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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRENT ROGER WILKES (1), JOHN THOMAS MICHAEL (2), Defendants.	Criminal Case No. 07CR0330-LAB **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT MICHAEL'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO DISQUALIFY, AND FOR OTHER RELIEF** DATE: September 4, 2007 TIME: 2:00 p.m. Judge: Honorable Larry A. Burns

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Sanjay Bhandari, Valerie H. Chu, Jason A. Forge, and Phillip L.B. Halpern, Assistant U.S. Attorneys, and hereby files its Response and Opposition to the above-captioned motions, together with the Declaration of Phillip L.B. Halpern.

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I

INTRODUCTION

Defendant John Thomas Michael is charged with conspiracy, money laundering, and obstruction of justice. Together with his uncle, co-conspirator Thomas Kontogiannis, defendant Michael laundered various illegal proceeds, including both bribery proceeds and the proceeds of mortgage fraud, for years. When subpoenaed to provide documents and testimony to a federal grand jury about his involvement in bribe proceeds that were laundered through his company to former Congressman Randy "Duke" Cunningham, defendant Michael provided both false documents and false testimony, designed to mislead the grand jury about Michael's dealings with Kontogiannis and Cunningham.

Defendant Michael has now filed motions seeking (a) dismissal or exclusion of evidence as a sanction for government misconduct in allegedly condoning additional criminal behavior by co-conspirator Kontogiannis;(b) recusal of various federal prosecutors based on an alleged conflict arising from a property transaction between a relative of a government prosecutor and Kontogiannis's daughter; and (c) a bill of particulars and certain other discovery. Defendant's motions, though lengthy and strident, are unsupported, untimely, and contrary to case law.[1/]

First, defendant Michael avers to ongoing criminal conduct by Kontogiannis, but relies on activity from 2005. Kontogiannis pled guilty on February 23, 2007 pursuant to a Plea Agreement with the government. If the government becomes aware of new criminal activity by Kontogiannis – which Michael alleges with great bravado, but does not prove – the government will take appropriate action, which might include withdrawing from Kontogiannis's Plea Agreement, as it has the right to do in the event of new crimes by Kontogiannis. There is no misconduct, and no basis for any sanction.

Second, the fact that Assistant U.S. Attorney (AUSA) Halpern's late uncle and one of Kontogiannis's daughters appear to have entered into a property transaction – something neither AUSA

[1/] Defendant's 47-page brief is nearly double the size allowed by this Court according to its local rule. *See* CrimLR 47.1 (e). As Defendant cited to the local rules himself as authority (see D's Mot. p. 30-31), he clearly is familiar with these rules. Defendant did not request leave of this Court to file his oversize brief. In light of the ongoing litigation in this case, and to avoid the precedent of boundless briefing for each set of motions, the government submits that the Court is within its discretion to strike Defendant's non-compliant brief, or the pages of the brief in excess of 25.

Similarly, the Court may consider the need to strike or seal Exhibit 6, a document which remains under seal in the court of filing.

Halpern nor others on the prosecution team even knew until defendant Michael dug up the fact – is nothing more than an irrelevant coincidence, and fails to even remotely approach a disqualifying conflict of interest under relevant case law.

Finally, Defendant's bill of particulars and discovery demands are untimely, contrary to case law, and moot, as explained in further detail below. The government has supplied full discovery, which obviates any possible need for a bill of particulars, and provides Defendant with all inculpatory and exculpatory information with which to prepare for trial.

II

ARGUMENT

A. THERE IS NO GOVERNMENT MISCONDUCT, MUCH LESS THE SORT OF CONDUCT REQUIRED FOR A DISMISSAL OF THE INDICTMENT

Defendant Michael accuses the government of two felony offenses: misprision of a felony, in violation of 18 U.S.C. § 4, and bribing a witness, in violation of 18 U.S.C. § 201(c)(2). As a sanction for this alleged misconduct, defendant Michael seeks dismissal of the indictment or an exclusion of Kontogiannis's testimony. In fact, Defendant has not shown any government misconduct, much less the sort of misconduct that would justify any of the remedies he seeks.

1. There Is No Misconduct

Defendant Michael's basis for his charge of government misconduct appears to be his complaint that "rather than requir[ing] Kontogiannis to pay off [any fraudulently obtained mortgages], the federal government instead is allowing Kontogiannis simply to continue making monthly payments on the fraudulent mortgages." Def.'s Mot. p. 19. The only evidence defendant Michael submits regarding Kontogiannis's "ongoing" or continuing criminality are exhibits which tend to show that in 2005, *years* before Kontogiannis's guilty plea in February 2007, Kontogiannis's company was making payments on dozens of mortgages. Def.'s Mot., Ex. 12-15.

What defendant Michael fails to mention is that several of these mortgages were originally written by Defendant's company, Coastal Capital. Indeed, it appears that defendant Michael was intimately involved in the fraudulent scheme with Kontogiannis, according to the statements of witnesses (Def.'s Mot., Ex. 16, p. 5 ("And were these loans taken out through Coastal Capital with the direction of John Michael?" A: "Orchestrating it, yes.")), the documents, and Kontogiannis's Plea

Agreement (Ex. 1, p. 5 ("[Kontogiannis], Michael, and others were also involved in writing and selling fraudulent mortgages on various properties.").

