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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ENRIQUE FAUSTINO AGUILAR NORIEGA, ANGELA MARIA GOMEZ AGUILAR, LINDSEY MANUFACTURING COMPANY, KEITH E. LINDSEY, and STEVE K. LEE,

Defendants.

Case No. CR 10-1031(A)-AHM

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT WITH PREJUDICE DUE TO REPEATED AND INTENTIONAL GOVERNMENT MISCONDUCT; DECLARATIONS OF ALAIN BRUNELLE, JANET I. LEVINE, AND MARTINIQUE E. BUSINO; EXHIBITS

Date: September 8, 2011
Time: 3:00 p.m.
Judge: Hon. A. Howard Matz

certain witnesses, omitted others, withheld discovery, and modeled its trial strategy with the intent of shielding its investigation from defense and jury scrutiny.[1] In so doing, it put an unqualified witness on the stand, falsely describing him as a summary witness (*see infra* at pp. 39-44), failed to produce *Brady* material (*see* Motion to Dismiss, May 9, 2011, Docket Entry 505, at pp. 19-21), and deprived the defense of its rights to confront and cross-examine witnesses (*see infra* at *id*.).

Weaknesses and holes in the evidence, inconsistencies in proof, and other problems with the government's investigation are highly relevant. *Kyles v. Whitley* holds that evidence of investigative failures is *Brady* material. 514 U.S. 419, 445-49 (1995). In *Kyles*, the Court noted that had the defense been provided *Brady* materials, the defense could have challenged "the thoroughness and even good faith of the investigation," *id.* at 445, and that "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." *Id.* at 446 (internal quotations and citation omitted).

Here, the government intentionally withheld *Brady* materials, even during trial. It purposely did not produce statements of one of its case agents, Susan Guernsey, in order to shield its investigation from scrutiny. It put an unqualified witness –Agent Dane Costley – on the stand as a summary agent, to shield its

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[1] In response to the Court's inquiry of why the government was not using Agent Guernsey as the summary witness, the Government responded that "[it] anticipate[d] that the defense [would] likely try to put the investigation on trial, about how the government went about conducting its investigation. In order to limit the ability to introduce that type of a defense," which the government believed was "irrelevant to the facts before the jury, [the government] wanted someone who [could] speak to the documents in this case – which [were] extremely voluminous – and summarize them." April 15, 2011, RT at 1697:21 – 1698:3. The government agreed with the Court's characterization of this decision, namely that the government "didn't want someone who was part of the investigation, so there wouldn't be questions about the investigation." April 15, 2011, RT at 1698:5-9.

investigation and to prevent the defense from presenting a legitimate and effective defense. It kept Agent Costley in the dark, spoon-feeding the few documents it wanted him to see and be able to introduce, and also to shield its investigation. This was a clear violation of *Brady/Kyles*.

D. Presenting Special Agent Dane Costley As A Summary Witness Was Misconduct[2]

The government represented to the Court that Special Agent Dane Costley was the government's summary witness. *See* Government's Response to Defendants' Motion to Exclude Summary Testimony by Special Agent Dane Costley, March 29, 2011, Docket Entry 368. It presented Agent Costley as a "summary witness." Agent Costley introduced and published most of the government's key exhibits; he introduced and published "summary charts" purporting to show money trails and the "bribe" payments. These charts were *not* prepared by him. He introduced all of the Jean Guy LaMarche emails, even though he knew nothing about Jean Guy LaMarche or the emails.

Summary witnesses are permitted to present voluminous evidence to a jury. In criminal cases they are typically the case agents. Joseph M. McLaughlin, et al., *Weinstein's Federal Evidence* § 1006.04[3] (2011) ("Sometimes a witness (*such as the case agent in a criminal prosecution*) is asked to summarize the testimony and exhibits that have already been admitted in the case.") (emphasis added).

Agent Costley was described by the government as "someone who can speak to the documents in this case – which are extremely voluminous – and summarize them." April 15, 2011, RT at 1698:1-3. This was not accurate. Instead, he was used in lieu of the case agents because, according to Mr. Miller, "we anticipate the

[2] A United States Supreme Court case, decided after this trial, strongly suggests that testimony such as Agent Costley's, including his introduction of charts created by others, violates the Confrontation Clause. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713-17 (2011).

defense will likely try to put the investigation on trial, about how the government went about conducting its investigation. In order to limit the ability to introduce that type of a defense, which we believe is irrelevant to the facts before the jury" – the government used Special Agent Dane Costley. April 15, 2011, RT at 1697:21 – 1698:4.

Agent Costley knew nothing about this case other than what he was told by the prosecution team. He had no relevant personal knowledge. He did not testify as an expert.[3] Despite the government's representation that Agent Costley could speak to and summarize voluminous documents in this case, he could not. There was no evidentiary basis for his testimony.

The following illustrates Agent Costley's lack of knowledge in this case. Agent Costley:

- Did *no* investigation. *See, e.g.,* April 26, 2011, RT at 2818:10-17; April 29, 2011, RT at 3220:10-13 (Costley admits that he has a "limited base of knowledge on this case" because he is not a case agent and has only really been involved since February 2011.)
- Interviewed *no* witnesses. *See, e.g.,* April 26, 2011, RT at 2641:4 – 2642:5; 2816:22 – 2817:18; April 29, 2011, RT at 3206:16 – 3207:10.
- Prepared *no* charts. *See, e.g.,* April 26, 2011, RT at 2790:3 – 2791:18

[3] April 27, 2011, RT at 2975:7-20 (objection by Ms. Levine to Agent Costley's testimony):

> He's not an expert. He has no knowledge of the case. He is up [there] to read documents, and I see no basis in law to allow somebody to do that. It denies confrontation. It allows the government three chances to argue, which is improper. It does not allow any cross-examination or confrontation about these exhibits whatsoever. It takes a trial out of the realm of an adversary proceeding on which one could be cross-examined, and puts it in the realm of a government creating some story through somebody that's immune to any questioning in an order that is purely argument.

(Guernsey admits that Costley only "helped" prepare Ex. 21, along with "prosecution team," the members of which she could not recall); April 26, 2011, RT at 2818:10-17; April 29, 2011, RT at 3239:22 – 3243:2 (Costley admits that he did not prepare any chart by himself, never completed a first draft, never participated in the document selection, and that many other people were involved: "A lot – there were – there was a lot of input from different people. I don't know who exactly was involved in the beginning to the end of the creation of the charts – excuse me – or the information how it was gathered."); May 3, 2011, RT at 3459:5-16; 3462:2-22 (On cross, Costley reiterates that he never completed the first draft of any chart and that information to be included in the charts was selected by someone else.).

