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 10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

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

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

6 DATED: June 6, 2011

7 Respectfully submitted,

8  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

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

18 **II.**

19 **ARGUMENT**

20 A. Legal Standard

21 The dismissal of an indictment based on alleged misconduct  
22 is an "extreme remedy" and is "disfavored" because it is "the  
23 most severe sanction possible." United States v. Lopez, 4 F.3d  
24 1455, 1464 (9th Cir. 1993); United States v. Isgro, 974, F.2d  
25 1091, 1097 (9th Cir. 1992); United States v. Jacobs, 855 F.2d  
26 652, 655 (9th Cir. 1988). The Ninth Circuit has held that this  
27 extreme remedy should only be granted in two limited  
28 circumstances.

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

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



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

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

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

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

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

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

4 1. As High As 90-95 Percent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 \* \* \*

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

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

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

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

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

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

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

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

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

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

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

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

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

3 WITNESS: I'm sorry?

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

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

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

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

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

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

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



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

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

25 //

26 //

27

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

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

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

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

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

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

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

3 \* \* \*

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

13 \* \* \*

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

17 CORTEZ: Yes.

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

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

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

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

25 \* \* \*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 The defendants' assertion that Agent Guernsey testified that  
25 "most of the money" from LMC was ultimately used to buy luxury  
26 goods for CFE officials is again inaccurate. (Mot. #505 at 10).  
27 Agent Guernsey testified that a "substantial portion of the  
28

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

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

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

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

28



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

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

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

20 The eighth allegedly false statement was Agent Guernsey's  
21 grand jury testimony that LMC's wire transfers to the Grupo  
22 account were used to pay over \$170,000 towards Moreno's American  
23 Express bill. (Mot. #505 at 12). The defendants argue that this  
24 testimony was false because "no LMC funds were used to pay Mr  
25 Moreno's American Express bills." (Id.). The defendants,  
26 however, provide no support for this argument in their motion.  
27  
28

1 Presumably, the argument is based on the same ground as the  
2 ninth argument in the defendants' motion: "the prosecutors [were  
3 seeking] to reinforce [a] false notion that LMC's funds could be  
4 specifically traced to corrupt payments." (Id.). What both of  
5 these arguments overlook, however, is that Agent Guernsey was not  
6 required to trace, i.e., to identify which particular funds were  
7 used to pay the bribes and could point to any funds in that  
8 account once they had been commingled in the Grupo account.

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

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

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

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

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

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

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

28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 C. The Government Did Not Violate Brady

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

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

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

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

25 Even assuming for the sake of argument that Agent Guernsey's  
26 grand jury testimony constituted Brady material (it did not), the  
27 defendants' assertion that the indictment should be dismissed as  
28



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

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

22 Another factor that undermines the defendants' showing of  
23 prejudice is the quality of their defense counsel, two seasoned  
24 criminal defense attorneys with extensive trial experience and  
25 extensive resources. Their ability to prepare effectively for  
26 cross-examination was most evident from the fact that neither  
27 defense counsel sought a continuance or additional time to  
28

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

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

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

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

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

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

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

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

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

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

28

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

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

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

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

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

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

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

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

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

16       In addition, other information provided by Rowan would have  
17 been very helpful to the government's case, and not just the  
18 defense. For example, Rowan told the FBI that (1) "LMC  
19 manufactures Emergency Restoration Systems and there were other  
20 companies that made the same product," and (2) "LMC made pretty  
21 routine stuff and other companies could make the same thing" and  
22 "[b]ecause of this, . . . people would be crazy to buy LMC."  
23 These and other statements by Rowan directly contradict the  
24 defense theory that the reason LMC was being rewarded contracts  
25 in Mexico was because LMC was the only company manufacturing and  
26 supplying the industry-standard 1070 transmission towers after  
27

1 2002. A theory which was basically only supported by the  
2 testimony of Sergio Cortez at trial.

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

14 \* \* \*

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

22 **III.**

23 **CONCLUSION**

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