The fact remains that defendant Michael has submitted no evidence of any mortgage payments after Kontogiannis' guilty plea, much less payments on fraudulent loans.[2/]

Far from countenancing ongoing criminal activity, the government made clear in its Plea Agreement that any further crimes by Kontogiannis prior to sentencing would invalidate the agreement. At section XIII, the Plea Agreement provides:

> This plea agreement is further based on the understanding that [Kontogiannis] will commit no additional criminal conduct before sentencing. If [Kontogiannis] engages in additional criminal conduct during this period, or breaches any of the terms of any agreement with the Government, the Government will not be bound by the recommendations in this plea agreement, and may recommend any lawful sentence. In addition, at its option, the Government may move to set aside the plea.

Id. p. 15. Thus, should Kontogiannis commit further criminal conduct, the government could certainly seek a higher punishment for Kontogiannis than the Plea Agreement contemplates. Even more significant, in that circumstance the government reserves the right to withdraw from Kontogiannis's Plea Agreement entirely, set aside his guilty plea, indict him, and proceed to trial against him. At the trial, the government could use Kontogiannis's admissions in his Plea Agreement against him. *Id.* p. 16 ("The government may use these admissions [in the "factual basis" paragraph] against me in any proceeding."). As detailed above, these admissions cover his engaging in the business of money laundering and involvement with defendant Michael in a fraudulent mortgage scheme.

2. The Government's Alleged Inaction Would Not Violate the Anti-bribery Statute

Defendant Michael's claim that the government "turned a blind eye" to (unproven) criminal activity is simply not a violation of the anti-bribery statute, and justifies no sanction.[3/]

[2/] Defendant Michael's claim of misconduct is conceptually flawed and illogical. The fraud occurs not when mortgages are repaid, but when they were obtained on the basis of false pretenses. Once the loans were issued (and resold, as defendant Michael alleges is true of Kontogiannis's mortgages), the lender would surely prefer that monthly payments continue, and would derive no further harm from such payments. The supposed benefit to Kontogiannis, of continuing to write thousands of dollars in checks a month to lenders, actually benefits lenders and reduces any loss they might incur from any fraudulent loans.

[3/] While Defendant lobs the highly-charged accusation that the government also engaged in misprision of a felony, he subsequently abandons the argument and provides no authority or analysis.

18 U.S.C. § 201(c)(2) does not apply to traditional incentives offered to trial witnesses by the government, such as leniency at sentencing, immigration assistance, or payments to informants. *See, e.g., United States v. Feng,* 277 F.3d 1151, 1154 (9th Cir. 2002) (prosecutor offered letters recommending grant of asylum to deportable witnesses); *United States v. Mattarolo,* 209 F.3d 1153, 1160 (9th Cir. 2000) (offering leniency in sentencing did not violate § 201(c)(2)); *United States v. Smith,* 196 F.3d 1034, 1038-40 (9th Cir.1999) (offering immunity from prosecution did not violate statute). Defendant concedes this, as he must. Def.'s Mot. p. 21-25.[4/]

Even when the incentive goes beyond simply allowing a witness to continue paying his obligations, and actually rises to the level of affirmative monetary payment to the witness for his cooperation, there is no § 201(c) violation. In *United States v. Ihnatenko*, 482 F.3d 1097, 1099 (9th Cir. 2007), the Assistant U.S. Attorney offered a cooperating witnesses three types of benefits: "(1) cash payments to housing providers and to him and his family in excess of $200,000 over a fifteen-month period; (2) promises not to prosecute him or his daughter for any drug crimes; and (3) provision of resident alien cards allowing Franco and his family to live and work in this country." The Ninth Circuit accepted, without need for further discussion, that existing precedent provided that § 201(c)(2) did not prohibit the government from providing immigration benefits or immunity from prosecution to a cooperating witness. *Id.* (citing *Feng* and others). As to the payment of cash benefits, the court noted that the defendants faced a high burden, since every circuit that had considered the matter had held that §201(c)(2) does not prohibit such incentives. *Id., citing United States v. Mojica-Baez,* 229 F.3d 292, 301-02 (1st Cir.2000); *United States v. Febus,* 218 F.3d 784, 796 (7th Cir.2000); *United States v. Harris,* 210 F.3d 165, 167 (3d Cir.2000); *United States v. Anty,* 203 F.3d 305, 311 (4th Cir.2000); *United States v. Barnett,* 197 F.3d 138, 144-45 (5th Cir.1999); *United States v. Albanese,* 195 F.3d 389, 394-95 (8th Cir.1999); and *United States v. Harris,* 193 F.3d 957, 958 (8th Cir.1999). Discussing the vital role that informants play in infiltrating and prosecuting criminal enterprises, and Congress's statutory approval

