IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	**Case No. 1:09-CR-335 (RJL)**
AMARO GONCALVES, et al	)	
Defendants.	)	

DEFENDANTS' MOTION FOR AN EVIDENTIARY HEARING FOR THE PURPOSE OF OBTAINING EXCULPATORY EVIDENCE AND INCORPORATED MEMORANDUM OF LAW

The Defendants hereby move for an evidentiary hearing requiring the testimony of Richard Bistrong ("Bistrong") and federal law enforcement agents responsible for managing him in connection with the investigation resulting in the indictment in the captioned case. In support of this motion, Defendants respectfully state as follows:

I. THE GOVERNMENT'S INVESTIGATION

Between 2001 and 2006, Richard Bistrong paid hundreds of thousands of dollars in bribes to foreign government officials to obtain business for his company Armor Holdings.[1] When confronted by lawyers for Armor Holdings in 2006, Bistrong lied and destroyed evidence.[2] When lies and destruction of evidence did not save him, Bistrong offered a plan to

[1] *See* Exhibit 1, Criminal Information in *U.S. v. Bistrong*, 1:10-cr-00021-RJL, Dkt. 1 (Jan. 21, 2010). The Information is part of a negotiated settlement between Bistrong and the United States, and as such does not set forth all of the crimes committed by Bistrong while he worked at Armor Holdings.

[2] *See* Exhibit K to the motion of Defendants John and Jeana Mushriqui, filed under seal on June 4, 2010 (indicating that Bistrong "lost" his laptop computer while traveling to meet with Armor Holdings counsel regarding the investigation into his misconduct and that during that meeting Bistrong did not disclose all of the compliance violations of which he was aware).

the government to entrap legitimate businessmen in the military and law enforcement products industry who had never been charged or convicted of any crimes relating to bribery. First, in 2008, Bistrong proposed to several Defendants actual business opportunities in Central America and elsewhere.[3] Documents produced by the government in discovery reveal that these opportunities yielded no evidence of any crime, so in 2008, the government and Bistrong significantly altered their strategy, and separately encouraged Defendants, many of whom did not know each other, to engage in phony sales of military equipment products to the Ministry of Defense of Gabon (collectively, "the Gabon deals").[4] The Gabon deals did not involve any foreign government official. Instead, Bistrong and several undercover FBI agents participated, including one posing as an intermediary named Pascal Latour ("Latour"), and another posing as an agent of the Government of Gabon, Jean-Pierre Mahmadou ("Mahmadou").

In short, Bistrong and Latour offered a similar deal to each Defendant, that is, each Defendant would supply products for the Gabon deals, subject to a commission being paid to Latour. Latour and Bistrong indicated that Latour would pay a necessary commission in Gabon. The Gabon commission was described briefly and in various ways to Defendants, however, there was not a single occasion in the hundreds of hours of audio and video tapes of conversations with Defendants that Bistrong, Latour or Mahmadou ever once stated that a "bribe" or "kickback" was or would be paid in connection with the Gabon deals. Instead, Bistrong told various Defendants that only Latour would handle the commission, and further that the deals had been approved by the U.S. State Department, were not illegal, and were not in violation of the

[3] None of the Defendants who participated have been charged with these transactions, presumably because the transactions were not unlawful.

[4] *See* Exhibit L to the motion of Defendants John and Jeana Mushriqui, filed under seal on June 4, 2010.

Foreign Corrupt Practices Act ("FCPA").[5] Bistrong also angrily admonished one Defendant who indicated that he was going to tell other Defendants that his lawyer had advised that the Gabon deals might be illegal.

Despite the government's insistence that it has produced all exculpatory and Rule 16 material, it has failed to produce any document or data reflecting instructions given to Bistrong about what he should – and should not – say to Defendants to ensure their participation in the Gabon deals and to dissuade them from withdrawing when they raised doubts about the deals' legality. The government has failed to produce this evidence even though Bistrong exchanged thousands of electronic text messages with the FBI agents running the investigation.

II. THE DEFENDANTS' REQUESTS FOR DISCOVERY

Defendants have requested all *Brady, Giglio,* and Rule 16 material from the government.[6] The government has repeatedly told the Court and Defendants that it has produced all *Brady* material, including "all *Brady*, *Giglio*, and Rule 16 materials relating to Richard Bistrong, including documents involving the direction, guidance, instruction and management of Bistrong during the undercover operation." *See* Oct. 29, 2010 letter to Court, filed as docket entry 192.

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[5] The sale of Defendants' products to a foreign customer required export licenses from the U.S. Department of State.

[6] Many Defendants have sent highly specific requests to the prosecutors for exculpatory evidence. The prosecutors have systemically ignored these letters. *See, e.g.*, Exhibit 2, March 19, 2010 letter from Drinker, Biddle & Reath (requesting *inter alia*, "All materials, whether written or oral, reflecting direction, guidance, instruction or other law enforcement management of Richard Bistrong during the period June 12, 2007 to January 19, 2010. Without limiting the generality of the foregoing, we request copies of all text messages, and the substance of any verbal communications, from law enforcement agents to Bistrong prior to and during his communications with Defendants, including but not limited to all email or text message communications between Bistrong and the individual(s) with access to the email account of avondalegroup@hotmail.com."); April 14, 2010 letter from Wilson Sonsini Goodrich & Rosati, (requesting "Documents related to the direction, guidance, instruction or other law enforcement management of Richard Bistrong leading up to and during the Undercover Operation."); November 11, 2010 letter from Reed Smith (requesting the "substance of any and all communications among any federal law enforcement officials, including but not limited to federal law enforcement agents and prosecutors, and/or with Richard Bistrong" regarding seven distinct issues concerning the management of the investigation).

