

1 ANDRÉ BIROTTE JR.
 United States Attorney
 2 ROBERT E. DUGDALE
 Assistant United States Attorney
 3 Chief, Criminal Division
 DOUGLAS M. MILLER (SBN: 240398)
 4 Assistant United States Attorney
 NICOLA J. MRAZEK
 5 JEFFREY A. GOLDBERG
 Senior Trial Attorneys
 6 1300 United States Courthouse
 312 North Spring Street
 7 Los Angeles, California 90012
 Telephone: (213) 894-2216
 8 Facsimile: (213) 894-6436
 Email: douglas.m.miller@usdoj.gov

9 Attorneys for Plaintiff
 10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,) CR No. 10-1031(A)-AHM
)
 14 Plaintiff,) GOVERNMENT'S RESPONSE TO MOTION TO
) DISMISS THE INDICTMENT WITH
 15 v.) PREJUDICE BASED ON ALLEGED
 ENRIQUE FAUSTINO AGUILAR) GOVERNMENT MISCONDUCT; MEMORANDUM
 16 NORIEGA, ANGELA MARIA) OF POINTS AND AUTHORITIES
 GOMEZ AGUILAR, KEITH E.)
 17 LINDSEY, STEVE K. LEE, and)
 LINDSEY MANUFACTURING) Hearing: June 27, 2011, 4:00 p.m.
 18 COMPANY,) (Courtroom 14)
)
 19 Defendants.)
)
 20

21 Plaintiff United States of America, by and through its
 22 attorneys of record, the United States Department of Justice,
 23 Criminal Division, Fraud Section, and the United States Attorney
 24 for the Central District of California (collectively, "the
 25 government"), hereby files its response to the Motion to Dismiss
 26 the Indictment With Prejudice Due to Repeated and Intentional
 27 Government Misconduct filed by defendants LINDSEY MANUFACTURING
 28 COMPANY ("LMC"), KEITH E. LINDSEY, and STEVE K. LEE ("the

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On May 9, 2011, the defendants moved to dismiss the first superseding indictment with prejudice on the ground that the government repeatedly and intentionally engaged in misconduct leading up to and during the course of the trial. (Mot. #505). Specifically, the defendants allege that the government (1) made several intentional and materially false statements to the grand jury and the Court; (2) deceived the grand jury by omitting material evidence; (3) submitted false affidavits in support of search and seizure warrants so as to mislead the United States Magistrate Judges authorizing those warrants; and (4) withheld discovery in violation of Brady v. Maryland, 373, U.S. 83 (1963). (Id. at 1-21). For the reasons set forth below, all of the defendants' arguments are without merit and therefore the motion to dismiss the indictment with prejudice should be denied.

II.

ARGUMENT

A. Legal Standard

The dismissal of an indictment based on alleged misconduct is an "extreme remedy" and is "disfavored" because it is "the most severe sanction possible." United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993); United States v. Isgro, 974, F.2d 1091, 1097 (9th Cir. 1992); United States v. Jacobs, 855 F.2d 652, 655 (9th Cir. 1988). The Ninth Circuit has held that this extreme remedy should only be granted in two limited circumstances.

1 First, a district court may dismiss an indictment for
2 alleged government misconduct where the misconduct amounts to a
3 due process violation. United States v. Barrera-Moreno, 951 F.2d
4 1089, 1091 (9th Cir. 1991). This involves "conduct which is so
5 grossly shocking and so outrageous as to violate the universal
6 sense of justice." United States v. Restrepo, 930 F.2d 705, 712
7 (9th Cir. 1991) (citations omitted). For example, where
8 (1) racial discrimination has been used in the selection of the
9 grand jurors, (2) women have been excluded from the grand jury,
10 or (3) the government allows a defendant to stand trial on an
11 indictment which it knows to be based on perjured testimony
12 material to the return of that indictment. Bank of Nova Scotia
13 v. United States, 487 U.S. 250, 257 (1988); United States v.
14 Basurto, 497 F.2d 781, 785 (9th Cir. 1974). The third example
15 cited above requires knowledge and materiality to prevent mere
16 misstatements or poor word choices from forming the basis of a
17 motion to dismiss. United States v. Sager, 227 F.3d 1138, 1149
18 (9th Cir. 2000); United States v. Harkonen, 2009 WL 5166246, *5-6
19 (N.D. Cal. Apr. 15, 2009).

20 Second, "[i]f the conduct does not rise to the level of a
21 due process violation, the court may nonetheless dismiss under
22 its supervisory powers." Barrera-Moreno, 951 F.2d at 1091. This
23 is distinguishable from a dismissal on due process grounds
24 because there is no presumption of prejudice to the defendant.
25 Id. at 256-257. "To justify such an extreme remedy, the
26 government's conduct must have caused substantial prejudice to
27 the defendant and been flagrant in its disregard for the limits

1 of appropriate professional conduct." United States v. Lopez, 4
2 F.3d at 1464; see United States v. Kearns, 5 F.3d 1251, 1253-54
3 (9th Cir. 1993) ("Dismissal under the court's supervisory powers
4 for prosecutorial misconduct requires (1) flagrant misbehavior
5 and (2) substantial prejudice.").

6 A district court may not dismiss an indictment under its
7 supervisory powers if the defendant has failed to demonstrate
8 actual and substantial prejudice. See, e.g., Id. at 254 ("a
9 district court may not dismiss an indictment for errors in grand
10 jury proceedings unless such errors prejudiced the defendants");
11 United States v. Woodley, 9 F.3d 774, 777 (9th Cir. 1993)
12 (government's refusal to disclose Brady materials was not
13 flagrant or prejudicial and did not justify dismissal of
14 indictment); United States v. Isgro, 974 F.2d at 1096-99
15 (dismissal of indictment based on alleged misconduct for failure
16 to disclose prior testimony reversed because defendant suffered
17 no prejudice). Finally, a district court may not dismiss an
18 indictment under its supervisory powers for misconduct alleged to
19 have occurred before the grand jury once the petit jury has
20 rendered a verdict of guilty beyond a reasonable doubt, because
21 the guilty verdict establishes a fortiori there was probable
22 cause to bring the indictment and that any error was therefore
23 harmless. United States v. Navarro, 608 F.3d 529, 539-540 (9th
24 Cir. 2010).

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1 B. The Grand Jury Testimony Identified by the Defendants
2 Did Not Amount to "False Testimony" and Was Immaterial

3 The motion to dismiss the first superseding indictment in
4 this case is based largely on what the defendants argue were 11
5 false statements that Federal Bureau of Investigation ("FBI")
6 Special Agent Susan Guernsey made to the grand juries returning
7 the original indictment and the first superseding indictment.
8 (Mot. #505 at 4-14). This aspect of the motion fails under the
9 Court's supervisory powers, because the jury has already rendered
10 verdicts of guilty on all counts in the first superseding
11 indictment. Thus, in order to prevail on this part of their
12 motion, the defendants must establish a due process violation.