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[4/] Defendant cites a number of out of circuit decisions that in dicta refer to the outer limits of what a prosecutor may appropriately offer – but none of these actually find an incentive inappropriate. The closest Defendant comes is a Seventh Circuit case in which the court "sharply criticized" an incentive structure that provided a witness at 25% commission on moneys recovered as a result of a defendant's conviction – but still did not find that this incentive structure violated the anti-bribery statute, that testimony should be excluded, or the case should be dismissed. Def.'s Mot. p. 25.

of benefits to informants reflected in the Witness Security Reform Act, the Ninth Circuit joined with the others in holding "that 18 U.S.C. § 201(c)(2) does not prohibit the government from paying fees, housing, expenses, and cash rewards to any cooperating witness, so long as the payment does not recompense any corruption of the truth of testimony." *Id.* at 1100.[5/] *See also United States v. Shelton*, 588 F. 2d 1242, 1246 (9th Cir. 1978) ("Informants fees [paid to informants who testify] are neither unlawful nor unduly prejudicial per se").

If outright cash payments, agreements not to prosecute family members, and immigration benefits do not rise to the level of atypical incentives, then allowing a witness to continue to pay existing mortgage obligations, even if true, falls far short of an improper benefit in violation of the anti-bribery statute or the due process clause.

3. Exclusion of Evidence Is Not Appropriate

Even if defendant Michael's meritless claim were supported, a violation of 18 U.S.C. § 201(c) may not be remedied by exclusion of evidence. The Ninth Circuit has expressly rejected the use of the exclusionary rule in this context, noting that the exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights. *See Smith,* 196 F.3d at 1040; *Feng,* 277 F.3d at 1154. The law does not allow judicial creation of a remedy for a statutory violation where the statute itself provides the remedy. *Smith,* 196 F.3d at 1040, citing *United States v. Frazin,* 780 F.2d 1461, 1466 (9th Cir. 1986). The statue Defendant cites provides the remedy: criminal prosecution leading to imprisonment and/or fine. *See* 18 U.S.C. § 201(c). Exclusion is simply not available as a remedy in the case law. *See, e.g., United States v. Flores,* 172 F.3d 695, 699 (9th Cir. 1999) (noting that "No court had ever excluded evidence on the ground that the government violated section 201(c)(2).") (citing cases). *See also Darden v. United States,* 405 F.2d 1054, 1056 (9th Cir.1969) ("The fact of a bargain, or of the hope or expectation of leniency, affects only the weight of the testimony, not its admissibility.").

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[5/] There is no indication that any benefit Kontogiannis received in his plea agreement corrupted or will corrupt his testimony. Defendant, armed with all of the information at his disposal that he recites in his pleading, will have every opportunity to cross-examine Kontogiannis if he is called as a witness at trial and uncover any corruption of the truth of his testimony.

4. Dismissal, Available for Outrageous Government Misconduct, Is Unwarranted

While defendant Michael relies on argument and case law concerning violations of 18 U.S.C. § 201(c) by prosecutors, his real argument seems to be that, by allegedly committing misprision of a felony and bribery of a witness, the government attorneys are engaging in such outrageous misconduct that the case should be dismissed.[6/]

A defendant asserting outrageous government conduct must show "that the government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed." *United States v. Montoya,* 45 F.3d 1286, 1300 (9th Cir. 1995). Under this doctrine, an indictment should be dismissed "only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice." *Id.* (citations omitted). *See also United States v. Garza-Juarez,* 992 F.2d 896, 904 (9th Cir. 1993); *United States v. Russell,* 411 U.S. 423, 431-32 (1973). This is an "extremely high standard." *United States v. Smith,* 924 F.2d 889, 897 (9th Cir. 1991).

The Ninth Circuit has thus far recognized two general situations in which government conduct may rise to the level of outrageousness: (1) when the government engages in brutal physical or psychological coercion, *United States v. Bogart,* 783 F.2d 1428, 1435 (9th Cir.), *vacated on other grounds sub nom., United States v. Wingender,* 790 F.2d 802 (9th Cir. 1986) (vacating only as to another defendant); *see United States v. Kelly*, 707 F.2d 1460, 1476 n. 13 (D.C. Cir. 1983) (listing cases involving brutal coercion); and (2) when government agents "engineer and direct the criminal enterprise from start to finish" so that the "conduct constitutes, in effect, the generation by police of new crimes for the sake of pressing criminal charges against the defendant," *Bogart,* 783 F.2d at 1436; *Smith,* 924 F.2d at 897; *see United States v. Twigg,* 588 F.2d 373, 380-82 (3d Cir. 1978) (dismissing indictment where government informant operated a drug laboratory and directed the defendant's minimal involvement in the lab's activities); *Greene v. United States,* 454 F.2d 783, 787 (9th Cir. 1971) (dismissing indictment where government officials reestablished and ran a criminal bootlegging operation).