For reasons explained more fully below, Defendants believe that federal law enforcement officials directed Bistrong to never use the words "bribe" or "kickback," and to tell one or more Defendants that the Gabon deals were lawful, were not in violation of the FCPA, and/or were approved by the State Department, with emphasis that the State Department would not have given such approval if anything about the transaction was illegal.[7] Further, Defendants believe that federal law enforcement officials directed Bistrong to tell one ore more of the Defendants that legal advice rendered by their lawyers was incorrect. Defendants believe that any such direction is exculpatory and/or critical to a pretrial motion to dismiss the indictment.

Defendants respectfully request an evidentiary hearing to resolve the apparent discrepancy between what the government has stated about discovery and should actually be produced. Specifically, Defendants seek the testimony of Bistrong and the government law enforcement officials supervising him regarding the substance of any direction given to or discussion with Bistrong that is exculpatory and/or relevant to a pre-trial motion to dismiss the indictment, including but not limited to any direction given to Bistrong that he should only use the words "commission" or "payment," and never use the words "bribe" or kickback," that he should tell Defendants that the Gabon deals were lawful, were not in violation of the FCPA, and/or were approved by the State Department.[8] For reasons explained more fully below,

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[7] The tapes produced by the government confirm that Bistrong made, and that the government was aware of, these statements. Bistrong was required to follow the FBI's guidance. *See* Department of Justice Guidelines Regarding the Use of Confidential Informants (including among the written instructions reviewed with confidential informants ("CI") that "the CI must abide by the instructions of the [Department of Justice Law Enforcement Agency] and must not take or seek to take any independent action on behalf of the United States Government"), attached as Exhibit 3, at 10.

[8] Concerning the materiality of the State Department export license issue, Defendants agreed to participate in the Gabon deals only pursuant to *bona fide* export licenses. Bistrong provided these licenses, containing forged signatures of the Gabon Minister of Defense and a forged seal of Gabon. Apparently the State Department participated in this fraud and issued licenses that Defendants believed to be legitimate. Yet there is no

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Defendants also seek testimony as to whether the government instructed Bistrong to try and convince at least two Defendants to disregard the advice of their lawyers regarding the Gabon deals. To the extent that the government maintains that no documentation of any such communications exist, Defendants seek testimony to obtain the substance of any such communications, and to determine whether any such documentation ever existed, and if so, under what circumstances it was destroyed. Defendants believe the bulk of the information sought can be obtained through examination of Bistrong and FBI Special Agent ("SA") Christopher Forvour, the primary agent on the investigation; however to the extent that SA Forvour claims to have no knowledge of these issues, the testimony of other law enforcement officials may be required.[9]

Defendants' request for an evidentiary hearing is appropriate under the circumstances. Under similar facts, a federal court in New Jersey recently ordered a hearing because of "the lack of information regarding the exact cause and circumstances surrounding the retention and deletion of" text messages between the government and a cooperating witness. *United States v. Suarez*, Crim. No. 09-932 (JLL), 2010 WL 4226524, at *2 (D.N.J. Oct. 21, 2010). During the hearing in that case, three FBI agents who communicated with the cooperating witness over text message each testified, as did other FBI representatives regarding the technological efforts taken to retrieve the unproduced text messages. Ultimately, the *Suarez* court concluded that the text

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documentation whatsoever of any direction to Bistrong from the government regarding the licenses. A sample of a forged Nontransfer and Use Certificate generated by Bistrong is attached as Exhibit 4.

[9] Contrary to the government's statement at the last hearing that Defendants are seeking a "mini-trial," Defendants have no intention of questioning SA Forvour or Bistrong as to the underlying transaction, but instead will limit questions to the substance of instructions from the government agents to Bistrong, and what process, if any, was utilized to maintain a record of those instructions. Defendants do not expect the evidentiary hearing to last more than one day.

messages constituted Jencks Act material, and the loss of this evidence warranted an adverse inference instruction based on the spoliation of evidence. *Id* at *5, 8-10.[10] *See also, United States v. Warshak*, No, 1:06-CR-00111, 2007 WL 2417407, at *1-5 (S.D. Ohio Aug. 21, 2007) (ordering an evidentiary hearing at which the government's agents were to testify as to their handling of potentially privileged materials, noting that the court found "gaps, both temporal and substantive, that can only be closed by sworn testimony of government agents that they did not use privileged information in obtaining evidence against Defendants").[11]

III. DEFENDANTS ARE ENTITLED TO ALL EXCULPATORY EVIDENCE, IN WHATEVER FORM

A. The Evidence Requested is Exculpatory and Discoverable

Fed. R. Crim. P. 16(a)(1)(C) requires the government, upon request, to permit a defendant to review all materials which are "material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial…." In addition, due process requires the government to disclose to the defense "evidence favorable to the accused." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The government has a duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt even in the absence of a specific request. *United States v. Agurs*, 427

[10] While the *Suarez* court determined the text messages to be Jencks material, for reasons explained fully below, Defendants believe the text messages in this case amount to exculpatory *Brady* material because at least some of them relate directly to some Defendants' efforts to ensure compliance with U.S. law.

[11] Defendants request is distinguishable from that in *United States v. Schafer*, Nos. 08-10167, 08-10169, 2010 WL 4400052 (9th Cir. Nov. 8, 2010), where defendants sought an evidentiary hearing to resolve factual disputes related to their entrapment by estoppel defense. The Ninth Circuit upheld the trial court's denial of the hearing finding that the factual disputes – whether two officers with the local sheriff's department were federal officials or authorized agents of the federal government and whether the agents erroneously informed defendants that their conduct was legal under federal law – were "intertwined with the 'general issue' to be decided at trial." *Id*. at *4. Here, Defendants know that Bistrong erroneously informed them that their conduct was legal, and they are not pursuing evidence regarding any facts underlying the charged conduct. Rather, Defendants are seeking information regarding the management of, and instructions given to, Bistrong and the preservation of related evidence.

U.S. 97, 112 (1976). *Brady* mandates the provision of all material which might be used to impeach a government witness, in addition to information which may be utilized in a defendant's case in chief. *Giglio v. United States*, 405 U.S. 150, 154-155, (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985).

