be  
7 determined by the trial judge, and not the jury. United States  
8 v. Zavala-Serra, 853 F.2d 1512, 1514 (9th Cir. 1988).

9 The term "in furtherance of the conspiracy" is construed  
10 broadly to include statements made to "induce enlistment or  
11 further participation in the group's activities," to "prompt  
12 further action on the part of conspirators," to "reassure  
13 members of a conspiracy's continued existence," to "allay a  
14 coconspirator's fears," and to "keep coconspirators abreast of  
15 an ongoing conspiracy's activities." United States v.  
16 Yarbrough, 852 F.2d 1522, 1535-1536 (9th Cir.) (citing cases),  
17 cert. denied, 488 U.S. 866 (1988).

18 A co-conspirator declaration need not have been made  
19 exclusively, or even primarily, to further the conspiracy.  
20 Garlington v. O'Leary, 879 F.2d 277, 284 (7th Cir. 1989).

21 Statements made with the intent of furthering the conspiracy  
22 are admissible whether or not they actually result in any  
23 benefit to the conspiracy. United States v. Williams, 989 F.2d  
24 1061, 1068 (9th Cir. 1993); United States v. Schmit, 881 F.2d at  
25 612; United States v. Zavala-Serra, 853 F.2d 1512, 1516 (9th  
26 Cir. 1988).

27 It is not necessary that the defendant was present at the  
28 time the statement was made. Sendejas v. United States, 428

1 F.2d 1040, 1045 (9th Cir.), cert. denied, 400 U.S. 879 (1970).

2 Co-conspirator declarations need not be made to a member of  
3 the conspiracy to be admissible under Rule 810(d)(2)(E). United  
4 States v. Zavala-Serra, 853 F.2d at 1516.

5 Co-conspirator declarations can be made to government  
6 informants and undercover agents. Id. (statements to informants  
7 and undercover agents); United States v. Tille, 729 F.2d 615,  
8 620 (9th Cir.) (statements to informants), cert. denied, 469  
9 U.S. 845 (1984); United States v. Echeverry, 759 F.2d 1451, 1457  
10 (9th Cir. 1985) (statements to undercover agent).

11 Once the existence of the conspiracy is established, only  
12 "slight evidence" is needed to connect the defendant and  
13 declarant to it. United States v. Crespo De Llano, 838 F.2d  
14 1006, 1017 (9th Cir. 1987); United States v. Dixon, 562 F.2d  
15 1138, 1141 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978).

16 The declaration itself, together with independent evidence,  
17 may constitute sufficient proof of the existence of the  
18 conspiracy and the involvement of the defendant and declarant in  
19 it. Bourjaily, 483 U.S. at 181; Zavala-Serra, 853 F.2d at 1515.

20 The foundation for the admission of a co-conspirator  
21 statement may be established before or after the admission of  
22 the statement. If a proper foundation has not yet been laid,  
23 the court may nevertheless admit the statement, but with an  
24 admonition that the testimony will be stricken should the  
25 conspiracy not be proved. United States v. Arbelaez, 719 F.2d  
26 1453, 1469 (9th Cir.), cert. denied, 467 U.S. 1255 (1984);  
27 United States v. Kenny, 645 F.2d 1323, 1333-1334 (9th Cir.),  
28 cert. denied, 452 U.S. 920 (1981); United States v. Spawr

1 Optical Research Inc., 685 F.2d 1076, 1083 (9th Cir. 1982),  
2 cert. denied, 461 U.S. 905 (1983).

3 The trial court has discretion to determine whether the  
4 government may introduce co-conspirator declarations before  
5 establishing the conspiracy and the defendant's connection to  
6 it. United States v. Loya, 807 F.2d 1483, 1490 (9th Cir. 1987).

7 Co-conspirator statements fall within a "firmly rooted  
8 hearsay exception." Therefore, if a statement is properly  
9 admissible under Rule 801(d)(2)(E), no additional showing of  
10 reliability is necessary to satisfy the requirements of the  
11 Confrontation Clause. Bourjaily, 483 U.S. at 183-184;  
12 Yarbrough, 852 F.2d at 1536; United States v. Knigge, 832 F.2d  
13 1100, 1107 (9th Cir. 1987), amended, 846 F.2d 591 (9th Cir.  
14 1988). In determining if these foundational facts have been  
15 established, the court may consider hearsay and other evidence  
16 not admissible at trial. See Fed. R. Evid. 104(a) and  
17 1101(d)(1); Bourjaily, U.S. at 178-179. Moreover, co-  
18 conspirators statements are not testimonial and do not violate  
19 the confrontation clause. United States v. Allen, 425 F.3d  
20 1231, 1235 (9th Cir. 2005).

21 **G. Tape Recordings**

22 When audio tapes and transcripts to be presented at trial  
23 are in English, the recordings themselves are the evidence of  
24 the conversation. See, e.g., United States v. Franco, 136 F.3d  
25 622, 625 (9th Cir. 1998). The government plans to provide the  
26 members of the jury with transcripts of the conversations in  
27 question as an aide to the jury. However, the transcripts will  
28 not be introduced into evidence. The government may establish

1 the identification of a voice through either direct or  
2 circumstantial evidence. See United States v. Turner, 528 F.2d  
3 143, 162 (9th Cir. 1975).

4 **H. Immunity Agreements**

5 One witness in the case, Susan Shore, has  
6 an immunity and cooperation agreement with the government. It  
7 is appropriate for the government to introduce the "truthful  
8 testimony" provisions in such an agreement after a defendant has  
9 attacked the credibility of a witness. See, e.g., United States  
10 v. Necochea, 986 F.2d 1273, 1278-79 (9th Cir. 1993) (reference  
11 to "truthful testimony" aspect of plea agreement permissible in  
12 direct examination of witness whose credibility was challenged  
13 in defendant's opening statement).

14 ///

15 ///

16 ///

17

18

19

20

21

22

23

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

VI.

CONCLUSION

The government requests leave to file such additional memoranda as may become appropriate during the course of the trial.

DATED: July 30, 2009

Respectfully submitted,

THOMAS P. O'BRIEN  
United States Attorney

CHRISTINE C. EWELL  
Assistant United States Attorney  
Chief, Criminal Division

\_\_\_\_\_/s/\_\_\_\_\_  
BRUCE H. SEARBY  
Assistant United States Attorney  
JONATHAN E. LOPEZ  
Senior Trial Attorney  
United States Department  
of Justice, Fraud Section

Attorneys for Plaintiff  
UNITED STATES OF AMERICA