- Read *no* witness statements. *See, e.g.,* April 27, 2011, RT at 2891:12-15 (Costley did not review any 302s in preparation for his testimony); April 29, 2011, RT at 3220:14-16; 3221:23-25.
- Reviewed *no* grand jury testimony. *See, e.g.,* April 29, 2011, RT at 3216:24 – 3217:5; 3233:10-14 (Costley did not review Guernsey, Spillane or Cortez grand jury testimony).
- Reviewed *no* trial testimony. *See, e.g.,* April 29, 2011, RT at 3221:17-22.
- Independently reviewed *no* documents. *See, e.g.,* April 29, 2011, RT at 3233:18 – 3234:17; 3241:9-16 (During cross examination, Costley acknowledged that the prosecution team provided him select documents and made decisions regarding what to present to him.).
- Wrote *no* reports. *See, e.g.,* April 29, 2011, RT at 3209:2-8.
- Made *only one* suggestion to the "prosecution team" which was *rejected*. *See* May 3, 2011, RT at 3461:14-22 (During cross examination on Government Exhibit 1009, Costley admitted that he wanted to make a change to some information included on the chart but was told he could not do so.).

In essence, all Dane Costley did was look at charts prepared by unnamed

others and check to see that the information on the charts prepared by others matched the documents he was given by unnamed others, and then act as a reader at trial.

The fact that he knew nothing about the witnesses was patently clear when he published the Jean Guy LaMarche emails. On cross, he admitted he knew nothing about Mr. LaMarche and the investigation and the lack of investigation, of Mr. LaMarche.[4] He knew nothing about why Mr. LaMarche did not testify as a witness or about the prosecution team's interview of Mr. LaMarche in the United States Attorney's Office in December 2010. He had not read the interview memorandum. This, of course, resulted in a very tortured and unproductive cross-examination. *See*, *e.g.* April 29, 2011, RT at 3294:3 – 3301:5; *see infra* at n. 29.[5]

He knew nothing about Agent Binder and Agent Guernsey's false statements in the search and seizure warrant affidavits. April 29, 2011, RT at 3235:6 – 3237:8.

As noted, the charts were prepared by others. However, because Costley was the witness through whom they were admitted, there was no one to meaningfully confront and cross-examine about the content of the charts. And, as the Court noted, "some of the charts that Costley testified to were ill-advised, misleading, [and] shockingly incomplete . . . . May 3, 2011, RT at 3603:25 – 3604:2.

It is at odds with basic constitutional principles of confrontation of witnesses and the right to cross-examine to allow someone as uninvolved and uninformed as

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[4] Nothing in the discovery indicates that the government conducted any investigation of Jean Guy LaMarche. Indeed, nothing to verify his claims or evaluate his credibility. *See*, *e.g.* April 29, 2011, RT at 3301:1-5, 3304:6-17, 3329:14 – 3330:21 (no investigation or interviews to determine if claims were true). Although nearly inconceivable, the government apparently accepted Mr. LaMarche at face value.

[5] The prosecutors even tried to place off-limits any questions to Costley about LaMarche. *See*, *e.g.* April 29, 2011, RT at 3199:3 – 3204:2; 3302:14 – 3304:1 (government's argument to limit impeachment of LaMarche).

Agent Costley to testify as a summary witness. *Cf. Bullcoming v. New Mexico*, *supra* at n. 25; *United States v. Wainwright*, 351 F.3d 816, 820-21 (8th Cir. 2003) (state investigator who *prepared* summary exhibit *explained preparation* and was available for cross-examination); *United States v. Gaitan–Acevedo*, 148 F.3d 577, 587-88 (6th Cir. 1998) (*preparer of summary* – the investigating agent – *explained method of compiling information* into chart and was available for cross-examination); *United States v. Radseck*, 718 F.2d 233, 237-38 (7th Cir. 1983) (use of summary exhibit approved "where the government witness who *prepared the exhibit* was available for cross-examination") (emphasis added); *United States v. Norton*, 867 F.2d 1354, 1362-63 (11th Cir. 1989) (no error in admitting summary charts where preparer subject to "thorough cross examination. . . concerning [any] disputed matters"); *United States v. Olano*, 62 F.3d 1180, 1203-04 (9th Cir. 1995) (government called case agent for its investigation as summary witness, and defense had opportunity for cross-examination); *United States v. Baker*, 10 F.3d 1374, 1411-12 (9th Cir. 1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000) (agent who *prepared chart* was fully subject to cross-examination regarding "her methods of preparing the summaries, her alleged selectivity, and her partiality").

Instead of using a summary witness in a legitimate manner, the prosecution used Costley as a tool to prevent the defense from eliciting the failings and shortcomings of the its investigation. This is cause alone to dismiss the indictment.

Also, during Agent Costley's testimony, the government displayed slides to the jury via a computer presentation. The slides contained notations, in subscript, at the bottom left-hand corner of each slide. The notation, inserted by the prosecution team, was the prosecutor's argumentative description of the information contained on a slide. For example, several slides were designated as "tip." When the defense objected, the prosecutor first feigned ignorance about the subscript, April 27, 2011, RT at 2891:20 – 2892:2, and then falsely represented

that the subscript could not be removed – that it was part of the software program. April 27, 2011, RT at 2970:11-15 ("I can't prevent it. It was simply a way that we used to organize the presentation so that it could be presented in a way that we would know what documents are coming up. It was not – I can't remove it from the screen because it's part of the program.").

E. The Prosecution's Introduction Of ABB's Criminal Conduct – And Attempt To Present A "Pattern Of Bribery" – Despite The Court's Pretrial Ruling Excluding The Evidence And The Prosecution's Jury Argument Highlighting The Stricken ABB Evidence Was Misconduct

Nicola Mrazek is the Department of Justice prosecutor assigned to the ABB cases.[6] She has been so assigned since at least 2007 or 2008. She is also assigned to the *United States v. Basurto*[7] case. Mr. Basurto and his father were the middlemen between bribes paid by ABB to the ultimate payees at CFE. Ms. Mrazek is also the prosecutor assigned to *United States v. O'Shea*.[8] Mr. O'Shea is a former ABB employee charged with bribing CFE.

As early as the search warrant and the grand jury proceedings, the prosecution has attempted to contrive a linkage between ABB and Lindsey Manufacturing Company, and to present evidence of a "pattern of bribery" – despite the fact that no such linkage exists.