These obligations apply regardless of the format of the materials. *See, e.g., United States v. Rodriquez*, 496 F.3d 221, 226 (2d Cir. 2007) ("The obligation to disclose information covered by the *Brady* and *Giglio* rule exists without regard to whether that information has been recorded in tangible form."). *See also* Exhibit 5, Memorandum for Department Prosecutors from David W. Ogden, Deputy Attorney General, Jan. 4, 2010, at 4 ("Prosecutors should also remember that with few exceptions (see, e.g., Fed. R. Crim. P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email.").

B. The Evidence Requested is Material to Potential Motions to Dismiss the Indictment

Fed. R. Crim. P. 12 allows Defendants to bring pretrial motions to dismiss an indictment, so long as the Court can determine the issue raised without a trial of the general issue. Fed. R. Crim. P. 12(b). Here, there are multiple grounds on which to move to dismiss the indictment. Any such motion cannot be fully briefed or accurately decided without the additional evidence Defendants have requested.

1. Motion To Dismiss Due To Outrageous Government Conduct

A court may dismiss an indictment for outrageous government conduct "where although no persons are harmed, the government's involvement in the criminal activity is excessive or

shocking." *United States v. Nochez*, No. CR 08-0730 WHA, 2010 WL 235077, *2 (N.D. Cal. Jan. 21, 2010), citing *United States v. Russell*, 411 U.S. 423, 431-32 (1973). In such cases, due process principles may bar the government from invoking the judicial process to obtain a conviction. *United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991) (citing *Hampton v. United States*, 425 U.S. 484, 489-90 (1976)). Under this theory the Court should consider whether: (1) the defendant was already involved in a continuing series of similar crimes, or the charged criminal enterprise was already in progress at the time the government agent became involved; (2) the agent's participation was not necessary to enable the defendants to continue the criminal activity; (3) the agent used artifice and stratagem to ferret out criminal activity; (4) the agent infiltrated a criminal organization and (5) the agent approached persons already contemplating or engaged in criminal activity. *U.S. v. Bonanno*, 852 F.2d 434, 437-38 (9th Cir. 1988). Here, Defendants believe that the government will not be able to establish any of these factors.

The alleged conduct in this case was not *malum in se*, but rather *malum prohibitum*, that is, the Gabon deals were only arguably in violation of U.S. law if Defendants actually knew that it was a violation of U.S. law for Latour, who was supposedly not a U.S. national, to pay commissions in Gabon to a Gabonese official. *See United States v. Kay*, 413 F.3d 461, 463 n.1 ("the Government must prove that Defendants knew that their conduct was not legal"). It would be outrageous and a violation of due process, and cause for dismissal of the indictment, if the government law enforcement officials handling Bistrong instructed him never to use the words "bribe" or "kickback" because if he did Bistrong and the government feared Defendants would not have agreed to participate in the deals. It would be equally outrageous if government law enforcement officials instructed Bistrong to deny the deals were illegal or in violation of the

FCPA, or to tell Defendants that the deals were approved by the State Department, while clearly indicating that such approval meant the transaction was lawful, or that the advice of their attorneys was erroneous or inaccurate.

Indeed, if the prosecutors and agents in this case instructed Bistrong regarding what to say to Defendants, the law is clear that Bistrong acted as their "alter ego" for purposes of evaluating a motion to dismiss premised on outrageous government conduct. For example, in *United States v. Hammad*, 678 F. Supp. 397, 400 (E.D.N.Y. 1987), *rev'd on other grounds*, 858 F.2d 834 (2d Cir. 1988), a prosecutor supplied an informant with a sham Grand Jury subpoena "as a ploy to extract damaging statements" from the target of a grand jury investigation. The prosecutor even met with the informant directly and instructed him regarding what to say to the target of the investigation during their recorded conversations. Under these facts, the District Court concluded that "the informant here was the alter ego of the prosecutor," for purposes of analyzing a motion to suppress the recorded statements. On appeal, the Second Circuit likewise held that the use of a sham grand jury subpoena and the close interaction between the prosecutor and the informant "contributed to the informant's becoming the alter ego of the prosecutor." *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988). What instructions the agents and prosecutors in this case gave to Bistrong are therefore undeniably relevant – and critical – to the motion to dismiss based on outrageous government conduct that Defendants have already informed the Court that they intend to file.

2. Motion To Dismiss Under The Inherent Supervisory Powers Of The Court

Even if the government's conduct does not rise to the level of a due process violation, a court may dismiss an indictment pursuant its inherent supervisory powers. *United States v. Struckman*, 611 F.3d 560, 574 (9th Cir. 2010), citing *United States v. Chapman*, 524 F.3d 1073,

1084 (9th Cir. 2008). Specifically, a court may dismiss an indictment (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 a jury; and (3) to deter future illegal conduct." *Id*. (internal citations omitted). The defendant must demonstrate prejudice before the court may exercise its supervisory powers. *Id*.

Dismissing an indictment to remedy a violation of a recognized statutory or constitutional right is appropriate "when the investigatory or prosecutorial process has violated a federal constitutional or statutory right and no lesser remedial action is available." *Struckman*, 611 F.3d at 576, citing *United States v. Barrera-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991). To dismiss an indictment to preserve judicial integrity and deter illegal government conduct, the court must find that there is an underlying violation of a federal statute, the constitution, or a procedural rule and that the prosecutorial misconduct was flagrant. *Id.* at 576 – 577. The non-production of exculpatory evidence in the government's possession may be a due process violation. *Brady*, 373 U.S. at 87.

Here, the government has not produced, and may have destroyed exculpatory evidence. Further, Bistrong, at the government's direction, deprived certain Defendants of advice of counsel by arguing – contrary to legal advice received by one or more Defendants – that the Gabon deals were legal, that the FCPA did not apply, and that the deals were approved by the State Department.

3. Motion to Dismiss for Spoliation of Evidence

A court may also dismiss an indictment for spoliation of evidence where the government acts in bad faith by destroying or failing to preserve evidence that is material to the defense.