Neither of these situations is applicable here. Defendant Michael does not contend that the government prompted Kontogiannis to develop a sophisticated mortgage fraud scheme for the mere

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[6/] Defendant raises this issue in a footnote 36 pages into his brief. Def.'s Mot. p. 36 n. 5.

purpose of ensnaring his poor unsuspecting nephew. And, as discussed above, federal courts have authorized the government's use of monetary incentives, immigration benefits, and offers of leniency and immunity to secure the testimony of witnesses. These do not rise to a violation of defendant Michael's due process rights. *See United States v. Cuellar*, 96 F.3d 1179, 1182, 1183 (9th Cir. 1996) ("[W]e hold that paying an informant based on a percentage of laundered funds and on results obtained in an extensive undercover operation did not constitute outrageous government conduct in violation of Cuellar's rights to due process.").

Because there was no government misconduct, and any of the alleged government action or inaction alleged by defendant Michael would not violate federal law or the due process clause, neither exclusion of any evidence nor dismissal of the indictment is appropriate. The government submits that defendant's Michael's motion to exclude evidence or dismiss should be denied.

B. DISQUALIFICATION OF THE ENTIRE UNITED STATE'S ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF CALIFORNIA, THE ASSIGNED PROSECUTORS, OR AUSA HALPERN IS UNWARRANTED

Defendant Michael next argues that the entire United States Attorney's Office for the Southern District of California ("USAO"), or, in the alternative, the AUSAs currently assigned to the case, or, in the alternative, AUSA Halpern, should be disqualified from this matter. Defendant claims that the USAO's participation "raise[s] grave concerns as to whether the prosecution of Mr. Michael has been affected by improper favoritism" toward co-conspirator Kontogiannis. Def.'s Mot. p. 34.

The disqualification of government counsel is a "drastic measure and a court should hesitate to impose it except where necessary." *United States v. Bolden*, 353 F.3d 870, 878 (10th Cir. 2003) (citation and quotation omitted). Accordingly, courts have allowed disqualification of government counsel only in limited circumstances. *See, e.g., Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (actual conflict of interest because appointed prosecutor also represented another party); *United States v. Heldt*, 668 F.2d 1238, 1275 (D.C. Cir. 1981) (*bona fide* allegations of bad faith performance of official duties by government counsel in a civil case); *United States v. Prantil*, 764 F.2d 548, 552-54 (9th Cir. 1985) (prosecutor who will act as a witness at trial). *Cf. United States v. Regan*, 103 F.3d 1072, 1083 (2d Cir. 1997) (a prosecutor will be disqualified based on her status as a witness only when there is a "compelling and legitimate reason" to call her as a witness).

There is little case law concerning the recusal or disqualification of a prosecutor for "conflict of interest" due to an alleged interest in the outcome of the proceeding. *See, e.g.*, "What Circumstances Justify Disqualification of Prosecutor in Federal Criminal Case," 110 A.L.R. Fed. 523 § 7[a]; *see also* 18 U.S.C. § 208(a) (government employee may not participate in matter in which she or spouse has a financial interest); 28 C.F.R. § 45.2 (prohibiting Justice Department employee from participating in a prosecution if he or she has a personal relationship with anyone with "a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution").[7/]

Whatever the standard for recusal is, it is higher than the showing required to recuse a judge. As the Supreme Court has explained, courts may "require a stronger showing for a prosecutor than a judge in order to conclude that a conflict of interest exists." *Young*, 481 U.S. at 811. *See also United States v. Tierney*, 947 F.2d 854, 864-86 (8th Cir. 1991) (following *Young* plurality and rejecting defendant's reliance on cases and statutes concerning judicial recusals). This is because "[t]rue disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury – not the prosecutor." *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (recognizing that a prosecutor need not be entirely disinterested to prosecute a case). "Prosecutors need not be entirely 'neutral and detached.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (citation omitted). *See also United States v. Vega*, 317 F.Supp.2d 599, 602 (D. V.I. 2004) (a prosecutor is not expected to be as guardedly neutral as a judge).

"Further, because disqualifying government attorneys implicates separation of powers issues, the generally accepted remedy is to disqualify a specific Assistant United States Attorney . . . not all the attorneys in the office." *Bolden*, 353 F.3d at 879 (internal quotation and citation omitted) Disqualification of an entire U.S. Attorney's office is nearly unprecedented. *See, e.g., United States v. Whitaker*, 268 F.3d 185 (3d Cir. 2001) (reversing disqualification of an entire U.S. Attorney' s Office); *United States v. Caggiano*, 660 F.2d 184, 190-91 (6th Cir.1982) (same); *Vega*, 317 F. Supp 2d at 605 (denying motion to disqualify an entire U.S. Attorney's Office). *See also Bolden*, 353 F.3d at 876 (noting that disqualifying an entire U.S. Attorney's office is almost always reversible error).

[7/] Section 45.2 "is not intended to create rights enforceable by private individuals or organizations." *See* 28 C.F.R. § 45.2(d).