Thus, the affidavit in support of warrant to search Lindsey Manufacturing Company begins with a description of the ABB case. *See* Motion to Suppress Evidence Seized in November 20, 2008 (Suppression Motion One), February 28,

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[6] *See United States v. ABB Inc.*, No. 10-CR-664 (S.D. Tex.); *United States v. ABB Ltd-Jordan*, No. 10-CR-665 (S.D. Tex.).

[7] No. 09-CR-325 (S.D. Tex.).

[8] No. 09-CR-629 (S.D. Tex.).

2011, Docket Entry 209, at pp. 38-39; Suppression Motion One, Exhibit B, November 14, 2010 Search Warrant Affidavit, at pp. SearchWarrant_DOJ_000023-24; And the recently revealed false grand jury testimony of Susan Guernsey and grand jury Exhibit 1 attempt to link Lindsey Manufacturing Company to ABB in the "pattern of bribery." Guernsey October 14, 2011 Grand Jury Testimony, RT at 6:4 – 8:25; Exhibit 1 to October 14, 2011 Guernsey Grand Jury Testimony. Before the Lindsey-Lee indictment, Ms. Mrazek asked Mr. Basurto to testify in this trial in a manner to connect ABB to Lindsey Manufacturing Company in this "pattern of bribery," despite the fact that Mr. Basurto had no knowledge of the Lindsey-Lee Defendants. *See* Exhibit L, October 10, 2010 email from Nicole J. Mrazek to William Rosch. Finally, the government moved *in limine* to introduce ABB evidence at the Lindsey trial. *See* Government's Pretrial Motions, February 28, 2011, Docket Entry 225, at pp. 27-28.

The defense opposed the motion to admit ABB evidence. Defendants' Opposition to Motion to Admit Evidence Relating to ABB Network Management, March 7, 2011, Docket Entry 243. The Court denied the government's motion, suggesting to the government that if it wished to revisit the issue, it could bring it up to the Court during trial.

Despite the Court's ruling, and *without seeking a new ruling*, the government called Mr. Basurto as a witness and elicited testimony from Mr. Basurto about ABB to prove this "pattern of bribery." April 6, 2011, RT at 686:25 – 713:21.

The Court, noting the prior ruling, and noting the prejudicial impact and lack of relevance of the ABB testimony, ordered the Basurto evidence severely limited – just to Sorvill – and instructed the jury to ignore anything Basurto testified to that did not relate to the role Sorvill played in this case. April 7, 2011, RT at 784:5 – 786:6.

Despite the Court's ruling, government counsel argued to the jury that Mr. Basurto's testimony – especially as it related to Nestor Moreno – proved the guilt of the Lindsey-Lee Defendants even though this was in violation of the Court's order. May 6, 2011, RT at 4337:10-15.

F. The Government's Conduct As It Relates To Jean Guy LaMarche Was Improper, From Beginning To End

Jean Guy LaMarche and the introduction of emails between he and Steve Lee were the subject of extensive motion practice. But those motions did not fully anticipate the extent of the government's misconduct with respect to Mr. LaMarche.

The government – in its protective order litigation – represented that Mr. LaMarche would be a witness and needed his identity protected because of concerns for his safety. And while the claimed threat has never been described, apparently Mr. LaMarche himself claimed to feel threatened.[9] Not a shred of evidence thus far provided supports LaMarche's claim. In fact, not a shred of evidence thus far provided suggests that the government took *any* steps to determine if a threat did exist. Instead, the government apparently relied on some unsupported claim by Mr. LaMarche as a justification to seek a protective order – in essence simply using the claim to prevent the defense from obtaining timely discovery. *See*, *e.g.,* Government's First *Ex Parte* Application for Order for Protective Order, January 27, 2011, Docket Entry 153; Government's Second *Ex Parte* Application for Order for Protective Order, January 31, 2011, Docket Entry 163.

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[9] Mr. LaMarche allegedly also represented that he felt threatened by the Lindsey-Lee investigator. *See* Motion *In Limine* to Prohibit Government From Vouching For Witness And To Exclude Inflammatory Evidence, April 11, 2011, Docket Entry 430, at Exhibit E, p. 00014. This is demonstrably false and absurd. *See id.* at p. 6. *See* Declaration of Alain Brunelle at ¶ ¶ 8-10.

Then it threw roadblocks in the way of the defense access to Mr. LaMarche.

The government represented that Mr. LaMarche would testify at trial. It continued to represent that even as the trial began. Indeed, Mr. LaMarche was included on the government's witness list read to the jury on March 30, 2011. And since Mr. LaMarche met with prosecutors and agents in the Federal courthouse in December 2010 – after a firm trial date was set – one would expect he would have been subpoenaed by the prosecution at that time, while on United States soil, especially since he was a Canadian citizen and resident, and he could not be subpoenaed from Canada. And that the appropriate measure would be taken to assure his appearance. *See* 18 U.S.C. § 3144 (material witness statute). Ms. Mrazek indeed represented to the Court that Mr. LaMarche was subpoenaed – although she did not say when or where this was done. April 29, 2011, RT at 3203:13-16.

During trial, the government changed course, saying that Mr. LaMarche had refused to come to the United States, and indicating that his presence could not be compelled. Instead, it sought to admit the LaMarche emails through a third party witness.

While the prosecutors represented that they subpoenaed LaMarche, the government could have taken additional steps to secure his testimony either by deposing him under Federal Rule of Criminal Procedure 15 or seeking to have him detained under 18 U.S.C. § 3144 (the material witness statute). It did not do so.

The other thing the government failed to do was level with the Court and defense counsel in a timely fashion. The government never said why, apparently having first learned of Mr. LaMarche's reluctance to testify two weeks before trial, it delayed in revealing this information until obtaining Mr. LaMarche's presence or

testimony had become impossible.[10]

The prosecution's misconduct with LaMarche was not limited to his appearance at trial. Defense counsel retained an investigator to interview Mr. LaMarche. He and his wife were interviewed on March 23, 2011. *See* Brunelle Decl. at ¶ 8-9. This interview, which lasted over an hour at Mr. LaMarche's home, was voluntary and cordial. *See* Brunelle Decl. at ¶ 10. The defense learned of LaMarche's address from publicly available, published sources. *See* Brunelle Decl. at ¶ 8. The government learned of the interview from Mr. LaMarche. *See* Brunelle Decl. at ¶ 11.