13 The defendants have utterly failed to show that Agent
14 Guernsey or the prosecutors allowed the defendants to proceed to
15 trial on an indictment which they knew was based on perjured
16 testimony. At best, the defendants have managed to scrape
17 together a few instances in which Agent Guernsey made a slight
18 misstatement or used poor word choice in summarizing several
19 hundreds of pages of witness statements and several hundred
20 thousand pages of documents. A close examination of the
21 remainder of the defendants' motion reveals that they have taken
22 Agent Guernsey's grand jury testimony entirely out of context
23 and/or have completely ignored evidence showing the veracity of
24 her grand testimony. Moreover, the defendants' have repeatedly
25 premised the alleged falsities on a misplaced belief that Agent
26 Guernsey and the government were obligated to present what they
27 claim was exculpatory evidence to the grand jury, something the

1 Ninth Circuit has aptly described as "flat wrong." The
2 government now addresses each of these serious allegations of
3 perjury separately to show how each is completely unfounded.

4 1. As High As 90-95 Percent

5 The first allegedly false statement relates to Agent
6 Guernsey's response to a grand juror's question just before
7 deliberations began on the first superseding indictment:

8 GRAND JUROR: I have a question. For the Grupo account at
9 Global, you mentioned earlier that there were
10 essentially no other funds in that account
11 other than those that came from -

12 WITNESS: I said the majority of the funds from Grupo.
13 I would say as high as 90, 95 percent of the
14 funds in the Grupo account are from Lindsey,
15 yes.

16 (RT 10/21/10 at 75) (emphasis added). The defendants argue that
17 this testimony was false because the government's own analysis of
18 the Grupo account had revealed that only 71 percent of the money
19 in the Grupo account came from LMC. (Mot. #505 at 5). The
20 defendants' argument fails for several reasons.

21 First, it completely ignores the fact that Agent Guernsey
22 cut off the grand juror in the middle of his question and
23 immediately corrected his misconception that there were
24 "essentially no" other funds in the Grupo account and immediately
25 clarified that her prior testimony was that "the majority" of the
26 funds were from LMC. Second, Agent Guernsey made it abundantly
27 clear to the grand juror that her statement regarding the
28 percentage of funds in the Grupo account was merely an
approximation - "as high as" 90 or 95 percent - and was neither
an exact amount nor the entire amount of funds in the account.

1 Third, because Agent Guernsey made it abundantly clear that LMC
2 funds did not make up all (100 percent) of the funds in the Grupo
3 account, the defendants' argument that the grand jury was left
4 with "no choice but to conclude that LMC's funds had been used to
5 pay bribes" is unavailing. (Mot. #505 at 5). In fact, if - as
6 the defendants contend - the grand juror was truly "skeptical" of
7 whether LMC funds had been used to pay bribes, the juror would
8 have asked follow-up questions once Agent Guernsey made it clear
9 that non-LMC funds were also present in the Grupo account.

10 2. LMC Did Not Have A Lot of Business with CFE Before They
11 Hired Enrique Aguilar

12 The second allegedly false statement relates to Agent
13 Guernsey's testimony regarding LMC's history of winning contracts
14 with CFE:

15 GRAND JUROR: My understanding is that Lindsey has been in
16 business for sixty-some years. Does Lindsey
17 have a history of winning contracts from CFE?

18 WITNESS: I believe according to Keith Lindsey's
19 testimony their first contract awarded by CFE
20 was in '94. They didn't have a lot of
21 business with CFE before they hired Aguilar.

22 PROSECUTOR: What did Sergio Cortez say about kind of the
23 drought, if you will, right before they hired
24 Enrique Aguilar?

25 WITNESS: He said it was like six or seven years before
26 they got a contract or that they didn't have
27 any business with CFE prior to hiring
28 Aguilar.

PROSECUTOR: During that time they had a representative in
Mexico?

WITNESS: They did. They had separate - they had Manuel
Gutierrez and a gentlemen named Cardenas
before him. They would go to CFE, do bids,
but just generally anything that they got
from CFE was very small.

1 (RT 10/21/11 at 67).

2 The defendants argue that this testimony was false because
3 Agent Guernsey and the prosecutor "knew" that LMC had entered
4 into "approximately ten contracts with a value of nearly
5 \$9,000,000 with CFE during this period." (Mot. #505 at 6). But
6 this argument ignores the fact that LINDSEY told the FBI during
7 his November 2008 interview that his recollection was "that the
8 first contract between [LMC] and CFE was around 1994" and that
9 "[d]uring the time that [Enrique] Aguilar represented SBB, SBB
10 routinely beat [LMC] out for CFE contracts." Sergio Cortez
11 provided similar information during his grand jury testimony:

12 CORTEZ: That was Cardenas. That was Cardenas, '94, '95,
13 '96. After we sold that big order in '94, we
14 didn't sell nothing else under him. And that's why
15 we considered that time that CFE needed more
16 towers, but we needed somebody to go and look for
17 that business and that's when we hire Manuel
18 Gutierrez. (RT 5/5/2010 at 39).

16 * * *

17 CORTEZ: Because we didn't see - we didn't see no - even
18 though Gutierrez told me, 'I can go in there and -
19 and visit the customer and I can try to get some
20 jobs,' et cetera, we didn't see no action; no real
21 action for few years ... I think we sold two or
22 four towers to the area of Veracruz through
23 Gutierrez. (Id. at 49).

24 Cortez provided essentially the same testimony at trial. When
25 asked whether LMC was successful in selling ERS towers to CFE
26 with Gutierrez as LMC's sales representative, Mr. Cortez
27 responded, "Not very much." (RT 4/14/11, p. 1643). Thus, there
28 was nothing false about Agent Guernsey's testimony regarding what
she learned from these witnesses.

1 The defendants further argue that Agent Guernsey should have
2 disclosed to the grand jury several documents produced by LMC in
3 response to a grand jury subpoena that the defendants maintain
4 "reflected a longstanding and lucrative relationship with CFE
5 dating back to 1991." (Mot. #505 at 6). But as Agent Guernsey
6 made clear during the trial, at the time of her grand jury
7 testimony she was only aware of two contracts between LMC and CFE
8 before Enrique Aguilar was hired and did not find "any other
9 evidence" of contracts being awarded to LMC, "even in the
10 subpoenaed documents, from [LMC]." (RT 4/22/2011 at 2479-80).
11 Defense counsel for LMC attempted to impeach Agent Guernsey
12 during the trial by showing her five documents - purporting to be
13 contracts between LMC and CFE prior to 2002 - that LMC produced
14 to the government during its investigation. Agent Guernsey
15 explained, however, that she was not aware of the five documents
16 at the time of her grand jury testimony. Moreover, the documents
17 were in Spanish, a language Agent Guernsey does not know. (RT
18 4/26/2011 2617-2630; DEX 2527, 2528, 2529, 2530, 2531).