Analysis of the few cases that grant this extraordinary remedy quickly reveals that they are completely inapposite. For example, in *United States v. Dyess,* 231 F. Supp. 2d 493 (S.D.W.Va. 2002), the U.S. Attorney's Office prosecuting the case managed case agents and witnesses who by their own admission "stole drug proceeds, suborned perjury, lied under oath, and tampered with witnesses." *Dyess,* 231 F. Supp. 2d at 495. Defendant's allegations do not begin to approach the conduct described by the Court in *Dyess*.[8/]

The government does not dispute the main facts underlying defendant Michael's claim of a conflict: that AUSA Philip L.B. Halpern had an uncle named Leonard Halpern who lived on the same street in New York as Kontogiannis, and whose widow or estate apparently sold a house to Kontogiannis's daughter Annette Apergis and her husband Elias. (Whether the funds used for the purchase were "dirty," or the sale was tardily recorded, are not even logically related to any alleged conflict.[9/])

[8/] A more thorough review of the *Dyess* case reveals one of the key government witnesses, Ursula Dyess, had divorced the defendant and had subsequently married a government agent who had investigated a multi-defendant narcotics conspiracy. According to Ursula Dyess, she began her sexual relationship with the agent in 1999 (before the defendant pleaded guilty). The agent encouraged her to lie to the court, concealed Ursula Dyess's failed polygraph from the government, and accepted $80,000 in drug proceeds from Ursula Dyess while tendering only $41,000 to the government. *Id.* at 495. Under these extreme facts, where "[t]he lead AUSA who prosecuted this case also managed the agents and witnesses who allegedly (and by their own admissions) stole drug proceeds, suborned perjury, lied under oath, and tampered with witnesses," *id.*, the Court disqualified the entire USAO, as the lead AUSA and other AUSAs had worked with the agent and would likely be necessary witnesses to testify as to "what the Government knew and when the Government knew it, about the alleged misconduct and improprieties of the Government's own agents, particularly investigative officers." *Id.* at 496.

[9/] Defendant Michael claims that Kontogiannis's daughter Annette Apergis used the same bank account to pay part of a down payment for Leonard Halpern's house in February 2005 that Kontogiannis had used to launder co-conspirator Brent Wilkes's bribe to Cunningham a year earlier. Def.'s Mot. p. 16. But the funds did not actually come from that account, because Apergis's check bounced. Another company controlled by Kontogiannis wired money to Apergis's account to cover the check. *Id.* The import of these allegations is that money for the purchase may have come through multiple accounts, and may have constituted the proceeds of criminal activity. These implications are unsurprising for an individual who is a convicted money launderer. These allegations, however, do not advance the instant motion.

Defendant Michael further alleges that Apergis did not record the deed to the purchase until March 1, 2007. The only benefit out of the delayed recording would accrue to Apergis, by delaying payment of taxes and fees, not to Leonard Halpern's estate. Furthermore, the records indicate that defendant Michael's company, Coastal Capital, supplied the purchase-money mortgage for Apergis's purchase of the house, in a mortgage executed on June 20, 2005, but similarly not recorded until March 1, 2007. Def.'s Mot. Ex. 32. Since defendant Michael was president of Coastal Capital in 2005, it appears that if there was a delay in recording the documents, then Defendant shares in responsibility.

As AUSA Halpern's Declaration makes clear, however, these facts never influenced the government's actions in this case, and indeed were largely unknown until defendant Michael filed his motion.[10/]

The few cases addressing disqualification of government counsel feature more problematic circumstances, but still the courts found no disqualifying interest. For example, in *Tierney,* the husband of the AUSA prosecuting the case was a partner in a law firm representing defendant's insurer, and the insurer was suing the defendant to rescind the policy. The husband did not work on the case. Although the insurer would benefit from a guilty verdict, the Eighth Circuit agreed with the district court that any interest imputed to the AUSA through her husband was "simply too insubstantial to require disqualification of a partner's spouse in related litigation," even though her husband, as a partner in the law firm suing the defendant, "may have an interest in prevailing" due to a conviction. *See Tierney,* 947 F.2d at 865.

In *Wright v. United States,* 732 F.2d 1048 (2d Cir. 1984), an attorney named Carol Ziegler led a public campaign against the defendant, and offered her assistance (and her office's assistance) to agencies investigating the defendant. She also lodged complaints against the defendant for a "violent episode" that she blamed on the defendant. *Id.* at 1053. The first AUSA assigned to the investigation recommended a declination. After the declination recommendation, the case was reassigned to a line AUSA, who had met Ziegler during the investigation and subsequently married her. The line AUSA then brought a second investigation into the defendant's activities, and this second investigation eventually led to the defendant's indictment and conviction. The Second Circuit criticized the U.S. Attorney's Office for designating the line AUSA as the lead prosecutor on the case, as Ziegler (the line AUSA's wife) "almost certainly harbored personal animosity against" the defendant, which "created

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[10/] The only evidence defendant Michael points to that amounts to even a whiff of a hint of a suggestion of something untoward about Kontogiannis's guilty plea is Kontogiannis's own boast to Defendant that he had a connection with AUSA Halpern. Def.'s Mot. p. 15. Of course, Kontogiannis is the same individual whom Defendant calls a "remorseless and manipulative sociopath" who is "unworthy of belief." Def.'s Mot. p. 29-30.

