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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

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

defendants"). (Mot. #505). The government's response is based upon the attached memorandum of points and authorities, the files and records in this matter, the exhibits and testimony admitted at trial, as well as any other evidence or argument presented at any hearing on this matter.

DATED: June 6, 2011

Respectfully submitted,

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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.

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

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

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

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

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

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

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

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

1. As High As 90-95 Percent

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

> GRAND JUROR: I have a question. For the Grupo account at Global, you mentioned earlier that there were essentially no other funds in that account other than those that came from -
>
> WITNESS: I said the majority of the funds from Grupo. I would say as high as 90, 95 percent of the funds in the Grupo account are from Lindsey, yes.

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

First, it completely ignores the fact that Agent Guernsey cut off the grand juror in the middle of his question and immediately corrected his misconception that there were "essentially no" other funds in the Grupo account and immediately clarified that her prior testimony was that "the majority" of the funds were from LMC. Second, Agent Guernsey made it abundantly clear to the grand juror that her statement regarding the 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.

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

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

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

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

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

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

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

(RT 10/21/11 at 67).

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

> CORTEZ: That was Cardenas. That was Cardenas, '94, '95, '96. After we sold that big order in '94, we didn't sell nothing else under him. And that's why we considered that time that CFE needed more towers, but we needed somebody to go and look for that business and that's when we hire Manuel Gutierrez. (RT 5/5/2010 at 39).
>
> * * *
>
> CORTEZ: Because we didn't see - we didn't see no - even though Gutierrez told me, 'I can go in there and - and visit the customer and I can try to get some jobs,' et cetera, we didn't see no action; no real action for few years ... I think we sold two or four towers to the area of Veracruz through Gutierrez. (Id. at 49).

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

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

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

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

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

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

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

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

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

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

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

WITNESS: I'm sorry?

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

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

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

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

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

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

Moreover, LEE's statement to the FBI was not the only evidence presented to the grand jury to establish his involvement in the charged crimes. On the contrary, Agent Guernsey's grand jury testimony was that LEE had, among other things, (1) been put on notice of Enrique Aguilar's and Nestor Moreno's corruption by 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

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

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

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

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

> PROSECUTOR: When they have this discussion about paying Enrique Aguilar this 30-percent commission and just passing it off, did they acknowledge to you that went against what they understood to be the normal bidding process?
>
> WITNESS: Yeah, they did. Cortez mentions it in his testimony that they've always known that CFE usually went with the lowest bid or one of the lowest bids just depending upon what the contract said. They had always been very careful in the past to make sure they came in with one of the lowest bids, if not the lowest bid, and Steve Lee also said the same thing. That his understanding was always that CFE usually awarded their contracts to the one of the lowest bidders, and once they hired Aguilar and added that 30 percent, they still got the contracts, and they knew they weren't the lowest bidder anymore.

(RT 10/21/2011 at 21). The defendants argue that this testimony was false because the "government knew . . . there were no competitors for LMC's ERS systems in Mexico." (Mot. #505 at 8) (emphasis in original). The defendants support this argument by 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

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

* * *

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

* * *

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

CORTEZ: Yes.

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

CORTEZ: No, that - not to my knowledge.

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

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

* * *

CORTEZ: I gave him the price and I gave him the quotation and SBB also gave their price and 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).

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

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

5. LMC Got Contracts Regularly After Hiring Enrique Aguilar

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

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

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

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

(RT 5/5/2010 at 61).

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

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

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

> GRAND JUROR: I just wonder, they have got 30 percent in commission and 15 percent is clearly paid as commission, and the other is all these other miscellaneous expenses. And I was just wondering are there any real plausible - because if you're running a company and you have a whole department for sales and then you don't need that department anymore maybe you agree I'll pay you 15 percent for your travel and - I'm just wondering did they give you any other plausible reasons for the commissions to be so high?
>
> PROSECUTOR: And if you have evidence of why these commissions were so high I think is the question regardless of who gave it to you. Do you have any evidence that would explain why a 30 percent commission would be paid to

> [LMC] other than what you've already testified to?
>
> WITNESS: No, we have no other explanation for the 30 percent commission.