19 Although the defendants contend that these five documents
20 were exculpatory (they were not) and should have been "handed
21 over to the grand jury," this argument fails to recognize that
22 the government has no legal obligation to present exculpatory
23 evidence to the grand jury and a district court may not dismiss
24 an indictment based on its failure to do so. United States v.
25 Williams, 504 U.S. 36, 36-37 (1992) ("A district court may not
26 dismiss an otherwise valid indictment because the Government
27 failed to disclose to the grand jury "substantial exculpatory
28

1 evidence" in its possession."); United States v. Navarro, 608
2 F.3d at 537 (it is "flat wrong" for a district court to state
3 that a prosecutor has a duty to present exculpatory evidence to
4 the grand jury); United States v. Isgro, 974 F.2d at 1096
5 ("prosecutors simply have no duty to present exculpatory evidence
6 to grand juries.").

7 3. Steve Lee Did Not Want to Know How Grupo Used its
8 Commission Payments

9 The third allegedly false statement was Agent Guernsey's
10 testimony that LEE "didn't want to know" what Enrique Aguilar was
11 doing with his 30 percent sales commission. (RT 10/21/2011
12 at 22). Although it is true that LEE never said he "didn't want
13 to know" what happened with the 30 percent commission, it is
14 clear from the context in which Agent Guernsey made this
15 statement that she was simply conveying to the grand jury that
16 both LINDSEY and LEE made similar statements during their FBI
17 interviews. Moreover, the prosecutor quickly sought to correct
18 this slight misstatement:

19 PROSECUTOR: Now, did there come a time that Keith Lindsey
20 talked about what he believed this high
21 commission was being used for?

22 WITNESS: When we interviewed him, he said that he
23 didn't want to ask what it was used for. He
24 thought it was high. Didn't want to know.
25 Just didn't want to know.

26 PROSECUTOR: Did he say that he assumed it was being used
27 for something?

28 WITNESS: He said he assumed that it was being used to
possibly pay someone at CFE but that he
didn't want to know.

PROSECUTOR: Now, you also talked to Keith; or pardon me,
Steve Lee about his own perception of why the

1 30-percent commission was needed or how it
2 would be used; is that right?

3 WITNESS: I'm sorry?

4 PROSECUTOR: Steve Lee, the CFO, he was asked by the FBI
5 about what he thought this 30-percent
6 commission was going to be used for; is that
7 right?

8 WITNESS: Yeah. But he also said that he didn't - he
9 didn't want to know.

10 PROSECUTOR: There came a point in that interview that
11 someone asked him, "Well, if I told you it
12 was being used to pay bribes," and he
13 suggested that he didn't know that; is that
14 correct?

15 WITNESS: Yes. He did say that he wasn't aware of
16 that happening.

17 (RT 10/21/10 at 22-23).

18 Thus, the grand jury was never left with the impression that
19 LEE had known or had assumed that the 30 percent commission was
20 being used to pay bribes. In fact, it was made very clear to the
21 grand jury that LEE had told the FBI that he was not aware of
22 that happening.

23 Moreover, LEE's statement to the FBI was not the only
24 evidence presented to the grand jury to establish his involvement
25 in the charged crimes. On the contrary, Agent Guernsey's grand
26 jury testimony was that LEE had, among other things, (1) been put
27 on notice of Enrique Aguilar's and Nestor Moreno's corruption by
28 Jean Guy Lamarche's email, (2) been told by Sergio Cortez and
Manuel Gutierrez about what happened at Hermosillo and thus knew
about Enrique Aguilar's influence over Moreno, (3) agreed to pay
a 30 percent commission to Enrique Aguilar, (4) paid that
commission even though only a 15 percent commission was listed on

1 the invoices, and (5) passed that additional 30 percent cost on
2 to CFE by increasing the cost of LMC's products. (RT 10/21/2010
3 at 8-21). Therefore, there can be no serious argument that this
4 slight misstatement was flagrant or substantially influenced the
5 grand jury's decision to indict. See Harkonen, 2009 WL 5166246
6 at *5-6.

7 The defendants next argue that it was improper for Agent
8 Guernsey to comment on the credibility of LEE's statement that he
9 did not know about the bribe payments, because Agent Guernsey was
10 not present for his interview. (Mot. #505 at 7). This argument
11 suggests that Agent Guernsey offered some abstract "opinion" as
12 to LEE's credibility, but the transcript shows that this is not
13 what happened. Agent Guernsey was indeed asked, "Now, did you
14 find that statement on Steve Lee's behalf to be credible that he
15 did not know that these payments were being made." (RT
16 10/21/2011 at 23). But in response Agent Guernsey did not opine
17 on LEE's credibility. Instead, she simply testified that LEE's
18 statement was "strange" based on all of the other evidence she
19 uncovered during the investigation. She then proceeded to
20 explain in detail all of the other evidence she relied upon to
21 reach that conclusion. (Id. at 23-29). Thus, the defendants
22 argument that Agent Guernsey gave her "opinion" as to LEE's
23 credibility or somehow "denigrated" LEE's credibility is without
24 merit.

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1 4. LMC Knew They Weren't the Lowest Bidders Anymore

2 The fourth allegedly false statement was Agent Guernsey's
3 testimony that LMC began increasing its bids by 30 percent after
4 hiring Enrique Aguilar:

5 PROSECUTOR: When they have this discussion about paying
6 Enrique Aguilar this 30-percent commission
7 and just passing it off, did they acknowledge
8 to you that went against what they understood
9 to be the normal bidding process?

10 WITNESS: Yeah, they did. Cortez mentions it in his
11 testimony that they've always known that CFE
12 usually went with the lowest bid or one of
13 the lowest bids just depending upon what the
14 contract said. They had always been very
15 careful in the past to make sure they came in
16 with one of the lowest bids, if not the
17 lowest bid, and Steve Lee also said the same
18 thing. That his understanding was always
19 that CFE usually awarded their contracts to
20 the one of the lowest bidders, and once they
21 hired Aguilar and added that 30 percent, they
22 still got the contracts, and they knew they
23 weren't the lowest bidder anymore.

24 (RT 10/21/2011 at 21). The defendants argue that this testimony
25 was false because the "government knew . . . there were no
26 competitors for LMC's ERS systems in Mexico." (Mot. #505 at 8)
27 (emphasis in original). The defendants support this argument by
28 pointing to Cortez's trial testimony during which he stated that
LMC had no competition in Mexico between 2002 and 2007. (RT
4/15/2011 at 1781). But this was not the testimony Agent
Guernsey was summarizing when she appeared before the grand jury.
Rather, Agent Guernsey summarized the following grand jury
testimony:

 CORTEZ: To tell you the truth, most of the time our
price is high than the competitors. And the
only reason that utilities decide to buy our
product because we are the pioneers of these

1 types of towers and it's the best engineered
2 tower. (RT 5/5/2010 at 26).