Defendant supplies only inference and his own forensic investigation to support his claim that the government even knew about Annette Apergis's purchase of Leonard Halpern's house. Def.'s Mot. p. 17-18. His inference is pure speculation and insufficient to support his claim. Moreover, the documents that Defendant received in discovery are the same ones – with original markings and in original form – the government recovered from various sources. With what markings and in what size these documents came into the government's custody does not substantiate Defendant's claim.

an appearance of impropriety." *Id.* at 1055. Despite the "appearance of impropriety," the Second Circuit recognized that "a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged". *Id.* at 1056.

The Second Circuit then noted that the indictment was signed by the U.S. Attorney, and not the line AUSA. Moreover, "even if we interpret the facts most adversely to [the defendant's] prosecutors, 'they were not utilizing the criminal process to advance their own pecuniary interests,'" as Ziegler's interest "was not a pecuniary interest in utilizing the criminal process to further her position in civil litigation but a public one in the condemnation of a man whom she thought, whether for good reasons or for bad, to have violated the public trust." *Id.* at 1058. In short, "with the facts taken at their worst against the Government, [the case] did not present the spectacle of a prosecutor's using the 'awful instruments of the criminal law' for the purpose of private gain." *Id.*

In the present case, defendant Michael does not to articulate any even remotely possible gain that AUSA Halpern could have received from Kontogiannis's daughter purchasing a house from the estate of an uncle whom he had last seen over eight years ago. *See Declaration of AUSA Halpern* at ¶ 6. Further, defendant Michael does not, and cannot, demonstrate that AUSA Halpern had any financial interest whatsoever as he was not an heir to his uncle's estate and received nothing as a result of the sale of the house. *Id.* at ¶ 7.

AUSA Halpern's "relationship" or, more appropriately put, lack of one with Kontogiannis clearly places the instant case far beyond *Tierney* and *Wright*. AUSA Halpern does not have a financial or personal interest in the outcome of this litigation, and had no financial interest in the outcome of the sale of Leonard Halpern's house. Indeed, the fact that Kontogiannis's daughter purchased in an estate sale AUSA Halpern's uncle's house in an unrelated transaction would not warrant recusal of AUSA Halpern even if he were the presiding judge in this matter, despite the greater need and interest in ensuring the impartiality of judges. *See, e.g., United States v. Young*, 39 F.3d 1561, 1570 (10th Cir. 1994) ("The former business dealings between Judge Butler and a potential defense witness in this case simply do not rise to the level of manifest conflict of interest" requiring recusal); *United States v. Mady*, 2006 WL 2420513 (E.D. Mich. 2006) ("[A] judge's friendships or other social relationships do not require recusal if there are no facts which support a reasonable inference of lack of impartiality with regard to the issues presented in the lawsuit").

Defendant's motion to disqualify is meritless with regard to AUSA Halpern, and frivolous as to any other AUSA or the entire USAO. Defendant Michael's motion to disqualify, and for an evidentiary hearing, should be denied.

C. A BILL OF PARTICULARS IS UNNECESSARY

Defendant Michael moves for a bill of particulars in relation to the obstruction of justice count. Under Federal Rule of Criminal Procedure 7(f), a defendant "may move for a bill of particulars before or within 10 days after arraignment *or at a later time if the court permits*." Fed. R. Crim. P. 7(f) (emphasis added). In asking permission to file a tardy motion for a bill of particulars, a defendant must explain why the motion was filed so late, and the motion may be denied on the basis of untimeliness alone. *United States v. Pyke*, 271 F. Supp. 359, 359 (S.D.N.Y. 1967). Defendant Michael has provided no justification for filing his motion so late.

The purposes of a bill of particulars are threefold: (1) to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial; (2) to avoid or minimize the danger of surprise at the time of trial; and (3) to enable him to argue that the prosecution should be barred for a violation of Double Jeopardy. *United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991); *see also United States v. Robertson*, 15 F.3d 862, 873-74 (9th Cir. 1994), *rev'd. on other grounds*, 514 U.S. 669 (1995); *United States v. DiCesare*, 765 F.2d 890, 897, *as amended*, 777 F. 2d 543 (9th Cir. 1985); *United States v. Mitchell*, 744 F.2d 701, 705 (9th Cir. 1984); *United States v. Giese*, 597 F.2d 1170, 1180-81 (9th Cir. 1979). "Acquisition of evidentiary detail is not the function of a bill of particulars." *United States v. Torres*, 901 F.2d 205, 234 (2d Cir. 1990).

The Court may look beyond the indictment and consider "all other disclosures made by the government" in determining whether the defense has been adequately advised of the charges. *Giese*, 597 F.2d at 1180. "Full discovery will obviate the need for a bill of particulars." *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983); *accord Mitchell*, 744 F.2d at 705 ("The[] purposes [for a bill of particulars] are served if the indictment itself provides sufficient details of the charges and if the Government provides full discovery to the defense.") (citation omitted). *See also United States v. Carpenter*, 35 F.Supp.2d 1189, 1193 (N.D. Cal. 1999) ("Even if an indictment is vague, a bill of particulars is not necessary if the government's disclosures and discovery adequately advise the defendant of the charges against him.").