Sometime after March 23, in an attempt to verify some facts, defense counsel asked the Canadian investigator to again interview Mr. LaMarche. *See* Brunelle Decl. at ¶ 11. The investigator called Mr. LaMarche. However, Mr. LaMarche refused to speak with the investigator. *See* Brunelle Decl. at ¶ 11. Mr. LaMarche indicated that he informed one of the FBI agents in this case of his interview by a defense investigator, and the FBI agent was "furious" with him for having spoken with the defense investigator. *See* Brunelle Decl. at ¶ 11. Mr. LaMarche told the defense investigator never to call or speak with him again.[11] *See* Brunelle Decl. at ¶ 11.

It is well-established that interference with access to a witness is prosecutorial misconduct. *Leung*, 351 F. Supp. 2d at 993, 996. An agent's expression of fury at a witness for speaking with a defense investigator crosses the line into prohibited interference with witnesses. ABA Standards for Criminal Justice, Prosecution Function, R. 3-3.1(d) (3d ed. 1993) ("A prosecutor should not

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[10] Had timely notification been made, the defense could have attempted to secure a Rule 15 deposition of Mr. LaMarche.

[11] LaMarche did not tell the defense investigator which agent expressed this "fury." *See* Brunelle Decl. at ¶ 11.

discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.").

Not only did the government interfere with access to LaMarche, it misused the evidence related to him. Most of the LaMarche emails were introduced for a limited purpose – only to establish Steve Lee's "state of mind." That the government wanted and needed to use the emails for a broader purpose was graphically demonstrated in a summary exhibit it tried to introduce. *See* Exhibit N, Government's Proposed Summary Trial Exhibit 1013. While the Court rejected the exhibit and gave a limiting instruction for the use of the emails in closing arguments, the government did just what that rejected exhibit would have done and used the LaMarche emails substantively, not in a limited fashion, and used them against all of the defendants. *See* May 6, 2011, RT at 4097:18 – 4109:3; 4117:1 – 4121:13.

The emails were woven throughout the government's closing and displayed on its computer projected slides – given equal status with all other evidence. And while the government gave lip service to the Court's limiting instruction, May 6, 2011, RT at 4097:22 – 4098:1, it explicitly and implicitly ignored it. May 6, 2011, at RT 4098:24 – 4099:2; 4106:1-4; 4106:13-14. The emails were quoted and then summarized against all defendants for the truth of the matter, not for a limited purpose.

G. <u>The Government Played Games With Its Witness List</u>

Pursuant to a Court order, the government was to provide the defense with its list of trial witnesses on February 15, 2011. That day, it provided a list of 78 names, *not including custodians of records*. Ultimately, 23 people from that list

testified at trial, and five (5) people not on that list testified at trial.[12]

On March 30, 2011 – it provided a witness list with 80 names, not including custodians of record, to be read to the jury. For many of those supposed witnesses, the prosecution had not produced any witness statements or discovery.

The lists contained names of people – such as Abel Huitron, the general counsel of CFE – that the government *knew* could not and would be witnesses.[13] Indeed, contrary to the clear representations in its witness lists, as the government revealed on April 7, 2011 – *during trial* – CFE officials *cannot* testify in United States courts. April 7, 2011, RT at 742:8-14. And that to get a CFE official's testimony, a Rule 15 deposition would be necessary. Mr. Huitron's inclusion in the witness list is emblematic of the government's deception.

H. The Government Committed Misconduct in its Closing Argument By Expressly Urging The Jury To Convict Based On A Willful Blindness Theory of Knowledge, Even Though The Court had Rejected Such An Invitation

The government's references to ABB and LaMarche were not, however, the only instances of misconduct during closing argument. In contravention of this Court's order refusing to give a willful blindness/deliberate ignorance instruction, the prosecutor repeatedly and expressly urged the jury to adopt such a theory of culpability.

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[12] Those five witnesses include: Maria Concepcion Delgado, April Buelle, Monica Lopez Guerra, Shauna Wilson, and Susan Guernsey.

[13] Mr. Huitron was placed on the February 15 witness list just four days after having been interviewed by the prosecutors and agents. Yet, the memorandum of this interview of Mr. Huitron was not provided to the defense until a month later. *See* Motion to Dismiss First Superseding Indictment for Violations of *Brady v. Maryland* or, in the Alternative, for Sanctions, March 22, 2011, Docket Entry 317, at pp. 2-3.

In ruling on jury instructions, the Court found that "there isn't a basis to give" a deliberate ignorance/willful blindness instruction as to "any defendant." May 5, 2011, RT at 3833:17-23. But that was exactly the standard Mr. Goldberg repeatedly told the jury to apply with regard to the knowledge element of the FCPA claims in his closing arguments.

Mr. Goldberg began his argument regarding the knowledge element of the FCPA by discussing the circumstantial evidence leading up to Mr. Aguilar's hiring and inquiring "[h]ow could they not know":

> You need, we submit, to review the evidence in total. In total. And all of that – all of that leading up to February of 2002, we submit, tells you that Keith Lindsey and Steve Lee knew. They actually knew that when they hired Enrique Aguilar at 30 percent, they knew a piece – at least a piece of that money was going to be going to CFE officials. ***How could they not know? How could they not know?***"

May 6, 2011, RT at 4148:16-23 (emphasis added). Then, in discussing the events following LMC's hiring of Mr. Aguilar, Mr. Goldberg argued again "[h]ow could they not know?":

> And then you have all of the events and circumstances after February 2002; the fact that they start getting direct purchases within months – within months – of them seeking to formally complain, that, *Hey, you used direct purchase under dubious circumstances*.[14] ***How could they not know that Enrique Aguilar was corrupt when they hired him? How could they not know that the 30 percent was designed to get money to the foreign officials?***

May 6, 2011, RT at 4149:23-4150:5.

Several sentences later, in discussing Mr. Lindsey and Mr. Lee as "smart" and "experienced" people in the industry, Mr. Goldberg again argues: "I mean,

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[14] This also misstates the facts. *See* Exhibit O, LMC Trial Exhibit 2525 (CFE charts of purchases).

how could they not know what's going on here, especially given the events of 1999 and 2000 and 2001 and the documents that they author?" May 6, 2011, RT at 4152:12-22.

Finally, in explaining the applicable law, Mr. Goldberg makes it explicit that he is urging the jury to adopt a willful blindness theory of culpability. Indeed, he ultimately instructs the jury that "the law is saying you can't turn a blind eye. . . .":

> Some of you might be saying, *Well, I don't know if they actually knew. We don't have an e-mail from Steve Lee or Keith Lindsey that says, "Hey, we're going to pay the bribes now,"* you know, some like real smoking gun, now, you know.