3 * * *

4 CORTEZ: When we are participating in a bid, an
5 international public bid, you compete with -
6 with Tower Solutions or SBB or only one of
7 them, maybe Kema comes in hand, you have to
8 sharpen up the pencil and be sure to give
9 them a price that is going to be competitive.
10 And, like I said, our price - even in public
11 bids like that is higher than SBB or Tower
12 Solutions or even Kema. (Id.)

13 * * *

14 PROSECUTOR: So now this maybe 2003, 2004, somewhere
15 around there. SBB was one of your
16 competitors, correct?

17 CORTEZ: Yes.

18 PROSECUTOR: But SBB didn't get any of the towers from
19 these seven purchase orders that you
20 mentioned?

21 CORTEZ: No, that - not to my knowledge.

22 PROSECUTOR: Did any other competitor get any of the
23 towers from the purchase orders?

24 CORTEZ: Not to my knowledge (Id. at 87).

25 * * *

26 CORTEZ: I gave him the price and I gave him the
27 quotation and SBB also gave their price and
28 they ended up purchasing from SBB. And why
was that? Because our price was higher than
SBB. And again I mention to Mario, 'You
know, we should be cutting this 30 percent
because you guys are - we not going to sell
the towers or anymore product, you know.
SBB's going to start getting these jobs
because they're cheaper in price than us, we
need to cut this commission.' And he mention
something like, 'Yes. Yes, I know. I'm going
to talk to Aguilar about this.'" (Id. 89).

29 At trial, the defendants and Cortez attempted to draw a much
30 finer distinction regarding whether LMC had any competitors in

1 Mexico by arguing that LMC had no competitors for its "1070
2 tower," (RT 4/15/2011 at 17681), but Cortez was merely addressing
3 competitors during his grand jury testimony.

4 5. LMC Got Contracts Regularly After Hiring Enrique
5 Aguilar

6 The fifth allegedly false statement was Agent Guernsey's
7 testimony that LMC started getting contracts "regularly" once it
8 hired Enrique Aguilar as its sales representative in Mexico.
9 (Mot. #505 at 9). The defendants argue that Agent Guernsey's
10 testimony was false because "LMC's sales to CFE continued in a
11 sporadic fashion, just as they had before its retention." (Id.).
12 This argument is completely unfounded.

13 As discussed above, Cortez testified in the grand jury that
14 before hiring Enrique Aguilar "we didn't see no action; no real
15 action for few years . . . I think we sold two or four towers to
16 the area of Veracruz through Gutierrez." Other evidence showed
17 that within approximately one month of hiring Enrique Aguilar,
18 LMC was awarded a direct purchase contract with CFE worth over \$1
19 million and received approximately \$18 million worth of payments
20 from CFE over the next six years. As Agent Guernsey testified in
21 the grand jury, there came a time when "they were so busy with
22 contracts that they were getting from CFE they had to put three
23 eight-hour shifts a day, seven days a week." (RT 10/21/2011 at
24 34). The defendants attempt to dismiss this obvious increase in
25 contracts by pointing to a 13-month period when LMC received no
26 contracts from CFE. (Mot. #505 at 9). This narrow focus
27
28

1 completely ignores Cortez's testimony regarding the sales cycle
2 in the electrical tower industry:

3 CORTEZ: So, therefore, this is not a product that you -
4 that the utilities are going to buy every year
5 because they need to stock every year. No.
6 Actually, you know, once -once we sell 20 towers
7 to one utility over here in the USA, that's it.
8 They are set forever.

9 (RT 5/5/2010 at 61).

10 The defendants' argument that Agent Guernsey should have
11 told the grand jury that the most significant contract came in
12 July 2006, after hurricane Wilma hit Mexico, also fails. (Mot.
13 #505 at 9). Again, assuming this was exculpatory evidence (it
14 was not), "prosecutors simply have no duty to present exculpatory
15 evidence to grand juries." Isgro, 974 F.2d at 1096.

16 6. We Have No Other Explanation for the 30 Percent
17 Commission

18 The sixth allegedly false statement was Agent Guernsey's
19 grand jury testimony regarding the 30 percent commission being
20 paid to Enrique Aguilar:

21 GRAND JUROR: I just wonder, they have got 30 percent in
22 commission and 15 percent is clearly paid as
23 commission, and the other is all these other
24 miscellaneous expenses. And I was just
25 wondering are there any real plausible -
26 because if you're running a company and you
27 have a whole department for sales and then
28 you don't need that department anymore maybe
29 you agree I'll pay you 15 percent for your
30 travel and - I'm just wondering did they give
31 you any other plausible reasons for the
32 commissions to be so high?

33 PROSECUTOR: And if you have evidence of why these
34 commissions were so high I think is the
35 question regardless of who gave it to you.
36 Do you have any evidence that would explain
37 why a 30 percent commission would be paid to
38

1 [LMC] other than what you've already
2 testified to?

3 WITNESS: No, we have no other explanation for the 30
4 percent commission.

5 (RT 9/8/2010 at 82) (emphasis added). The defendants argue that
6 this testimony was false because (1) the government was aware
7 that Grupo had, in fact, performed significant outside services
8 for LMC, including travel, training, transportation and
9 translation; and (2) the all-inclusive, contingent nature of
10 Grupo's 30 percent commission was another plausible explanation
11 for its size. (Mot. #505 at 10).

12 The first argument has no merit because it presumes that
13 Agent Guernsey gave "no other explanation for the higher fee
14 other than the money being used for corrupt purposes." (Id.).
15 This is inaccurate. Agent Guernsey was asked whether there was
16 any explanation for the payments "other than what [she had]
17 already testified to." She said no, because she had already
18 explained the "plausible explanations" listed on the invoices,
19 which the defendants argue were "concealed from the grand jury,"
20 namely that the money was for "commissions, customer visits,
21 translations, and travel." (RT 9/8/2010 at 28-35).

22 The defendants claim that Agent Guernsey uncovered evidence
23 that these explanations on the invoices were in fact true, but as
24 Agent Guernsey explained to the grand jury, she determined that
25 the invoices being submitted by Grupo were fraudulent because
26 many of the invoices listed the commission as 15 percent of the
27 sales contract, even though Cortez and other evidence clearly
28 indicated that Enrique Aguilar's commission was 30 percent. (Id.)