California v. Trombetta, 467 U.S. 479, 487-89 (1984). Material evidence must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Id.* Due process violations for destruction of evidence require bad faith by the government. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).[12] As discussed more fully below, Defendants believe the government knowingly, and in bad faith, failed to preserve or destroyed exculpatory evidence.

4. Motion to Dismiss Due to Entrapment as a Matter of Law

Where it is evident that government agents have created a purportedly illegal transaction, then induced an individual who has engaged in no previous wrongdoing to participate in the transaction, those circumstances establish entrapment as a matter of law and require dismissal of the indictment. *See, e.g., Sherman v. United States*, 356 U.S. 369 (1958); *Jacobson v. United States*, 503 U.S. 540 (1992). Although both *Sherman* and *Jacobson* were decided on the basis of evidence adduced at trial, they establish a rule that is equally applicable pretrial. This is so because the government's own investigative reports demonstrate that the FBI was solely responsible for manufacturing the transactions underlying the indictment and that it pursued Defendants for more than a year to enlist their participation. These same reports are devoid of any information – much less evidence demonstrating beyond a reasonable doubt – that any given Defendant was disposed to commit a criminal act "independent … of the attention that the

[12] The Department of Justice recently argued that the applicable standard requires a court to find: (1) that the government or an agent of the government destroyed the evidence; (2) that the evidence had constitutional materiality in that its exculpatory value was apparent before the evidence was destroyed and the evidence was of such a nature that the defendant is unable to obtain comparable evidence by other reasonably available means; and (3) that the government acted in bad faith. *See* Exhibit 6, *United States v. Esquenazi*, Case No. 09-21010-CR-JEM (S.D. Fla.), Opposition to Motion to Dismiss Indictment for the Government's Spoliation of Defense-Favorable Evidence and Request for Evidentiary Hearing, at 2 (Jul. 8, 2010).

government had directed at [the defendant]." *Jacobson*, 503 U.S. at 550. Thus, there is entrapment as a matter of law and the Court can intervene on this basis pre-trial.

Indeed, the Department of Justice itself has admonished its agents not to even commence an undercover investigation that risks ensnaring law-abiding citizens. The Attorney General's Government's Guidelines on FBI Undercover Operations (Dec. 31, 1980), reprinted in S. Rep. No. 97-682 p. 551 (1982), provide that an inducement to commit a crime should not be offered unless:

> (a) there is a reasonable indication based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; *or*
>
> (b) the opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

Id. at 549.

When the government began its undercover investigation it had ample information that Bistrong had "engaged in illegal activity of a similar type," but no evidence that Defendants had done so. And unlike undercover "stings" involving trafficking in drugs or stolen property, the transaction at issue here was not structured to be ***patently illegal***. Indeed, as explained above, in his dealings with many Defendants, Bistrong only alluded to the sharing of commissions with persons located overseas and even assured other Defendants that the transactions at issue were ***legal***. Again, because the government has destroyed or refused to produce the text messages and other documentation of the instructions given to Bistrong, Defendants are entitled to an opportunity to a pre-trial examination of Bistrong and his FBI handlers to ascertain whether

Bistrong was instructed to avoid making plain to his targets that he was enlisting their participation in illegal conduct.

IV. RELEVANT EVIDENCE PRODUCED TO DATE[13]

A. Telephone Records and Certain Text Messages

Discovery has revealed at least eight different phone numbers apparently used by Bistrong during the period of his cooperation with the government.[14] Despite ample evidence of communications between Bistrong and his FBI agent-handlers, however, the government has failed to provide details of how it communicated instructions to Bistrong and how and why it did not preserve those communications.

Defendants believe that Bistrong primarily used two different phones while he was working on the Gabon deals.[15] The first phone was an "Operation Phone," which Bistrong used to communicate with the various targets of the operation, including Defendants. The

[13] As Defendants have noted to the Court many times, the government has dumped massive amounts of discovery materials since Defendants' indictment. The government has not provided any log or index of the documentary evidence it has produced and so Defendants have been required to sift through large amounts of documents and data to find material relevant to their case and this motion. As such, the representations made here are to the best of Defendants' knowledge based on their collective review of the government's discovery to date.

[14] Although discovery reveals at least eight different phone numbers apparently used by Bistrong during the period of the undercover operation, Defendants will focus on what appear to be the primary numbers used by Bistrong to communicate with either Defendants or his FBI agent-handlers by the FBI's recording software. Records for the remaining phone numbers, all unrecorded, remain a mystery due to the government's refusal to provide information about those phone numbers. For ease of reference, Defendants will not burden the Court with details of the specific phone numbers and wireless carriers used by Bistrong at various times during the undercover operation.

[15] Defendants have deduced this from data produced by the government. It is possible that additional electronic devices were used.

government applied electronic recording software to the Operation Phone and captured most, although not all, of the voice calls that Bistrong made or received on this phone.[16]

For text messages to the Operation Phone, the FBI applied the same software. That software captured the substance of most, although not all, of the text messages sent or received on the Operation Phone.[17] For many messages the FBI software failed to capture the phone number of the sender or recipient of the message. The government has acknowledged these shortcomings of the recording software. The information that was captured is reflected in FBI "logs" that have been produced to Defendants. However, the government has not stated whether it searched Bistrong's Operation Phone for the text messages themselves, took steps to preserve those text messages, or ordered Bistrong to refrain from deleting those text messages (including messages to and from Defendants).[18] Defendants' understanding is that absent affirmative action on someone's part—either Bistrong or an FBI agent—the substance of the text messages,

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[16] Some of the text messages between Bistrong and the agents that have been produced indicate that the recording software on the Operation Phone did not always work and that the FBI agents relied on Bistrong to tell them if relevant calls were missed. *See, e.g.*, Exhibit 7, RB 5671 (FBI to Bistrong: "Line was down yesterday. Looks like there were a few short calls. Anything we need to memorialize?" Bistrong to FBI: "Nothing important at all.").