Mr. Goldberg argues that even if the Lindsey-Lee Defendants are not shown to have actual knowledge, the jury can convict. And he concludes:

> And why is that in there? Why is that in the law? It's because the law is saying you can't turn a blind eye to what is –
> [Defense objection to misstating the law is sustained]

May 6, 2011, RT at 4152:24-4154:7.

Immediately after this defense objection to the improper willful blindness argument was sustained, however, Mr. Goldberg stated: "Defendants like Keith Lindsey and Steve Lee cannot see all of this smoke and all of these red flags and ***then close their eyes***." May 6, 2011, RT at 4154:8-12 (emphasis added). To drive home the point, Mr. Goldberg put his hands over his eyes. *See also* Declaration of Martinique E. Busino at ¶ 3.

The defense again objected to this continued improper argument, but the Court construed Mr. Goldberg as "not stating the law," but "arguing what he thinks the evidence may have shown." May 6, 2011, RT at 4154:13-4155:1.

Importantly, notwithstanding the Court's admonishment to Mr. Goldberg to not misstate the jury instructions, Mr. Goldberg's argument told the jury that the willful blindness or deliberate ignorance was not sufficient to establish knowledge.

Given that this case consisted of entirely circumstantial evidence, evidence that was weak at best, the improper willful blindness argument by Mr. Goldberg undoubtedly affected the jury to the prejudice of the defense.

VII. THE PERVASIVE GOVERNMENT MISCONDUCT NECESSITATES DISMISSAL OF THE INDICTMENT

An indictment may be dismissed for prosecutorial misconduct: (1) where "outrageous government conduct" violates due process; or (2) if the misconduct does not rise to the level of a due process violation, "the court may nonetheless dismiss under its supervisory powers." *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008);

"Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (internal citation omitted). In each case, the court must evaluate "the whole course of the proceedings (resulting in a conviction) in order to ascertain whether" alleged government misconduct violated fundamental "canons of decency and fairness." *Rochin*, 342 U.S. at 169 (internal citation and quotations omitted).

"Even where no due process violation exists, a federal court may dismiss an indictment pursuant to its supervisory powers." *United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004). District courts have wide discretion to "dismiss an indictment under their inherent supervisory powers (1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and (3) to deter future illegal conduct." *United States v. Struckman*, 611 F.3d 560, 574 (9th Cir. 2010) (internal citation and quotations omitted).

The specific analysis for determining whether prosecutorial misconduct

justifies dismissal varies depending on whether the misconduct at issue occurred at the grand jury stage or at the other phases of the case – such as during the investigation, discovery, and trial stages. Here, misconduct sufficient to justify dismissal occurred at every stage – during the investigatory stage, the grand jury stage, pre-trial, and at trial.

A. The Cumulative Effect Of Government Misconduct Throughout The Investigation, Discovery And Trial Phases Of This Case Warrants Dismissal

Prosecutorial misconduct occurring during the investigatory, discovery, and trial stages warrants dismissal of the indictment when the misconduct is "flagrant" and causes "substantial prejudice" to the defendant. *See*, *e.g., Chapman*, 524 F.3d at 1085, 1087; *Ross*, 372 F.3d at 1110. Here, the misconduct is flagrant and has caused substantial prejudice.

1. The Misconduct Was Flagrant

For misconduct to be "flagrant," "a finding of 'willful misconduct' in the sense of intentionality is not required." *United States v. Fitzgerald*, 615 F. Supp. 2d 1156, 1159 (S.D. Cal. 2009). "Rather, 'reckless disregard' satisfies the standard for dismissal." *Id.*; *see also Chapman*, 524 F.3d at 1085 ("[F]lagrant misbehavior" includes "reckless disregard for the prosecution's constitutional obligations."); *United States v. Renzi*, 722 F. Supp. 2d 1100, 1132 (D. Ariz. 2010) ("Reckless government conduct may be remedied under the Court's supervisory powers even when prosecutors act in good faith.")

Any review of the government's misconduct that permeated all stages of the case – from the investigation through trial – makes clear that the prosecutors acted recklessly, if not willfully, in repeatedly disregarding their obligations to the Defendants and the Court.

As detailed above, during the investigation, the prosecutors committed misconduct by, among other things: (1) inserting patently false statements into FBI

agent affidavits seeking search and seizure warrants without consulting with the agent – before inserting the false assertions and without bringing the false information added to these affidavits to the agent's attention; (2) affirmatively modifying search warrants for the purpose of specifically circumventing the requirements of *Tamura* by allowing case agents to search electronically stored information; (3) searching two buildings at LMC without a search warrant; (4) presenting false testimony through Agent Guernsey at four grand jury sessions; and 5) obtaining e-mails of Angela Aguilar while she was in the MDC, which the prosecutors had not been authorized to obtain.

During the discovery phase of this case, the prosecutors committed misconduct by, among other things: (1) concealing the false and misleading grand jury testimony by Agent Guernsey in violation of *Brady* and *Giglio*; (2) directly violating a Court order and the Jencks Act by not producing an additional transcript of Agent Guernsey's testimony until *after* her testimony at trial and only in response to further inquiry by defense counsel; (3) failing to disclose falsities in Agent Binder's search warrant affidavit and the prosecutors' responsibility for inserting those false statements; (4) delaying production of drafts of Agent Binder's affidavit until after the *Franks* hearing; (5) delaying the production of certain *Brady* and Jencks material (including an FBI 302 statement for Fernando Basurto and potentially exculpatory statements by former LMC employee Patrick Rowan) until after it concluded its case in chief; (6) attempting to conceal its investigation from defense scrutiny, by, among other things, keeping Agent Guernsey off the witness list and off the stand until the false grand jury testimony was ordered to be produced by the Court; (7) interfering with defense access to its key witness, Mr. LaMarche, by delaying disclosure of his identity based on dubious assertions of "danger" to his safety, discouraging him from speaking with defense investigators, and delaying disclosure of the prosecution's decision to not call him as a witness; (8) playing games with its witness list, and thereby interfering with the defense

team's preparation for trial, by listing individuals who the government had no intention of calling, or could not call, and omitting other individuals who would testify; (9) concealing *Brady* material regarding the source of funds for the allegedly corrupt military school tuition payments; and (10) falsely assuring the Court and defense counsel of full compliance with all discovery obligations.