1 at 31-35; 10/21/2010 at 25-28). Agent Guernsey further explained
2 that many of the invoices claimed to be for customer visits,
3 translation, and travel, yet in many instances were for the exact
4 same amount as the invoices submitted for commissions, even when
5 the invoice was for over \$1 million. (9/8/10 at 31-35).
6 Finally, Agent Guernsey explained how when she looked at Grupo's
7 brokerage account for evidence of these purported expenses, she
8 found no payments for travel, customer visits, or translation.
9 (Id. at 35).

10 The argument that Agent Guernsey concealed the all-inclusive
11 and the contingent nature of Grupo's 30 percent commission from
12 the grand jury is also inaccurate. The government introduced
13 several of the invoices from Grupo during the grand jury
14 proceedings and each showed that the purported explanation for
15 the payments to Grupo were commissions and expenses for customer
16 visits, translation, and travel. (Id. at 31-35). As for the
17 contingent nature of the payments, Agent Guernsey explained that
18 the 30 percent commission was "in exchange for achieving . . .
19 contracts for [LMC] from CFE." (Id. at 16). Agent Guernsey also
20 made it clear that these payments were "always after [LMC was]
21 paid by CFE." (Id. at 27). Therefore, there is nothing to
22 suggest that Agent Guernsey tried to conceal any of these other
23 "plausible explanations" from the grand jury.

24 The defendants' assertion that Agent Guernsey testified that
25 "most of the money" from LMC was ultimately used to buy luxury
26 goods for CFE officials is again inaccurate. (Mot. #505 at 10).
27 Agent Guernsey testified that a "substantial portion of the
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1 proceeds" and "a significant amount of money" was used to buy
2 luxury goods for CFE officials. (RT 9/8/2010 at 36). The
3 defendants cannot dispute the accuracy of this testimony given
4 their own acknowledgment that "\$2.2 million of these monies were
5 . . . used for these purposes."

6 Lastly, Agent Guernsey did nothing to conceal from the grand
7 jury the dates on which these corrupt payments were made to CFE
8 officials. (Id.). The government introduced documents showing
9 that (1) the authorization to pay Moreno's American Express card
10 "in full every month" was dated July 13, 2006, (2) the \$297,500
11 check used to purchase the Ferrari was dated February 16, 2007,
12 and (3) the \$540,000 check used to help purchase the yacht was
13 dated August 28, 2006. (9/8/2010, Ex. 6, 7, 10, 16).

14 7. Looking at the Invoices, They Appear to be Fraudulent

15 The seventh allegedly false statement was Agent Guernsey's
16 grand jury testimony that "looking at the invoices they appear to
17 be [fraudulent]." (RT 9/8/2010 at 29). The defendants argue
18 that this testimony "had no basis in fact" because "there was
19 extensive evidence that Grupo was, in fact, performing valuable
20 outside services for LMC." (Mot. #505 at 11). As explained
21 above, Agent Guernsey did not testify that Grupo never performed
22 any outside services for LMC. Rather, her testimony was that the
23 invoices she reviewed during her investigation "appeared" to be
24 fraudulent. (RT 9/8/2010 at 29-35). When Agent Guernsey was
25 asked to "walk through" how she came to that determination, the
26 grand jury was shown several of the invoices and how they
27 reflected a 15 percent commission and how in many instances were

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1 the same exact amount as the invoices for expenses. (Id.). In
2 the end, however, the grand jury ultimately made its own
3 determination as to the authenticity of the invoices. (Id.).

4 The argument that there were "numerous email exchanges
5 between Mr. Aguilar and LMC" to support the validity of these
6 invoices is again inaccurate. (Mot. #505 at 11). The reason the
7 defendants do not include these "numerous emails" in their motion
8 is because none can explain (1) the high dollar values being
9 listed on the invoices, (2) why the commission invoices listed
10 only 15 percent of the contract price, or (3) why in many
11 instances they were the same exact amount as the expense invoices
12 - features that were the crux of Agent Guernsey's determination
13 the invoices "appeared" fraudulent. Again, assuming that the
14 emails showing Enrique Aguilar's mere involvement in the
15 administration of contracts with CFE were exculpatory (they were
16 not), the government had no obligation to present those documents
17 to the grand jury.

18 8. LMC's Wire Transfers Went To Pay Off Moreno's American
19 Express Bill

20 The eighth allegedly false statement was Agent Guernsey's
21 grand jury testimony that LMC's wire transfers to the Grupo
22 account were used to pay over \$170,000 towards Moreno's American
23 Express bill. (Mot. #505 at 12). The defendants argue that this
24 testimony was false because "no LMC funds were used to pay Mr
25 Moreno's American Express bills." (Id.). The defendants,
26 however, provide no support for this argument in their motion.
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1 Presumably, the argument is based on the same ground as the
2 ninth argument in the defendants' motion: "the prosecutors [were
3 seeking] to reinforce [a] false notion that LMC's funds could be
4 specifically traced to corrupt payments." (Id.). What both of
5 these arguments overlook, however, is that Agent Guernsey was not
6 required to trace, i.e., to identify which particular funds were
7 used to pay the bribes and could point to any funds in that
8 account once they had been commingled in the Grupo account.

9 United States v. Rutgard, 116 F.3d 1270, 1292 (9th Cir. 1997).

10 As the Ninth Circuit explained in Rutgard, the reasoning rests on
11 the fungibility of money in a bank account, which destroys the
12 specific identity of any particular funds, and allows the
13 government to point to "any funds 'involved' in the transaction."
14 Id.; see also United States v. English, 92 F.3d 909, 916 (9th
15 Cir. 1996) ("it is sufficient to prove that the funds in question
16 came from an account in which proceeds were commingled with other
17 funds").

18 9. The 2006 Representation Agreement Between Enrique
19 Aguilar and LMC Was In Response to an IRS Audit of LMC

20 The tenth allegedly false statement was Agent Guernsey's
21 grand jury testimony regarding why the Representation Agreement
22 between Enrique Aguilar and LMC was dated in 2006:

23 WITNESS: I do know why. It's in response, actually,
24 to a IRS audit of Lindsey Manufacturing's
25 accounting practices with regards to their
26 tax returns and they were questioned as to
27 the 30 percent commission. And the date of
28 that contract is about the time that the
audit began. So it's basically documentation
documenting the 30 percent commission because
they did not have any in their files until
that point.

1 (RT 9/8/2010 at 80). The defendants argue that this testimony
2 was false for several reasons. First, LMC was not notified by
3 the IRS about an audit until July 12, 2006, and the agreement
4 Agent Guernsey referred to was dated nine days earlier, on
5 July 3. Second, the IRS audit in July 2006 did not relate to tax
6 year 2006 or to sales commissions, but rather to bad debt
7 deductions taken in tax years 2004 and 2005. Third, it was not
8 until February 2008 that LMC was audited with regard to its 2006
9 tax return's sales commissions. (Mot. #505 at 13). The
10 defendants argue that Agent Guernsey knew these were false
11 statements and that she led the grand jury to believe LMC had
12 committed a tax crime. (Id.).