Out of privacy concerns, Defendants have partially redacted all phone numbers that appear in the exhibits to this Motion.

[17] A comparison of the bills for the Operation Phone (which indicate the occurrence, but not the substance, of text messages), with the Operation Phone line sheets indicates that there were text messages sent and received between Bistrong and Defendants for which the substance has not been produced.

[18] The failure to preserve these messages would be especially problematic inasmuch as the FBI agents likely tasked Bistrong via text message when he was meeting with his targets. Bistrong can be seen on many video tapes of meetings with Defendants using a handheld electronic device.

including the sender or recipient information, would still be on Bistrong's and the agents' phones.[19]

During the same time, Bistrong also used a separate "Personal Phone." The government chose to communicate with Bistrong almost entirely on this Personal Phone, instead of the Operation Phone. The government, however, chose *not* to apply its recording software to the Personal Phone, and therefore did *not* capture the substance of the calls or text messages with the FBI agents regarding how Bistrong was to target and entrap Defendants. As with the Operation Phone, the government has not stated whether it searched Bistrong's Personal Phone for text messages, took any steps to preserve those messages, or instructed Bistrong not to delete those messages. The government has acknowledged to Defendants that it was aware that its operational instructions to Bistrong on the Personal Phone were not being preserved in any manner. Remarkably, in discovery the government has represented that it did not view itself as obligated to preserve communications—such as calls or text messages—between FBI agents and Bistrong, and therefore it did not preserve those communications. There is no reasonable explanation for this affirmative decision of the government other than that the government did not want a record of its instructions to Bistrong.[20]

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[19] The same text messages that Bistrong sent to and received from the agents would also appear on the agents' phones. To the extent the government claims it no longer possesses any of these messages, they must have been deleted from the agents' phones. There is no record produced to date to indicate where the actual phones which were used by Bistrong or the agents are today.

[20] This obvious conclusion is also supported by the fact that the FBI Form 209s, discussed more fully below, not only contain no substance of instructions given to Bistrong, but rather by omission suggest that no instructions at all were given. The failure to record the substance of these communications is particularly troubling in light of the May 5, 2009 audit report admonishing the investigation team for failing to properly document their contacts with Bistrong, and instructing the agents to complete documentation to support these contacts, as required by FBI procedures. *See See* Exhibit L to the motion of Defendants John and Jeana Mushriqui, filed under seal on June 4, 2010, at ABF 936.

Defendants are able to determine from phone records provided to the government by Bistrong's wireless carriers that hundreds of calls were made between Bistrong and SA Forvour on this Personal Phone, with thousands of additional text messages.[21] These phone records merely contain the fact of a call or text message, without their substance. The government has advised that the wireless carriers do not preserve the substance of text messages beyond five days, which leaves the burden on the government to preserve those communications. However the government has not provided those communications to the defense and at a minimum failed to preserve the communications, despite the fact that as noted above, Defendants' understanding is that cell phones preserve text messages until they are deleted by the user.

FBI logs confirm that agents communicated with Bistrong by text message thousands of times. As Defendants have pointed out to the court (*see* Status Conference Tr. at 26:1-12, November 5, 2010), discovery shows that the FBI agents were even sending text messages to Bistrong in the middle of his telephone conversations with Defendants. Yet because the government apparently failed to take any steps to preserve those messages, Defendants have no way of knowing the substance of the directions given by FBI agents to Bistrong regarding what to say to Defendants and how to say it.[22]

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[21] Defendants are aware of SA Forvour's cell phone number because it appears on his business card. On November 8, 2010, Defendant Jeana Mushriqui requested the Government provide the phone numbers used by any federal law enforcement officer who communicated with Bistrong during the course of the investigation. The Government has not responded to that request. It will be necessary pre-trial for Defendants to separately move to compel discovery because the government has routinely ignored and failed to respond to specific *Brady* and *Giglio* requests made in writing. While the Court has repeatedly urged the parties to work out discovery disputes, it is not possible for Defendants to work out anything when the government ignores written requests for discovery.

[22] The only evidence Defendants have of the substance of agent communications with Bistrong is from two sources. First, according to representations by the government, the agents occasionally had no choice but to communicate with Bistrong on the Operation Phone, which was recorded. Defendants have received approximately a dozen short voice recordings, and a similar number of text messages. Second, after indictment, the agents were able to retrieve a limited number of text messages from their electronic devices and produce them.

Significantly, *after* Defendants began demanding that the government carry out its discovery obligations and produce the substance of communications with Bistrong, the FBI agents apparently searched their phones and two agents were able to retrieve a number of text messages to and from Bistrong in the period of November 29, 2009, to April 7, 2010.[23] The fact that the agents were still able to retrieve these more recent text messages highlights Defendants' concern about the government's apparent decision not to preserve them in the first place, and implies that earlier messages would have been retrievable but for affirmative decisions by the agents to delete them.

The only way to obtain information regarding the substance of these communications between Bistrong and the FBI agents, and the missing communications between Bistrong and Defendants, is an evidentiary hearing during which Defendants can solicit testimony from Bistrong and the agents. *See Warshak*, 2007 WL 2417407, at *5.