During the trial of this case, the government committed misconduct by, among other things: (1) improperly using an unqualified summary witness with no knowledge of the case to present its key evidence, admittedly to shield its investigation from attack and to deprive the defense of its constitutional right to confront and cross-examine the witnesses against them; (2) introducing "misleading" and "shockingly incomplete" summary charts; (3) publishing prejudicial commentary on the computer projected slides used to present exhibits during Agent Costley's testimony; (4) introducing evidence of ABB's criminal conduct in violation of the Court's pretrial ruling and then highlighting this stricken evidence to the jury during closing arguments; (5) violating the Court's limiting instruction regarding the use of Mr. LaMarche's e-mails for the truth of the matters asserted therein and using them against all defendants (as opposed to just Mr. Lee); (6) violating the Court's order excluding deliberate ignorance/willful blindness as a basis for culpability in this case by urging the jury, during closing arguments, to employ a willful blindness theory of culpability.

A review of *United States v. Chapman* demonstrates the flagrant nature of the misconduct at issue in this case. In *Chapman*, the Ninth Circuit held that the government's failure to produce *Brady* material until mid-trial, its failure to keep track of what had been produced and its affirmative representations to the court of full compliance, "support[ed] the district's court's finding of 'flagrant' prosecutorial misconduct even if the documents themselves were not intentionally withheld from the defense." 524 F.3d at 1085. In upholding the district court's dismissal of the indictment, *Chapman* specifically noted "as particularly relevant

the fact that the government received several indications, both before and during trial, that there were problems with its discovery production and yet it did nothing to ensure it had provided full disclosure until the trial court insisted it produce verifications of such after numerous complaints from the defense." *Id.*; *see also Fitzgerald*, 615 F. Supp. 2d at 1159-60 (finding government's refusal to disclose exculpatory tape recordings to be flagrant, justifying dismissal, because the government recklessly disregarded its discovery obligations in refusing to produce the tapes until after trial, failing to keep a discovery log tracking what documents were disclosed, and not owning up to its misconduct).

Similarly, the prosecutors in this case received numerous warnings from the Court throughout this case that its conduct was "sloppy" and "clumsy;" that its "flow of information" was "extremely troubling;" that its disclosures were "incomplete," "inconsistent" and untimely; and that further lapses would not be tolerated. But the government's misconduct and concealment persisted.

Perhaps most troubling, on April 7, 2011, in response to repeated issues of discovery compliance, the prosecution specifically assured this Court that it had conducted a "top-to-bottom review of discovery that's been turned over and what we're required to turn over" and confirmed "[w]e have done what we believe not only meets our obligation, but exceeds it." *See* April 7, 2010, RT at 880-81. That assurance was made at a time when the prosecution was still concealing, among other things: (1) Agent Guernsey's patently false grand jury testimony; (2) an FBI 302 statement by Fernando Basurto who had testified at trial *the same day* the prosecutors assured the Court of full discovery compliance; and (3) a potentially exculpatory statement by a former LMC employee (Patrick Rowan).

Moreover, much of the misconduct at issue in this case directly violated the Court's orders, such as: (1) introducing evidence of ABB's criminal conduct to prove a "pattern of bribery" in violation of pre-trial rulings; (2) utilizing Mr. LaMarche's e-mails against all defendants and for the truth of the matters asserted

in them, in violation of the Court's limiting instructions; (3) presenting a deliberate ignorance theory of culpability to the jury in violation of the Court's order on jury instructions, and exclusion of such a theory of culpability; and (4) failing to produce to the Court or the defense the October 14, 2010 grand jury testimony of Agent Guernsey in contravention of a Court order requiring production of all her testimony.

Finally, the prosecutors openly admitted that their intent in keeping Agent Guernsey off the witness list, and thus off the stand, and utilizing Agent Costley as its "summary" witness was to shield the government's investigation from defense scrutiny. This demonstrates a willful attempt to deny the defense their constitutional right to raise the inadequacies of the investigation as a defense. *See Kyles*, 514 U.S. at 445-49 (holding that evidence of investigative failure is *Brady* material).

In short, the prosecutors' misconduct throughout the course of this case demonstrates, at the very least, a reckless disregard for their constitutional obligations and this Court's rulings, and was therefore flagrant.

2. The Misconduct Caused Substantial Prejudice

In *United States v. Ross*, the Ninth Circuit set forth the controlling standard for determining whether government misconduct caused "substantial prejudice" to the defendants:

> Where the defendant asks the district court to use its supervisory powers to dismiss an indictment for outrageous government conduct, the proper prejudice inquiry is whether the government conduct "had at least some impact on the verdict and thus redounded to [the defendant's] prejudice."

372 F.3d at 1110 (*quoting United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993)). The Ninth Circuit expressly clarified that "this is a *less stringent* standard than the *Brady* materiality standard." *Id.* (emphasis added).

While published cases have not yet set forth exactly what level of prejudice is sufficient to satisfy the "some impact" standard announced in *Ross*, an unpublished decision by the Honorable Dean Pregerson addressed the issue and found that "the prejudice standard is low." *United States v. Hector*, No. CR 04-00860 DDP, 2008 WL 2025069, *18-20 (C.D. Cal. May 8, 2008).

Hector addressed a post-conviction motion to dismiss or, in the alternative, for a new trial, based on the government's failure to discover and disclose impeachment information regarding its informant until after trial. Citing *Ross*, Judge Pregerson held that "[o]nce egregious government conduct has been established, the prejudice standard is low; Defendant must show only that the Government's flagrant conduct had 'at least some impact on the verdict.'" *Id.* at *18. He went on to explain that "[a]ny impact on the trial at all will suffice." *Id.* Judge Pregerson ultimately concluded that because the withheld evidence in that case could make the jury "less likely to believe" the informant – even though it was made aware of his criminal past – it had "*some* impact on the verdict." *Id.* at *19-20 (emphasis in original). A new trial was ordered. *Id.* at *20.

Of equal importance in evaluating whether the misconduct caused prejudice, a district court must consider "[t]he cumulative effect" of the misconduct "when viewed in the context of the entire trial . . . ." *United States v. Sanchez*, 176 F.3d 1214, 1225 (9th Cir. 1999); *see also Berger*, 295 U.S. at 89 (holding that numerous instances of prosecutorial misconduct at trial had "a probable cumulative effect upon the jury which cannot be disregarded as inconsequential" and therefore "a new trial must be awarded"); *Hein v. Sullivan*, 601 F.3d 897, 905 n.4 (9th Cir. 2010) ("[W]e cannot review each instance of non-disclosure or prosecutorial misconduct in isolation, but rather must view them collectively in light of the entire record.")