13 Although the inaccuracies the defendants point out in their
14 motion are correct, Agent Guernsey was not trying to falsely
15 represent to the grand jury that LMC had committed a tax crime.
16 (RT 4/22/2011 at 2576). She was simply mistaken about the
17 purpose of the IRS audit that began in 2006. As Agent Guernsey
18 explained during her cross-examination at trial, she knew that
19 the IRS began auditing LMC sometime in the middle of 2006 and
20 that the representation agreement was created "about the time
21 that the audit began." (Id. at 2576-85; 9/8/2010 at 80). Agent
22 Guernsey also knew that the audit had to do with the tax returns
23 LMC had filed during tax years 2004 and 2005. (Id. at 2580-
24 2585). Agent Guernsey mistakenly believed, however, that the
25 audit related to LMC's commissions, so when she conveyed that
26 information to the grand jury "that's what [she] believed to be
27 the truth." (Id. at 2581). Agent Guernsey's confusion about

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1 this issue was corroborated by her appearance before the grand
2 jury on October 21, 2010, in connection with return of the first
3 superseding indictment, when she again said, "I'm going to say in
4 '05 or '06, they were audited by the IRS with regard to their
5 commissions." (RT 10/21/2010 at 29). Agent Guernsey's confusion
6 was not surprising given that the tax audits in question were
7 back-to-back and one involved commissions related to tax year
8 2006.

9 The defendants' assertion that they were nevertheless
10 prejudiced by the testimony because it suggested to the grand
11 jury that they had committed a tax crime is not supported by the
12 record. (Mot. #505 at 13). Almost immediately after reference
13 to the IRS audit was made, the prosecutor admonished the grand
14 jury:

15 PROSECUTOR: There was a reference made to an IRS audit
16 being conducted of Lindsey Manufacturing.
17 That's not charged in the indictment that
18 will be presented to you ... You're not to
19 consider those acts or allegations in your
20 deliberations. Your deliberations regarding
21 probable cause should only consider the
22 testimony which relates to the acts charged
23 in the indictment. Does everyone understand
24 that?

25 GRAND JURORS: Yes.
26 (RT 9/8/2010 at 81).

27 Moreover, Agent Guernsey gave her testimony in connection
28 with the return of the original indictment, which did not charge
LMC, LINDSEY, or LEE. Agent Guernsey's testimony with respect to
the first superseding indictment made only a fleeting reference
to an IRS audit ("I'm going to say in '05 or '06, they were

1 audited by the IRS with regard to their commissions" (RT
2 10/21/10 at 29)) and the prosecutor gave the grand jury
3 essentially the same admonishment to address that minor comment.
4 (Id. at 31). Therefore, because Agent Guernsey's testimony about
5 the IRS audit was not a knowing misrepresentation to the grand
6 jury and was not material to the return of the first superseding
7 indictment, it should not serve as a basis to dismiss that
8 indictment.

9 10. In 2005 or 2006 LMC Reclassified Grupo's 30 Percent
10 Commission

11 The eleventh allegedly false statement was Agent Guernsey's
12 grand jury testimony regarding LEE's instruction to LMC employee
13 Mang Hue Kwok to "reclassify" Grupo's 30 percent commission to 15
14 percent commission and 15 percent to outside services in the
15 general ledger in 2005. (Mot. #505 at 14). Agent Guernsey
16 testified that LEE instructed Ms. Kwok

17 WITNESS [W]e have to reclassify the 30-percent commission
18 that we're listing on our general ledger, and he
19 did that with any of the commissions that had been
20 submitted or the bills that had been submitted by
21 Grupo up to that point.

22 (RT 10/21/2010 at 31). The defendants correctly point out that
23 there was only one instance in 2006 where LEE instructed Ms. Kwok
24 to "reclassify" a commission on the general ledger and that he
25 did not instruct her to reclassify the entries "up to that
26 point."

27 However, whether the 15 percent commission ended up on LMC's
28 general ledger as a result of a "reclassification" or whether it
was originally "classified" that way was not the focus of Agent

1 Guernsey's testimony. What Agent Guernsey was conveying to the
2 grand jury - correctly - was that after '05 or '06 LMC began
3 classifying the 30 percent commission as a 15 percent commission,
4 and that change in how LMC classified the commission came from
5 LEE, even though he knew the commission was, in fact, 30 percent.
6 This is clear from Agent Guernsey's grand jury testimony.

7 Agent Guernsey was asked why she had found LEE's statement
8 about not knowing the 30 percent commissions were being used to
9 pay bribes "strange." (RT 10/21/2010 at 23). One of the reasons
10 Agent Guernsey gave was that when she looked at the invoices she
11 recalled that LEE and others had acknowledged that Enrique
12 Aguilar's commission was 30 percent, yet the invoices only showed
13 a commission rate of 15 percent. (Id. at 26). Agent Guernsey
14 said it appeared the invoices were splitting the commission to
15 make it appear smaller. (Id. at 26-28). Agent Guernsey examined
16 the general ledger for this pattern and saw the commission was
17 also split down to 15 percent instead of 30 percent. (Id. at 29-
18 30). Agent Guernsey asked Ms. Kwok, the Assistant Comptroller at
19 LMC, who was responsible for listing the commission as 15
20 percent. Ms. Kwok said in '05 or '06, LEE came to her and said,
21 "We need to reclassify the commission. We need to split it out.
22 We need to split it 15 and 15. 15 to commission and 15 to other
23 services."

24 The defendants argue that Agent Guernsey's testimony that
25 LEE instructed Ms. Kwok to reclassify the general ledger "up to
26 that point" improperly influenced the grand jury's deliberations.
27 (Mot. #505 at 15). Actually, it provided Agent Guernsey with an

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1 opportunity to clarify her earlier misstatement. A grand juror
2 said he was "a little confused on the dates and timing," because
3 he thought Ms. Kwok was "writing a check [for] 30 percent" up
4 until 2005, even though the invoices being presented from August
5 1, 2002 through 2005 were split into two separate payments. (RT
6 10/21/2010 at 65) (emphasis added). The prosecutor asked Agent
7 Guernsey to explain that part of her testimony again. Agent
8 Guernsey explained that Ms. Kwok was not writing a check to
9 anyone, but rather entering information on LMC's general ledger.
10 (Id.). Agent Guernsey further explained that up until 2005, Ms.
11 Kwok was "documenting everything as 30 percent commission. They
12 weren't separating it out, distinguishing the two." (Id.).