B. 209a Forms

The government produced numerous 209a forms ("209s"), purporting to memorialize FBI contacts with Bistrong. The 209s are FBI forms used for documenting contacts with informants. *See United States v. Wu*, 52 F.3d 323, at n.4, 1995 WL 215440 at *7 (4th Cir. 1995). Here, each of the 209s documenting contacts during critical periods of the investigation (defined more fully below) indicate that no FBI investigative techniques or information was revealed to Bistrong for operational purposes. Thus, these 209s claim – falsely, Defendants believe – that no

[23] Incredibly, one text message string relates to an FBI agent soliciting Bistrong's assistance in preparing for an interview of one or more of the Defendants at the time of their arrests. *See* Exhibit 8, RB 5690-92 (FBI to Bistrong: "What's your schedule like Wed. through Fri.? Is there a time I could pick your brain on my interview subjects?" Bistrong to FBI: "How about 830 tomorrow?" FBI to Bistrong: "Works for me. My two are Saul and Wier. Interested to hear what you think[.]" FBI to Bistrong, a few days later: "thanks again for the insight on my subjects. Extremely helpful to bounce ideas of [sic] you.").

instructions were conveyed to Bistrong in any of the dozens of meetings and telephone calls between Bistrong and his FBI handlers.[24] *See* Exhibit 9, a representative sample of the 209s the government has produced. Defendants believe that these 209s may also omit other relevant and exculpatory information. While some of the forms identify "telephonic contacts," they do not reference any text message contacts. For example, the 209 that covers contact for October 16, 2009 indicates that SA Forvour and SA Queener had 8 telephonic contacts with Bistrong that day. However, text message logs indicate that SA Forvour also exchanged 27 text messages with Bistrong on October 16, 2009.[25] No reference to these text messages are reflected on the relevant 209 form.[26]

V. GOVERNMENT'S CONDUCT DURING CRITICAL PERIODS OF THE INVESTIGATION

Defendants identified two critical periods of the investigation as a representative sample of when the government took actions that are exculpatory and/or material to a motion to dismiss, but for which the government has not produced evidence of instructions to Bistrong. A simple and common sense analysis of the government conduct during those periods suggests that either

[24] The government has also produced numerous, but what appear to be random, FBI FD-1023 forms, some of which contain information reported by Bistrong regarding unrecorded phone calls. To Defendants' knowledge, these 1023s do not contain the substance of any instruction provided to Bistrong. In fact, the 1023s, unlike the 209s, do not contain a field for information *given to* a confidential source, as opposed to information obtained from a source.

[25] *See* Exhibit 10, at RB 4309, and RB 8833-35. The unredacted portion of SA Forvour's telephone number is 8632. These text messages have been highlighted for the Court's convenience.

[26] A May 2009 FBI report produced by the government indicates effective May 11, 2009, the case agent would maintain a paper log of the contact he and handling agents have with Bistrong regarding tasking, strategy observations, and operational issues, and that the case agent would submit this paper log on a weekly basis to the FBI file along with a corresponding 209. To their knowledge, Defendants have not been provided with this paper log.

the government possesses material and exculpatory evidence that has not been produced, or the government failed to preserve and/or destroyed material and exculpatory evidence.

A. Example Critical Period One: June 25, 2009[27]

In June 2009, after receiving advice from his lawyer that the Gabon deals might violate U.S. law, Defendant Saul Mishkin decided he no longer wanted to participate in the deal. On June 25, 2009, Mishkin informed Bistrong of his decision via email.[28] Bistrong responded with an email stating "I can not believe what I am reading and now I have to deal with it and it's consequences on my 'word' to a friend of twenty-five years. Rather than write or talk to you out of emotion, I will think about how you behaved here and contact you tomorrow. …Right now I'm so upset I really don't want to even speak."[29]

Later that day, Defendant Daniel Alvirez[30] told Bistrong, by telephone, that he had spoken to Mishkin about getting out of his Gabon deal because it might be illegal, and Alvirez sought assurance from Bistrong that they were not violating the FCPA. Bistrong initially stated the deal was not illegal and, when Alvirez pushed him on the issue, evaded the question and said that "[his] attitude is on this is what Pascal [Latour] has to do Pascal has to do."[31] During this

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[27] A detailed timeline of key events from these two time periods, with specific references to exhibits, is attached as Exhibit 11. This timeline does not contain all communications from the relevant period. For simplicity, Defendants have included only selected demonstrative events in the body of this Motion. Exhibit 11 contains only text, and for that reason Defendants suggest that the Court might benefit from listening to selected excerpts so that it can hear both the anger and desperation in Bistrong's voice during some of the conversations noted below.

[28] Exhibit 11 at Tab B.

[29] Exhibit 11 at Tab C.

[30] For reasons unknown to Defendants, Alvirez has entered a guilty plea and is apparently cooperating with the government. Defendants believe that his testimony may also be exculpatory and/or relevant to the trial of one or more of the Defendants.

[31] Exhibit 11 at Tab F, at 2:8-12; Exhibit 11 at Tab G, at 3:15 – 19.

call, Bistrong was clearly angry with Mishkin, and made statements including, "I am so pissed right now," "I am so fucking pissed at him," and "He better watch his mouth. Okay?"[32] Bistrong also sent a text message to Alvirez in which he wrote "@'m [sic] thinking about going to Miami and telling him off in person."[33] While these conversations, emails and text messages were occurring, Bistrong was also exchanging text messages with SA Forvour on the Personal Phone.[34] The government has not produced the content of these text messages.

Later the same day, Bistrong called Mishkin to discuss his decision to drop out of his Gabon deal. At first, Bistrong was very calm and did not seem angry with Mishkin. Bistrong told Mishkin he respected, supported, and admired Mishkin's decision not to participate.[35] Defendants suspect the agents instructed Bistrong to change his demeanor and tone when he called Mishkin. During the forty-five minute telephone conversation, Bistrong asked Mishkin if he raised his legal concerns about his Gabon deal with anyone other than Alvirez. When Mishkin told Bistrong that he had discussions with Defendant Marc Morales, Bistrong started to yell at Mishkin about messing up the deal and demanding that Mishkin not speak with the other Defendants.[36] Bistrong also told Mishkin that he had "already spoke[n] to the State Department, okay? And they're supporting this transaction."[37] Bistrong further told Mishkin that he "had

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[32] Exhibit 11 at Tab F, at 4:16 – 5:2.

[33] Exhibit 11 at Tab D, at page 108 of 726.

[34] *See* Exhibit 11, at 3-6.

[35] Exhibit 11 at Tab H, at 2:18 – 3:7.

[36] *Id*. at 22:15-29:21.