"In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors

may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). Indeed, where, as here, there are numerous instances of misconduct, "a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *Id.* (internal citation and quotations omitted). Moreover, "[i]n those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *Id.*

In *Frederick*, the Ninth Circuit found that, although no single incident of prosecutorial misconduct standing alone may have been sufficient to warrant reversal of the conviction, the "cumulative effect" of three separate incidents of misconduct established sufficient prejudice. *Id.* The misconduct at issue involved the prosecutors soliciting testimony by two government witnesses that vaguely suggested the possibility of other instances of sexual misconduct by the defendant in violation of the court order excluding such testimony, the prosecutors' improper reference in closing argument to the key witness's prior consistent statements, and improper comments by the prosecutor about the motives of defense counsel to confuse the evidence. *Id.* at 1375-80. The Ninth Circuit ultimately concluded that, because "the evidence against the defendant was not overwhelming" and "the case was a close one," the "cumulative effect of the errors was prejudicial." *Id.* at 1381. It therefore reversed the conviction.[15]

Here, the "cumulative effect" of the pervasive prosecutorial misconduct undoubtedly had "some impact on the verdict." Although a conviction was ultimately secured, the evidence against the defendants was weak. In addition, the

[15] *See also Sanchez*, 176 F.3d at 1225 (finding that "cumulative effect" of various instances of prosecutorial misconduct "when viewed in the context of the entire trial" necessitated reversal of the conviction).

evidence was entirely circumstantial and very confusing. As a result, the instances of misconduct, when viewed in aggregate, most certainly impacted the jury.

B. Allowing The Defendants To Stand Trial On An Indictment Knowingly Secured, In Part, By Material False Testimony Violates Due Process

The Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. The Supreme Court has found that "[t]his constitutional guarantee presupposes an investigative body acting independently of either prosecuting attorney or judge . . . ." *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (internal quotations and citation omitted). The grand jury can fulfill its historic function of safeguarding a defendant's Fifth Amendment rights only if it is "an independent and informed grand jury." *Wood v. Georgia*, 370 U.S. 375, 390 (1962)

Where the prosecutors engage in misconduct at the grand jury stage, the applicable standard for dismissing the indictment depends on whether the motion is decided before or after a trial jury has issued a guilty verdict. *See United States v. Navarro*, 608 F.3d 529, 538-40 (9th Cir. 2010).

Even when the motion is ruled on after a trial jury has issued a guilty verdict, the indictment may still be dismissed based on a due process violation.

Where the misconduct rises to the level of a due process or "structural error," the indictment must be dismissed "without a particular assessment of the prejudicial impact of the errors." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). "'Structural error' is a term of art for error requiring reversal regardless of whether it is prejudicial or harmless, not for error in some way affecting the structure of criminal proceedings." *Navarro*, 608 F.3d at 538.

Importantly, the Ninth Circuit has specifically found – and the government's previous opposition papers agree – that allowing a defendant to stand trial on an

indictment that the government knows is based, at least in part, on perjured testimony rises to the level of a due process violation. *See United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974). Government's Opposition to Defendants' Motion to Dismiss, June 6, 2011, Docket Entry 600.

As already discussed at length in Defendants' original Motion and Reply Brief, that is exactly what happened here. The prosecutors knew about the falsity of Agent Guernsey's representations to the grand jury, but rather than disclose them to the defense, the Court, and the grand jury, they actively concealed them and allowed the case to proceed to trial. This was a serious due process violation that, standing alone, necessitates dismissal of the indictment.

VIII. THE INDICTMENT SHOULD BE DISMISSED WITH PREJUDICE

Where, as here, the Court is faced with pervasive prejudicial misconduct by the prosecutors, it has the discretion to order a new trial or dismiss the indictment either with or without prejudice. *Kojoyan*, 8 F.3d at 1318, 1323-25. "In determining the proper remedy, [a court] must consider the government's willfulness in committing the misconduct and its willingness to own up to it." *Id*. at 1318. A court "may exercise its supervisory power to make it clear that the misconduct was serious, that the government's unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence of this chain of events." *Id.* at 1325 (vacating the conviction and remanding to trial court for determination of whether to retry the defendants or dismiss the indictment with prejudice "as a sanction for the government's misbehavior").

Also relevant to the determination of the appropriate remedy is the strength of the government's case against the Defendants. The weaker the case, the more the balance tips in favor of dismissing the indictment with prejudice because a retrial would unfairly allow the government to revise its case strategy. *See Fitzgerald*, 615 F. Supp. 2d at 1161-62 (holding that dismissal of indictment with prejudice, rather than mistrial, was warranted for *Brady* violation because "the

strength of the Government's case against Defendant was not overwhelming" and, therefore, "retrial would be substantially prejudicial" in that it would "allow the Government to revise its case strategy").

In this case, the evidence of guilt was far from overwhelming, the prosecutorial misconduct permeated every phase of this case, and the misconduct persisted despite numerous warnings from the Court. While in some cases a lesser remedy, such as a new trial, may be appropriate, *Kojoyan*, 8 F.3d at 1325, dismissal with prejudice is the appropriate remedy here.

IX. CONCLUSION

For these reasons, the Defendants respectfully request that the First Superseding Indictment be dismissed with prejudice.

DATED: July 25, 2011

Respectfully submitted,

JANET I. LEVINE
CROWELL & MORING LLP

/s/ Janet I. Levine
By: JANET I. LEVINE
Attorneys for Defendant
Steve K. Lee

DATED: July 25, 2011

JAN L. HANDZLIK
GREENBERG TRAURIG LLP

/s/ Jan L. Handzlik
By: JAN L. HANDZLIK
Attorneys for Defendants
Lindsey Manufacturing Company and
Keith E. Lindsey

DECLARATION OF ALAIN BRUNELLE

I, Alain Brunelle, hereby declare as follows:

1. I have personal and first-hand knowledge of the facts set forth in this Declaration, unless otherwise stated, and, if called as a witness, I could and would testify competently to those facts.

2. I am presently employed as a private investigator at GW Consulting and Investigations Inc., a private investigation firm headquartered in Montreal, Québec, Canada. GW Consulting and Investigations Inc. is affiliated with GARDA, a consulting, investigation, and security firm also headquartered in Montreal, Québec, Canada. Attached hereto as exhibits are materials describing GARDA.

3. I am a retired police officer from the *Service de Police de la ville de Montréal* (Montreal Police Department), where I served between September 1969 to January 2002 as a constable, a sergeant, a sergeant-detective and a lieutenant-detective. My last assignment was from May 1997 to January 2002 with the rank of lieutenant-detective, and my title was assistant-commander at the Fraud Division.

4. I am licensed pursuant under the *Private Security Act of the Province of Quebec (R.S.Q. chapter S-3.5)*[16], with nine (9) years of experience in private investigation and twenty-three (23) years in public investigation with the Montreal Police Department.