13 Once again, the defendants argue that the government failed
14 to "reveal that the IRS audit found no irregularities in the
15 payments to the Mexican sales representative and no taxes owing."
16 (Mot. #505 at 15). For the reasons previously stated, the
17 government had no obligation to present such evidence and its
18 failure to do so may not serve as a basis to dismiss the
19 indictment. Moreover, the prosecutor admonished the grand jury

20 PROSECUTOR: Ladies and gentlemen, you've heard testimony
21 that they were being audited, that is, one of
22 the defendants in this case. But that's not
23 what their charged with. You should not
24 consider that in your deliberations as to
25 whether or not they were guilty of the
26 offenses that they have been charged with.

27 (RT 10/21/2010 at 32).

28 C. The Government Did Not Violate Brady

The defendants argue that the indictment should also be
dismissed for what they allege were a series of Brady violations

1 and misrepresentations to the Court. (Mot. #505 at 15-21). In
2 order to establish a Brady violation, a defendant must make a
3 three-part showing: "[t]he evidence at issue must be favorable to
4 the accused, either because it is exculpatory, or because it is
5 impeaching; that evidence must have been suppressed by the State,
6 either willfully or inadvertently; and prejudice must have
7 ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999).
8 Evidence is material for Brady purposes "if there is a reasonable
9 probability that, had the evidence been disclosed to the defense,
10 the result of the proceeding would have been different." Id.
11 at 280 (quoting United States v. Bagley, 473 U.S. 667, 682
12 (1985)).

13 1. Disclosure of Agent Guernsey's Grand Jury Testimony

14 The defendants first argue that the government violated its
15 Brady obligation by failing to turn over Agent Guernsey's grand
16 jury testimony before the start of the trial. (Mot. #505 at 16).
17 The defendants premise this Brady argument on the 11 allegedly
18 false statements Agent Guernsey made in that grand jury
19 testimony. (Id.). For the reasons set forth above, however,
20 these statements did not amount to false statements or perjury
21 before the grand jury. Agent Guernsey's grand jury testimony
22 became discoverable only when the government decided to call her
23 as a trial witness, a decision that was made after the trial had
24 commenced.

25 Even assuming for the sake of argument that Agent Guernsey's
26 grand jury testimony constituted Brady material (it did not), the
27 defendants' assertion that the indictment should be dismissed as
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1 a result of it not being disclosed "at the outset" has no merit.
2 (Mot. #505 at 16). The Ninth Circuit has held that Brady only
3 requires that the disclosure of information be made while it
4 still has substantial value to the accused. United States v.
5 Woodley, 9 F.3d 774, 777 (9th Cir. 1993); United States v.
6 Aichele, 941 F.2d 761, 764 (9th Cir. 1991). In other words, to
7 establish a Brady violation, a defendant still must prove that
8 prejudice ensued from the timing of the disclosure. (Id.).

9 Here, the defendants acknowledge that they were provided
10 with Agent Guernsey's grand jury testimony on April 15, 2011.
11 (Mot. #505 at 16). The government did not call Agent Guernsey as
12 a witness at trial until one week later, on April 22. The
13 defendants' counsel, therefore, had ample time to prepare their
14 extensive cross-examination of Agent Guernsey and to present the
15 alleged falsities to the jury. In fact, three of the seven week
16 days before Agent Guernsey testified, there were no court
17 proceedings held. Then, after Agent Guernsey testified for a
18 full day on April 22 (a Friday), defense counsel were given
19 another three days during which no court proceedings were held to
20 prepare for additional cross-examination of Agent Guernsey, which
21 resumed on April 26, 2011 (Tuesday).

22 Another factor that undermines the defendants' showing of
23 prejudice is the quality of their defense counsel, two seasoned
24 criminal defense attorneys with extensive trial experience and
25 extensive resources. Their ability to prepare effectively for
26 cross-examination was most evident from the fact that neither
27 defense counsel sought a continuance or additional time to
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1 prepare their cross-examination. Nor did they ask that Agent
2 Guernsey be called as a witness after the government's summary
3 witness, so that they might have additional time to prepare.
4 Finally, there can be no prejudice given that all of the key
5 arguments raised in the defendants' motion to dismiss are the
6 same arguments that were brought out during the extensive cross-
7 examination of Agent Guernsey at trial. United States v.
8 Aichele, 941 F.2d at 764 ("When a defendant has the opportunity
9 to present impeaching evidence to the jury ... there is no
10 prejudice in the preparation of his defense.").

11 2. Disclosure of Agent Binder's Search Warrant Affidavit

12 The second alleged Brady violation relates to the disclosure
13 of Agent Binder's search warrant affidavit. (Mot. #505 at 16-
14 17). The defendants argue that, in addition to disclosing Agent
15 Binder's search warrant affidavit in discovery, the government
16 was also required to "immediately" point out the fact that Agent
17 Binder's statement in the affidavit regarding LMC making deposits
18 to Sorvill was inaccurate. (Id. at 16). The defendants cite no
19 authority, and the government is aware of none, that stands for
20 the proposition that Brady required more than the government's
21 early disclosure of the affidavit.

22 But perhaps more importantly, the defendants again fail to
23 demonstrate how they were prejudiced by this alleged deficiency
24 or how further disclosure would have resulted in a different
25 outcome at trial. Indeed, it was this inaccuracy that the
26 defendants relied upon to form the basis for their Franks motion
27 and other motions to suppress, which the Court ultimately denied

1 after finding that the inaccuracy was immaterial to the finding
2 of probable cause and was not the result of bad faith or
3 dishonesty on the part of Agent Binder. (CR 439).

4 Next, the defendants argue that the government should have
5 voluntarily produced several drafts of Agent Binder's search
6 warrant affidavit without being specifically ordered to do so by
7 the Court. (Mot. #505 at 17). The defendants offer no support
8 for their argument that these drafts of the affidavit constituted
9 Brady material or even Jencks material beyond that which was
10 disclosed in Agent Binder's signed affidavit. Nor do they
11 explain why, if there was Brady material in these drafts, the
12 defendants failed to renew their motions to suppress and other
13 motions in advance of trial and failed to make any further use of
14 that alleged Brady information from March 24, 2011, through to
15 the conclusion of trial in May.

16 The final argument raised by the defendants with respect to
17 Agent Binder's affidavit is that the government failed to
18 disclose the fact that a deposit of approximately \$433,000 was
19 made into the Grupo account by someone other than LMC around the
20 time of the purchase of the Ferrari. (Id. at 17). The
21 defendants argue that the government knowingly waited until after
22 the Court had issued its tentative ruling denying the Franks
23 motion to make this disclosure. (Id.). However, as the
24 government explained to the Court at the Franks hearing, it
25 discovered this additional error while it was preparing its
26 response to the Franks motion. (RT 3/23/201 at 56). More
27 importantly, defense counsel were given the opportunity to cross-

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1 examine Agent Binder about this additional error before the Court
2 rendered its final ruling on the motion and the Court went so far
3 as to take judicial notice of the fact "that the account was
4 funded - that the account had moneys in it from which the
5 payments for the Ferrari could have been used, and not all the
6 moneys - evidently, according to what Mr. Miller just disclosed,
7 not even close to all the moneys had been recently placed there
8 by [LMC]." (RT 3/23/2011 at 62). When the Court asked defense
9 counsel if that was the ultimate fact that they wanted the Court
10 to conclude with respect this additional evidence, defense
11 counsel for LEE said, "Yes." (Id.). Thus, the defendants have
12 again failed to demonstrate how any prejudice resulted from the
13 alleged Brady violation.