[37] *Id*. at 26:11-14.

everything vetted at State so I'm telling you they're supporting this license."[38] FBI data logs indicate that SA Forvour sent Bistrong six text messages while Bistrong was on the phone with Mishkin; the government, however, has not produced the content of any of these text messages.[39]

Also during the call between Mishkin and Bistrong, Mishkin read to Bistrong a letter he received from his lawyer,[40] which included in relevant part that "certain commercial transactions involving the Government of Gabon are currently under investigation by the U.S. Department of Justice and also by a Congressional Committee. This proposed transaction appears to have some of the same features as the other transaction that is currently under investigation."[41] At several points during the call, Bistrong told Mishkin that the legal advice received by Mishkin was incorrect: "And I will tell you something, Saul, and this is the only thing I disagree with your lawyer, if Gabon was under any Congressional investigation, the State Department would not have told me that they're going to support this license. There is no way."[42] In fact, the advice provided by Mishkin's attorney was true and Bistrong's statement was false – a Senate committee was investigating Gabon.[43]

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38 *Id.* at 49:16-18.

39 Exhibit 11 at Tab E, at RB 8543.

40 This same attorney had previously and independently provided legal advice to Defendant Caldwell's company regarding export regulations.

41 Exhibit 11 at Tab H, at 12:6-14.

42 *Id.* at 18:15-21.

43 *See* Senate Permanent Subcommittee on Investigations report "Keeping Foreign Corruption Out of the United States: Four Case Histories," Feb. 4, 2010 (available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=9a9a2e09-5056-8059-76f6-1b9eb33b29b2). One of the case histories included in the report is that of Omar Bongo, President of Gabon.

After Bistrong ended his call with Mishkin, he spoke again to Alvirez and informed him that Mishkin had already talked to Morales but would call Morales the next day to say that he "overreacted" to his lawyer's advice.[44] SA Forvour sent Bistrong five text messages during this call with Alvirez and shortly thereafter.[45] The following day, on June 26, 2009, Bistrong had three telephonic contacts with SA Forvour and SA Queener.[46] The government has not produced the content of the text messages or the telephone calls.

It is inconceivable that Bistrong and law enforcement officials did not communicate about the fact that Mishkin, Alvirez, and Morales raised concerns about whether the Gabon deals were legal and how Bistrong should respond to these concerns. If Bistrong had admitted to Mishkin or Alvirez during their calls on June 25, 2009, that the Gabon deals would violate the FCPA it is reasonable to conclude that these Defendants would have withdrawn and advised at least those other Defendants they knew to withdraw. By the government's theory that this was a single conspiracy, this would have caused the entire transaction to unwind and the investigation would have ended. Furthermore, Defendants are entitled to know whether the government instructed Bistrong to lie about the nonexistence of a Congressional investigation into corruption in Gabon, or whether Bistrong acted on his own accord in contradicting sound and proper legal advice Mishkin received from his attorney that he withdraw from the Gabon deal.

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44 Exhibit 11 at Tab I, at 12:14-13:10

45 Exhibit 11 at Tab E, at RB 8543.

46 Exhibit 11 at Tab J.

B. Example Critical Period Two: October 9 – 28, 2009

In October 2009, Tom O'Dea,[47] then Vice President of International Sales for Protective Products, Inc. ("PPI"), the company for which Defendant Caldwell was the acting Chief Executive Officer, at the direction of Defendant Caldwell, negotiated with Bistrong an FCPA addendum to the Purchase Agreement between PPI and the Ministry of National Defense of Gabon.

On October 9, 2009, O'Dea spoke by telephone with Bistrong about PPI's demand that Bistrong and his two agents sign a certification that they would not violate the FCPA. Bistrong told O'Dea that the FCPA language was "a problem" because he had already sent an earlier addendum which did not contain any FCPA language to the Gabonese officials.[48] A few days later on October 13, 2009, Bistrong called O'Dea and apparently discussed the FCPA addendum sought by PPI.[49] A short time later, Bistrong called O'Dea again and apologized for being "short" with O'Dea and for his tone in that conversation.[50] Bistrong went on to say that he would pass the FCPA addendum along to the Gabonese.[51]

On October 19, 2009, Bistrong told Defendant Caldwell by telephone that the FCPA "does not cover the actual foreign official" and that asking Mahmadou (the FBI agent posing as a representative of Gabonese Ministry of National Defense) to sign the certification was "asking a

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47 O'Dea is not charged in this case.

48 Exhibit 11 at Tab K, at 5:11-7:12.

49 The government has not produced Defendants with a recording of this phone call, despite Defendants' specific request.

50 Exhibit 11 at Tab M, at 2:7-15.

51 *Id*. at 3:20-4:6.

person to sign who is not covered under the actual FCPA law."[52] Defendant Caldwell stated that he wanted to discuss the issue with his attorney. Approximately forty-five minutes later, Bistrong and Defendant Caldwell spoke again, at which time Bistrong said that Mahmadou and Latour would sign the contract addendum acknowledging they will comply with the FCPA.[53]

In the ten days between October 9 and October 19, 2009, when these critical discussions took place, Bistrong and SA Forvour exchanged 162 text messages and spoke by telephone 23 times.[54] The government has not produced the substance of any of those communications and while the 209s reflect that the contacts were "for the purpose of discussing administrative issues and operational tasking surrounding the Gabon deal," they further state that no investigative techniques or information was revealed to Bistrong.[55]

A week later, on October 26, 2009, Bistrong met with SA Queener, SA Wiehn, and prosecutors Hank Walther of the Fraud Section of the Department of Justice, and Assistant U.S. Attorney Matthew Solomon.[56] The Form 209 of that meeting states that no operational information was communicated to Bistrong, and further does not contain any information about the substance of the meeting.[57] The following day, October 27, 2009, Bistrong met again with

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[52] Exhibit 11 at Tab O, at 3:11-4:9.

[53] Exhibit 11 at Tab P, at 3:16-21.

[54] Exhibit 11 at Tab L, at RB 8811-42; Exhibit 11 at Tab N, at RB 4304, 4309.