The notice provided by the Superseding Indictment more than adequately advises defendant Michael of the bases of the charge against him. Count 26 of the Superseding Indictment alleges that "[f]rom on or about August 2, 2005 through at least August 12, 2005," defendant Michael:

> did corruptly and with improper purpose endeavor to influence and impede a federal grand jury investigation by knowingly and intentionally doing, among other things, the following: (1) providing false and misleading testimony to the grand jury regarding the source of the down payment for coconspirator Cunningham's purchase of the Arlington Condominium; (2) providing false and misleading testimony to the grand jury concerning Cunningham's $500,000 second mortgage on his Rancho Santa Fe Home, including but not limited to, testimony about the issuance, servicing, sale, and payoff of the mortgage; and (3) causing to be provided to the grand jury, in response to subpoenas, documents that had been altered and created to distort the transactions that the documents purported to reflect.

The Superseding Indictment thus identifies two specific topic areas about which defendant Michael made statements (the source of the down payment for Cunningham's Arlington condominium, and Cunningham's $500,000 second mortgage), and a very narrow time period during which the government alleges both the false statements and the altered documents were supplied: August 2-12, 2005. Despite this specificity about a brief (62-page) grand jury transcript and a brief period of production of documents, defendant Michael demands to know specific "portions of Mr. Michael's grand-jury testimony alleged to be false and misleading," and "documents and portions of particular documents" alleged to be misleading. Def.'s Mot. p. 37.

In the first place, defendant Michael misapprehends the charge against him, which is not perjury or false statements, but obstruction of justice, which requires no specific false statement or document.

More significantly, defendant Michael is attempting to misuse FRCP 7(f). A bill of particulars may ***not*** be used to compel the government to disclose the "manner in which it will attempt to prove the charges, the precise manner in which the defendants committed the crimes charged, or a preview of the Government's evidence or legal theories." *United States v. Sattar*, 272 F. Supp. 2d 348, 375 (S.D. N.Y. 2003); *see United States v. Rittweger*, 259 F. Supp. 2d 275, 291 (S.D.N.Y. 2003) (government does not have to provide the "precise manner" in which the defendants committed the crime charged). That is clearly the aim of defendant Michael's motion.

In this case, the government has provided extensive discovery that permits defendant Michael to understand the charges, and has even provided *Jencks* Act statements months before the trial date. As defendant Michael's oversize brief demonstrates, he is fully aware of the evidence provided in

discovery. Kontogiannis's Plea Agreement, the testimony of grand jury witnesses, and the dated subpoena documents shed light on the statements alleged to be false and misleading as well as the documents Defendant is alleged to have altered. The charging document and available discovery sufficiently inform Defendant of the charges against him to enable him to prepare his defense.[11/]

In light of the specificity of the Superseding Indictment, the full and prompt discovery provided, and the additional particulars provided in this motion response, the Court should deny the defendant Michael's motion for a bill of particulars.[12/]

D. BRADY/BAGLEY/GIGLIO MATERIAL AND TRIAL EXHIBITS

Defendant Michael asks that the government be ordered to identify exculpatory material and trial exhibits. The Court has already asked, and the government agreed, to make provide a tentative list of trial exhibits by September 4. That aspect of the motion is thus moot.

With respect to exculpatory material, the law is clear that the government may make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed. *United States v. Pelullo,* 9 F.3d 197, 212-13 (3rd Cir. 2005); *United States v. Estate of Parsons,* 367 F.3d 409 (5th Cir. 2004)) ("there is no authority for the proposition that the government's Brady obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over"); *United States v. Parks,* 100 F.3d 1300, 1307 (7th Cir.1996) ("Brady [does not] require [ ] the Government to carry the burden of transcribing [65 hours of intercepted conversations]" because the defendants "had been given the same opportunity as the government to discover the identified documents" and "information the defendants seek is available to them through the exercise of reasonable diligence") (internal quotations and citation omitted); *see also*

[11/] Defendant's motion is especially ironic given that counsel for the government, along with agents from the FBI and IRS, spent well over an hour with then-newly-retained defense counsel at a meeting on or about April 12, 2007, explaining the obstruction charge, the government's case, and defendant Michael's potential exposure, all in an effort to resolve the case against defendant Michael prior to superseding the indictment in May. As part of that hearing, AUSA Halpern walked present defense counsel through much of defendant Michael's jury transcript, line-by-line, discussing various statements that the government believed were inaccurate.

[12/] However, in recognition of the Court's interest in allowing the trial to proceed expeditiously as set, the government identifies the allegedly altered documents as the payment histories for the Cunningham second mortgage that defendant Michael prepared for the grand jury.

United States v. Mulderig, 120 F.3d 534, 541 (5th Cir.1997) (finding no *Brady* violation where government gave defense access to 500,000 indexed pages of discovery); *United States v. W. R. Grace*, 401 F.Supp.2d 1069, 1080 (D.Mont. 2005) ("*Brady* simply requires that information be produced in such a way that it will be of value to the accused") (finding no *Brady* violation where government produced over 3 million pages of discovery in searchable format, and over half were documents obtained from defendants). *Cf. United States v. Weiner*, 578 F.2d 757, 767 (9th Cir. 1978) (affirming district court's denial of request that prosecution submit all discovery so court could ferret out possible *Brady* material).