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

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

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

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

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

The defendants' assertion that Agent Guernsey testified that "most of the money" from LMC was ultimately used to buy luxury goods for CFE officials is again inaccurate. (Mot. #505 at 10). Agent Guernsey testified that a "substantial portion of the

proceeds" and "a significant amount of money" was used to buy luxury goods for CFE officials. (RT 9/8/2010 at 36). The defendants cannot dispute the accuracy of this testimony given their own acknowledgment that "$2.2 million of these monies were . . . used for these purposes."

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

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

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

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

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

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

The eighth allegedly false statement was Agent Guernsey's grand jury testimony that LMC's wire transfers to the Grupo account were used to pay over $170,000 towards Moreno's American Express bill. (Mot. #505 at 12). The defendants argue that this testimony was false because "no LMC funds were used to pay Mr Moreno's American Express bills." (Id.). The defendants, however, provide no support for this argument in their motion.

Presumably, the argument is based on the same ground as the ninth argument in the defendants' motion: "the prosecutors [were seeking] to reinforce [a] false notion that LMC's funds could be specifically traced to corrupt payments." (Id.). What both of these arguments overlook, however, is that Agent Guernsey was not required to trace, i.e., to identify which particular funds were used to pay the bribes and could point to any funds in that account once they had been commingled in the Grupo account. United States v. Rutgard, 116 F.3d 1270, 1292 (9th Cir. 1997). As the Ninth Circuit explained in Rutgard, the reasoning rests on the fungibility of money in a bank account, which destroys the specific identity of any particular funds, and allows the government to point to "any funds 'involved' in the transaction." Id.; see also United States v. English, 92 F.3d 909, 916 (9th Cir. 1996) ("it is sufficient to prove that the funds in question came from an account in which proceeds were commingled with other funds").

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

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

> WITNESS: I do know why. It's in response, actually, to a IRS audit of Lindsey Manufacturing's accounting practices with regards to their tax returns and they were questioned as to the 30 percent commission. And the date of 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.

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

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

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

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

> PROSECUTOR: There was a reference made to an IRS audit being conducted of Lindsey Manufacturing. That's not charged in the indictment that will be presented to you ... You're not to consider those acts or allegations in your deliberations. Your deliberations regarding probable cause should only consider the testimony which relates to the acts charged in the indictment. Does everyone understand that?
>
> GRAND JURORS: Yes.

(RT 9/8/2010 at 81).

Moreover, Agent Guernsey gave her testimony in connection 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

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

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

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

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

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

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

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

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

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

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

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

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

(RT 10/21/2010 at 32).

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

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

1. Disclosure of Agent Guernsey's Grand Jury Testimony

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

Even assuming for the sake of argument that Agent Guernsey's grand jury testimony constituted Brady material (it did not), the defendants' assertion that the indictment should be dismissed as

a result of it not being disclosed "at the outset" has no merit. (Mot. #505 at 16). The Ninth Circuit has held that Brady only requires that the disclosure of information be made while it still has substantial value to the accused. United States v. Woodley, 9 F.3d 774, 777 (9th Cir. 1993); United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991). In other words, to establish a Brady violation, a defendant still must prove that prejudice ensued from the timing of the disclosure. (Id.).

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

Another factor that undermines the defendants' showing of prejudice is the quality of their defense counsel, two seasoned criminal defense attorneys with extensive trial experience and extensive resources. Their ability to prepare effectively for cross-examination was most evident from the fact that neither defense counsel sought a continuance or additional time to

prepare their cross-examination. Nor did they ask that Agent Guernsey be called as a witness after the government's summary witness, so that they might have additional time to prepare. Finally, there can be no prejudice given that all of the key arguments raised in the defendants' motion to dismiss are the same arguments that were brought out during the extensive cross-examination of Agent Guernsey at trial. United States v. Aichele, 941 F.2d at 764 ("When a defendant has the opportunity to present impeaching evidence to the jury ... there is no prejudice in the preparation of his defense.").

2. Disclosure of Agent Binder's Search Warrant Affidavit

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

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

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

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

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

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

3. The Government's Motion to Admit SBB Evidence

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

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

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

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

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

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

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

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

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

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

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

2002. A theory which was basically only supported by the testimony of Sergio Cortez at trial.

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

* * *

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

III.

CONCLUSION

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