[55] Exhibit 11 at Tab N.

[56] Exhibit 11 at Tab Q.

[57] The government has also produced a FD-1023 form documenting this October 26, 2009 meeting, but has requested that Defendants not attach it as an exhibit to this public filing. The 1023 does not contain the substance of any instructions provided to Bistrong, and only summarizes information Bistrong provided regarding locations to be searched after Defendants' arrests.

SA Queener and SA Wiehn.[58] The Form 209 for that meeting once again states that no operational information was communicated to Bistrong, and further does not contain any information about the substance of the meeting. One day later, on October 28, 2009, Bistrong sent a copy of the contract addendum, executed by him, Latour, Mahmadou, and affixed with a forged seal of the Ministry of National Defense of the Republic of Gabon, certifying to PPI that they would not violate the FCPA.[59]

In the nine days between October 19, 2009, when Bistrong told Caldwell the FCPA did not apply to foreign officials and that Mahmadou would sign the addendum, and October 28, 2009, when Bistrong sent the executed addendum, Bistrong and SA Forvour exchanged 145 text messages.[60] Government documents indicate that there were 16 additional telephone contacts between agents and Bistrong.[61] The 209s indicate that the purpose of these telephonic contacts was to "discuss[] administrative issues and operational tasking surrounding the Gabon deal," and yet each and every one of these forms indicate that no "FBI investigative techniques / information" were "revealed to source for operational purposes."[62]

It is inconceivable that the FCPA certification Defendant Caldwell requested, and the communications between Defendant Caldwell and PPI's lawyer, were not discussed in these text messages, telephone contacts and/or in-person meetings. Any evidence regarding the substance

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58 Exhibit 11 at Tab R.

59 Exhibit 11 at Tab S.

60 Exhibit 11 at Tab L, at RB 8843-68.

61 Exhibit 11 at Tab N, at RB 4309.

62 *Id.*

of these communications is exculpatory and material to the defense. Yet, nothing has been produced. This includes no memoranda, no notes, and no record of any kinds of discussion or decisions on these subjects within the FBI or the Department of Justice.

VI. CONCLUSION

Defendants request an evidentiary hearing to resolve the glaring discrepancy between the information produced and the information which should reasonably exist and be produced. Defendants seek the testimony of Mr. Bistrong and the law enforcement officials that were communicating with him regarding any instructions given to Mr. Bistrong as to how he was to describe the Gabon deals. Specifically, whether to say the payments in question were to be termed a "commission" or "payment" as opposed to a "bribe" or kickback;" whether the Gabon deals were lawful and not in violation of the FCPA; whether the Gabon deals were approved by the State Department; and whether one or more Defendants should ignore the advice of their lawyers. To the extent that the government maintains that no documentation of any such communications exist, Defendants seek testimony to obtain the substance of any such communications, and to determine whether any such documentation ever existed, and if so, the circumstances under which it was destroyed, disappeared, recorded over or whatever actually happened to these highly relevant communications. An evidentiary hearing is necessary to determine the reasons that hundreds of text messages, which Defendants know existed at some point in time on both Bistrong's and the agents' respective phones, have not been produced in discovery.

Dated: December 7, 2010

Respectfully submitted,

/s/Eric A. Dubelier

Eric A. Dubelier (DC Bar No. 419412)
Katherine J. Seikaly (DC Bar No. 498641)
REED SMITH LLP
1301 K Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005
Telephone: (202) 414-9291
Email: edubelier@reedsmith.com
kseikaly@reedsmith.com
Fax: (202) 414-9299
Counsel for R. Patrick Caldwell

Peter Zeidenberg
DLA PIPER
Counsel for David Painter

Steven J. McCool
MALLON & MCCOOL LLC
Counsel for Marc F. Morales

Jeremy D. Margolis
Robert M. Andalman
LOEB & LOEB LLP
Counsel for Amaro Goncalves

Charles S. Leeper
Barry Gross
DRINKER BIDDLE & REATH LLP
Counsel for Jeana Mushriqui

David S. Krakoff
James T. Parkinson
Lauren R. Randell
BUCKLEYSANDLER LLP
Counsel for John Mushriqui

Steven Bronis
Paul Calli
CARLTON FIELDS
Counsel for Stephen Giordanella

Lisa Prager
Lara Covington
WILSON SONSINI GOODRICH & ROSATI
Counsel for Israel Weisler

Danny Onorato
David Schertler
SCHERTLER & ONORATO
Counsel for Lee Wares

Eric Bruce
KOBRE & KIM, LLP
Counsel for Pankesh Patel

Brian Heberlig
STEPTOE & JOHNSON, LLP
Counsel for Ofer Paz

G. Allen Dale
LAW OFFICE OF G. ALLEN DALE
Counsel for Yochannan Cohen

Todd Foster
COHEN FOSTER & ROMINE PA
Counsel for John Benson Wier

Brittney Horstman
KUBILIUN & ASSOCIATES
Counsel for Saul Mishkin

Lawrence Jacobs
LAWRENCE A. JACOBS PA
Counsel for Andrew Bigelow

Eugene Gorokhov
BURNHAM & GOROKHOV PLLC
Counsel for Helmie Ashiblie

Michael Madigan
ORRICK, HERRINGTON & SUTTCLIFFE
Counsel for John Gregory Godsey

Dee Wampler
Joseph Passanise
LAW OFFICES OF DEE WAMPLER JOSEPH PASSANISE
Counsel for Lee Tolleson

David Barger
GREENBERG TRAURIG LLP
Counsel for Michael Sacks

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2010, a copy of the foregoing was served electronically via the District Court's CM/ECF system on all parties of record.

/s/Katherine J. Seikaly
Katherine J. Seikaly (DC Bar No. 498641)
REED SMITH LLP
1301 K Street, N.W.
Suite 1100 – East Tower
Washington, D.C. 20005
Telephone: (202) 414-9291
Email: kseikaly@reedsmith.com
Fax: (202) 414-9299