Because "materiality" turns on whether disclosure would have created a reasonable probability of a different result at trial, the actual scope of the government's *Brady* obligations can only be decided after the trial itself. *See United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001):

> although obligations under *Brady* may be thought of as constitutional duty arising before or during trial, scope of government's constitutional duty -- and, concomitantly, the scope of a defendant's constitutional right -- is ultimately defined retrospectively, by reference to likely effect that suppression of particular evidence had on outcome of trial.

Defendant Michael's fanciful reading of what constitutes exculpatory information in this case renders even more difficult his demand that the government identify *Brady* material. He identifies, for example, Kontogiannis's Plea Agreement as exculpatory as to defendant Michael, because Kontogiannis "did not claim in his plea agreement that Mr. Michael had knowingly participated in a bribe of Cunningham." Def.'s Mot. p. 8. Defendant, as he certainly recognizes, is charged with a conspiracy to commit wire fraud, bribe a public official, and launder money. *See* Superseding Indictment; Def.'s Mot. p. 3. Kontogiannis affirmed under penalty of perjury that Defendant knowingly participated in a scheme to launder the $200,000 payment from Kontogiannis to Cunningham, and to pay off Cunningham's $500,000 mortgage on his Rancho Santa Fe home by siphoning $512,538.75 off a separate and fraudulent mortgage scheme. *See* Def.'s Mot. Ex. 1 p. 3-5. In the government's view, this information is highly incriminating, not exculpatory, as to Defendant with respect to the charges levied against him in this case. If defendant Michael were so convinced that Kontogiannis provides exculpatory information, it is difficult to see why he would be moving this Court to exclude

Kontogiannis's testimony or dismiss this case entirely on the possibility that the government could use Kontogiannis as a witness against him.[13/]

The case defendant Michael cites as supporting his notion that the government is required to identify exculpatory material, *United States v. Locascio,* 2006 WL 2796320, *7 (D. S.C. 2006), in fact does not. In that case, while noting the government's *Brady* obligation, the district court's order required that the government identify in advance of trial which of the 3000 patient files it would be using at trial. The material ordered to be identified was therefore not exculpatory, but inculpatory – essentially the same order this Court has already entered by asking the government to identify its trial exhibits .

The government has agreed to identify the exhibits it will be using at trial, nearly a full month before the trial is scheduled to begin. Defendant's motion should be denied.

E. THERE IS NO AUDIOTAPE OF DEFENDANT'S GRAND JURY APPEARANCE

Defendant Michael has moved for production of any audiotape of his August 2, 2005 grand jury appearance. In this district, grand jury proceedings are recorded via court reporter. The government has been informed by the court reporter that no audio tape exists for the proceeding on August 2, 2005.

F. DEFENDANT'S EXPERT WITNESS AND RULE 404(b) NOTIFICATION MOTIONS

Defendant Michael has moved for immediate notice of any expert testimony and any Rule 404(b) evidence. The government does not intend to present any such evidence.

With respect to expert witnesses, the government does not intend to call expert witnesses with respect to defendant Michael's case. Of course, percipient witnesses such as Defendant's former employees will testify about mortgage loan procedures, but there will be no hired experts on these topics.

With respect to Rule 404(b) evidence, the government's view is that defendant Michael's fraudulent loan and money laundering business is inextricably intertwined with the money laundering alleged to have occurred in relation to Cunningham's mortgage loans. Any evidence falling under Rule 404(b) will be addressed in the government's motions *in limine* filing.

[13/] The government is similarly perplexed as to how Cunningham's interview constitutes exculpatory material. That the person laundering money does not know all the convoluted avenues through which the money passes (or the people involved) before it reaches its intended destination is not particularly exculpatory; it simply suggests a good money laundering scheme.

G. COURT SHOULD REAFFIRM ITS DECISION TO HOLD 6(e) HEARING, IF AT ALL, AFTER TRIAL

Defendant Michael again asks this Court to dismiss the indictment or hold an evidentiary hearing on alleged leaks of grand jury information. On July 9, 2007 this Court denied without prejudice co-defendant Wilkes's motion to dismiss due to outrageous government misconduct in connection with alleged leaks of grand jury information. The Court has indicated that it would consider conducting the hearing requested by defendant Wilkes after the trial, should there be a conviction. There is no new information or reason to revisit this issue. The Court should deny without prejudice with respect to defendant Michael as well.

III

CONCLUSION

For the above reasons, the government respectfully requests that this Court deny Defendant's motions.

DATED: August 29, 2007

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ Sanjay Bhandari
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRENT ROGER WILKES (1), JOHN THOMAS MICHAEL (2), Defendants.	Criminal Case No. 07CR0330-LAB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Valerie H. Chu, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT MICHAEL'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO DISQUALIFY, AND FOR OTHER RELIEF** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Mark Geragos (Counsel for Defendant Wilkes)

2. Raymond Granger (Counsel for Defendant Michael)

I hereby certify that I shall cause to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

NONE

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 29, 2007

/s/ Valerie H. Chu
VALERIE H. CHU