5. I am a Canadian citizen, residing in Québec, Canada.

6. I am informed and believe that in February 2011, GARDA was retained (on behalf of defense counsel) by Adam Dawson of Dawson Ryan Associates. Mr. Dawson is a Los Angeles-based investigator who was and is working with the attorneys representing Lindsey Manufacturing Company ("LMC"), Keith E.

[16] *See* http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/S_3_5/S3_5_A.htm

Lindsey ("Dr. Lindsey") and Steve K. Lee ("Mr. Lee"). GARDA was engaged to investigate Jean Guy LaMarche, a possible witness in the case against LMC, Dr. Lindsey and Mr. Lee.

7. I was asked to interview Mr. LaMarche and his wife, Aura M. Velasquez Martinez, both of whom I was told met with authorities for the United States. I was given little information about the case prior to interviewing Mr. LaMarche, so I did my own research of public sources about the case. Also, Mr. Dawson provided a list of questions to cover during the interview.

8. On March 23, 2011, Leeanne Bastos Couto, a fellow investigator, and I interviewed Mr. LaMarche and his wife at their home in Sainte-Mélanie, Québec, Canada. We learned their address and phone number using publicly available resources; this information was also listed on the website www.canada411.ca.

9. Upon meeting Mr. LaMarche and his wife, I identified myself and Ms. Couto and whom we represented. Mr. LaMarche asked if I worked as a government investigator, specifically mentioning the Royal Canadian Mounted Police and the United States government. I told him I did not work for either of these entities. I informed Mr. LaMarche who we were, namely, private investigators employed by GARDA, retained by the defense, namely, the lawyers for LMC, Dr. Lindsey and Mr. Lee.

10. The interview lasted about an hour and a half. Both Mr. LaMarche and his wife were cooperative and cordial throughout the interview. Neither of them expressed any resistance to being interviewed nor asked us to stop or leave at any time.

11. On May 4, 2011, at the request of Mr. Dawson, I telephoned Mr. LaMarche to confirm certain facts. Upon reaching Mr. LaMarche by phone, he informed me that, after our interview on March 23, 2011, he spoke with one of the FBI agents involved in this case. Mr. LaMarche further stated that he told the FBI agent he had been interviewed by us. The agent was furious with him for speaking with us. Mr.

LaMarche then told me that he did not wish to speak to me anymore about this case, and that I should not call him again.

I declare under penalty of perjury under the laws of the United States of America, pursuant to 28 U.S.C. § 1746, that the information contained in this declaration is true and correct.

Executed this 19th day of July 2011, at Montreal, Québec, Canada.

/s/ Alain Brunelle (original signature on file)
ALAIN BRUNELLE

DECLARATION OF JANET I. LEVINE

I, Janet I. Levine, herby state and declare as follows:

1. I am a lawyer duly admitted to practice law before this Court and in California. I am counsel of record for defendant Steve K. Lee ("Mr. Lee") in this case. I have personal and first-hand knowledge of the facts set forth in this Declaration, unless otherwise stated, and, if called as a witness, I could and would testify competently to those facts.

2. I have reviewed the discovery and pleadings in this matter, as well as some of the pleadings in *United States v. Basurto* and *United States v. O'Shea*. I have seen documents associating Ms. Mrazek with this and related investigations as early as 2007 or 2008. I have seen documents associating Mr. Miller with this investigation as early as 2008.

3. I received about 604 pages of materials, Bates-numbered "Affidavit 000001 to 000604," on or about March 24, 2011. These were represented to be the drafts of the November 14, 2008 search warrant used to search the LMC premises in Azusa, California.

4. At my direction, Sima Namiri-Kalantari, a summer associate at Crowell & Moring, LLP reviewed the drafts of the search warrant affidavit. I asked her to determine how many different drafts were received. She isolated 15 different documents, but one of these was not a draft of the LMC November 14, 2008 search warrant affidavit. She divided the documents into drafts pursuant to my request.

5. There are 14 different drafts of the November 14, 2008 search warrant affidavit. I cannot determine who authored or modified them.

6. The false claim that LMC made "several large payments to Sorvill" first appears in draft 13 of the search warrant.

7. We reviewed the drafts of the search warrant to see if the language that permitted the searches of electronically stored information changed in the drafts. Drafts 1 through 9, and drafts 11 and 12 are different from drafts 10, 13, and 14.

The language allowing the "case agents" to search ESI first appears on the 10th version of the search warrant. The prior versions (1 through 9), as well as versions 11 and 12, only allow the "computer personnel" to search ESI.

8. I have attached an exhibit a chart prepared by Ms. Namiri-Kalantari and others in my office. The chart sets forth the changes in the ESI language from version to version.

9. During the testimony of Agent Costley, the government displayed exhibits as slides on a computer presentation. On each slide, the presentation contained subscripts which gave a short description of the slide. The description was consistent with the government's theory of its case, as it was argued to the jury. I recall one that such description used for many of the slides was "tip."

I declare under the penalties of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed this 25th day of July 2011, at Los Angeles, California.

__/s/Janet I. Levine_____
JANET I. LEVINE

DECLARATION OF MARTINIQUE E. BUSINO

I, Martinique E. Busino, herby state and declare as follows:

1. I am a lawyer duly admitted to practice law before this Court and in California. I am counsel of record for defendant Steve K. Lee ("Mr. Lee") in this case. I have personal and first-hand knowledge of the facts set forth in this Declaration, unless otherwise stated, and, if called as a witness, I could and would testify competently to those facts.

2. During the government's summation, Mr. Goldberg made references to the willful blindness theory.

3. During one of these references, Mr. Goldberg raised his hands, covering his eyes.

I declare under the penalties of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed this 25th day of July 2011, at Los Angeles, California.

__/s/Martinique E. Busino_____
MARTINIQUE E. BUSINO

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, at Crowell & Moring LLP at 515 S. Flower Street, 40th Floor, Los Angeles, California 90071. I am over the age of 18 and not a party to the within action.

On **July 25, 2011**, I served the foregoing document described as **SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT WITH PREJUDICE DUE TO REPEATED AND INTENTIONAL GOVERNMENT MISCONDUCT** on the parties in this action via hand-delivery in Court:

Douglas M. Miller (Assistant United States Attorney)
Email: doug.miller@usdoj.gov

Nicola J. Mrazek (United States Department of Justice Senior Trial Attorney)
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Email: mweber@girardikeese.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **July 25, 2011**, at Los Angeles, California.

_/s/ Kristen Savage Garcia_____
KRISTEN SAVAGE GARCIA