14 3. The Government's Motion to Admit SBB Evidence

15 The defendants next argue that the indictment should be
16 dismissed because the government represented to the Court in a
17 motion to admit evidence relating to LMC's Canadian competitor,
18 SBB, that such evidence was necessary to "rebut a defense raised
19 for the first time at trial." (Mot. #505 at 18). The defendants
20 correctly point out that this representation to the Court was
21 inaccurate and that the government had overlooked the fact that
22 over a month earlier the defendants had arguably put the
23 government on notice of this defense by making reference to it in
24 a footnote of one of their motions. (Mot. #317 at 11 n.11).
25 However, this mere oversight cannot serve as a basis for
26 dismissing the indictment, especially given that the Court denied
27 the government's motion to admit the evidence and there was no

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1 resulting prejudice to the defendants. United States v. Kearns,
2 5 F.3d 1251, 1255 (9th Cir. 1993) (holding that even though the
3 government's conduct "may have been negligent, or even grossly
4 negligent," it did not rise to the level of flagrant misconduct).

5 4. The Government's May 3, 2011 Discovery Production

6 Lastly, the defendants argue that the indictment should be
7 dismissed because the government produced five FBI 302s on May 3,
8 2011, after the close of its case-in-chief. (Mot. #505 at 19).
9 The defendants argue that this production of six pages of
10 discovery warrants dismissal of the entire first superseding
11 indictment with prejudice because the government had previously
12 represented to the Court that it had complied with its discovery
13 obligations and because the timing of the production allegedly
14 prejudiced the defendants in two ways. (Id.).

15 The first argument fails because the government's untimely
16 production of the witness statements was not flagrant or in
17 reckless disregard for its discovery obligation. As the
18 government explained in its May 3, 2011 letter, the prosecutors
19 had Bates-stamped the five witness interviews, which took place
20 between March 30 and April 4, 2011, and had attached them to a
21 discovery letter to be sent out by a paralegal on April 4. On
22 May 3, the government discovered a duplication in the Bates
23 numbering for the five witness statements. The paralegal who was
24 responsible for sending out the April 4 discovery letter
25 containing the five witness statements was no longer working for
26 the government, so the prosecutors were unable to resolve the
27 discrepancy. In an abundance of caution, the government

1 immediately reproduced the witness statements with new Bates
2 numbers and provided them to the defense counsel the same night
3 that the discrepancy was discovered.

4 Next, the argument that the defendants were prejudiced by
5 this late disclosure also fails. Although the defendants note
6 that one of the five witness statements provided by the
7 government belonged to someone who had already testified
8 (Fernando Maya Basurto), the defendants do not explain how they
9 would have made use of the witness statement if it had been
10 produced before Basurto took the stand. Nor could they, as the
11 statement is only one half of a page and deals primarily with the
12 ABB case and what type of car an ABB coconspirator drove.
13 Furthermore, the Court admonished the jury that this case "does
14 not involve ABB" and limited the jury's consideration of
15 Basurto's testimony solely to the issue of Sorvill
16 International's role in this case (RT 4/7/2011 at 784-85).

17 The defendants attempt to manufacture prejudice with respect
18 to the Patrick Rowan witness statement. Rowan worked at LMC from
19 September 2001 through April 2005. (Mot. #505 at 20). The
20 defendants argue that Rowan's information was helpful to them
21 because Rowan discussed how everyone at LMC was told that this
22 "really big" job in Mexico would be coming, but it kept getting
23 pushed back and Rowan eventually "kissed [it] off." (Id. at 20).
24 According to the defendants, Rowan's statement "undermines" the
25 government's theory that LMC received a windfall of contracts
26 after hiring Enrique Aguilar and corroborates their argument that

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1 contracts with CFE remained "sporadic" from 2002 through 2005.
2 (Id. at 20-21).

3 However, merely showing that the statement might have been
4 "helpful" to the defendants is insufficient to establish a Brady
5 violation. Rather, the defendants must establish that "there is
6 a reasonable probability that, had the evidence been disclosed to
7 the defense, the result of the proceeding would have been
8 different." And the defendants cannot make this showing. To
9 start, the defendants tacitly acknowledged that any testimony by
10 Rowan would not have resulted in a different outcome at trial
11 because they did not call Rowan as a witness in the defense case.
12 The defendants were provided with Rowan's witness statement
13 before the trial had concluded. If Rowan's information was
14 really so useful, the defendants would have called him as a
15 witness at trial.

16 In addition, other information provided by Rowan would have
17 been very helpful to the government's case, and not just the
18 defense. For example, Rowan told the FBI that (1) "LMC
19 manufactures Emergency Restoration Systems and there were other
20 companies that made the same product," and (2) "LMC made pretty
21 routine stuff and other companies could make the same thing" and
22 "[b]ecause of this, . . . people would be crazy to buy LMC."
23 These and other statements by Rowan directly contradict the
24 defense theory that the reason LMC was being rewarded contracts
25 in Mexico was because LMC was the only company manufacturing and
26 supplying the industry-standard 1070 transmission towers after
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1 2002. A theory which was basically only supported by the
2 testimony of Sergio Cortez at trial.

3 Finally, Rowan's testimony regarding the "really big job"
4 apparently relates to the 100 towers LMC sold to CFE in 2006 by
5 way of public bid for over \$10 million. The defendants' argument
6 that Rowan's testimony about this contract repeatedly getting
7 pushed back would not only support the defense's theory. After
8 all, Rowan told the FBI that LMC was, in fact, awarded the big
9 contract after he left LMC. This shows that internally LMC's
10 salesmen were discussing winning a CFE contract submitted for
11 public bid more than six months in advance of it being awarded,
12 which the government would have argued was consistent with LMC
13 rigging the bids and paying bribes.

14 * * *

15 In summary, the defendants' motion to dismiss - filed during
16 jury deliberations - appears to be just another in a series of
17 motions designed to attack the government and specifically the
18 conduct of the prosecutors and agents in this case, all while
19 ignoring the applicable legal standards and/or the evidence.
20 When those standards and evidence are applied to the defendants'
21 present challenge, the defects in the motion become clear.

22 **III.**

23 **CONCLUSION**

24 For the foregoing reasons, the defendants' motion to dismiss
25 the first superseding indictment for alleged government
26 misconduct should be denied in all respects.