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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(**HONORABLE GONZALO P. CURIEL**)

UNITED STATES OF AMERICA,

Plaintiff,

v.

[REDACTED] [REDACTED] [REDACTED] (5),
Defendant.

Criminal No. 18cr5382-GPC

**Reply Brief in Support of Motions
To Dismiss**

I.

Introduction

[REDACTED] [REDACTED] [REDACTED] submits this reply brief in support of his motions to dismiss. He also joins his codefendants' objections to the government's assertions of facts that are not in the record or that have not been disclosed to the defense (e.g., citations to documents submitted in camera, statements about what allegedly took place before the grand jury, and statements of fact lacking any citation whatsoever) and his codefendants' request for an evidentiary hearing.

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II.

The government continues to misrepresent the facts and the evidence from the CWA case, which demonstrates a vindictive motive underlying this successive prosecution.

A. *Despite defense counsel's repeated requests, the government did not identify until its opposition to [REDACTED] [REDACTED] motions to dismiss in this case the additional, relevant discovery produced [REDACTED] 1, and November 7, 2017.*

In its opposition, the government states that “Pre-Plea Discovery was Provided,” and that undersigned counsel did not “initially seek to obtain copies of the discovery.”¹ It also suggests that counsel misrepresented to this Court and to Judge Benitez that he had appended all the relevant discovery to [REDACTED] [REDACTED] objections to the PSR in the CWA case.² Those contentions are misleading.

First, the government did not provide pre-plea discovery regarding the plant disruption. On March 26, 2017, Knut Johnson, then counsel for [REDACTED] [REDACTED] made a request for that discovery on behalf of “all three [defendants] as our positions overlap.”³ The government refused that request.⁴ Indeed, although capable of producing 12,367 pages of payment records regarding dump fees in pre-plea discovery,⁵ the government did not – contrary to its section heading – produce “Discovery Related to the NCWRP . . . as it was Received.”⁶ The case agents interviewed the plant operator, [REDACTED] [REDACTED] on February 20, 2017, and obtained power point presentations from the city’s consultants, yet neither the report of that interview nor the work product of the consultants was disclosed until after all the defendants had pleaded guilty on June 1. Additionally, the

¹ Doc. 134 at 6, 4 (emphasis in original).

² *See id.* at 11.

³ Doc. 110-5 at 2 (Exhibit C to [REDACTED] [REDACTED] motions at 1).

⁴ *See id.* at 3 (Exhibit C to [REDACTED] [REDACTED] motions at 3) (“I appreciate the concerns you raised However, I don’t believe [REDACTED] should be an impediment to an agreement in this matter.”).

⁵ Doc. 134 at 6.

⁶ *Id.* (emphasis in original).

1 government received pertinent emails and spreadsheets from the city in July 2016 and in
 2 February and March 2017, yet disclosed none of that material until after the guilty pleas
 3 on June 1, 2017.⁷

4 Second, undersigned counsel neither failed to request discovery nor intentionally
 5 misrepresented the status of the discovery to the court. On the contrary, he made repeated
 6 requests for the pertinent discovery and the prosecutor led him to believe that he had
 7 identified all of it.

8 When the government notified defense counsel of its first, post-plea discovery
 9 production, it characterized that production as “6-8 terabyte[s]” of “what was seized from
 10 [REDACTED] during the search warrant.”⁸ Because counsel had no need to review “what was
 11 seized from [REDACTED] he did not request a copy of that initial production. Unbeknownst
 12 to counsel, that production also contained three relevant spreadsheets provided by
 13 [REDACTED]

14 On December 7, 2017, undersigned counsel sent the first of at least five emails
 15 requesting the discovery relevant to the plant disruption.⁹ He also delivered a 1 terabyte
 16 hard drive to the USAO, specifically for the purpose of obtaining all the NCWRP
 17 discovery (as well as discovery relevant to the uncharged misconduct that appeared in the
 18 PSRs). The government did not put the November 10, 2017 production¹⁰ (which, as
 19

20 ⁷ See Exhibit B (spreadsheets produced on June 1, 2017), Exhibit C (emails
 21 produced on November 7, 2017), and Exhibit D (spreadsheet produced on November 7,
 2017).

22 ⁸ Exhibit A at 1. Exhibit A is a series of emails documenting undersigned counsel’s
 23 repeated discovery requests. In its opposition, the government alleged that counsel had
 24 violated Civil Local Rule 83.9 by appending a similar exhibit to [REDACTED] motions to
 25 dismiss. The undersigned does not agree with the government’s [REDACTED] n of that rule,
 26 which is directed at ex parte communications with the court. *See id.* Moreover, if the
 government’s interpretation of the rule is correct, the prosecutor herself violated it by
 27 appending an email chain originated by Agent Carroll to a previous opposition brief. *See*
 28 Doc. 82-2 at 7-8.

⁹ *See id.* at 7-17.

¹⁰ The November 10, 2017 production contained the same three spreadsheets that
 were produced on June 1, 2017 (Exhibit B), several emails to and from [REDACTED]

1 addressed below, completely disproved the government’s “circumstantial” theory) on that
 2 hard drive, however. And despite counsel repeatedly expressing his concerns that he
 3 didn’t “have everything,” the government never made him aware of its relevance.¹¹

4 Indeed, for the express purpose of confirming that he had found all the relevant
 5 discovery, the undersigned went so far as to itemize everything that he had identified in
 6 an email to the prosecutor.¹² She replied, “[t]hat sounds like you have found everything
 7 although I don’t want you to rely on that. I have some deadlines on other cases so I don’t
 8 have time right now to comb through it to make sure that’s every mention of the issue.”¹³

9 Counsel then specifically inquired again, informing the prosecutor that he had not
 10 found any evidence relevant to the government’s claim “that things got better [at the
 11 NCWRP] after the summer 2016.”¹⁴ The prosecutor did not directly respond to that
 12 inquiry. She instead replied that she had “forwarded [the] request to the case agent” and
 13 then asked about a continuance.¹⁵ Undersigned counsel agreed to the continuance but also
 14 asked “if [he] could get an answer to [his] questions today.”¹⁶ The prosecutor replied, “I
 15 can tell you that you have all the records currently in our possession on the subject.”¹⁷
 16 The case agent never responded to this request.

17 Based on the prosecutor’s answers to his inquiries, undersigned counsel
 18 represented to the district court repeatedly throughout the pendency of the CWA case that
 19 he had appended the “universe of [relevant] evidence” to [REDACTED] [REDACTED] objections to the
 20

21 (Exhibit C) and an additional spreadsheet containing data from March 2017 (Exhibit D).

22 ¹¹ Exhibit A at 15; *see also id.* at 7, 11, 12, 13, and 17.

23 ¹² *Id.* at 15.

24 ¹³ *Id.*

25 ¹⁴ *Id.* at 17.

26 ¹⁵ *Id.*

27 ¹⁶ *Id.*

28 ¹⁷ *Id.* at 18.

1 PSR.¹⁸ Not once did the government object to that representation (or in any way try to
 2 correct it) until its opposition to the current motions to dismiss. Perhaps that is because
 3 the discovery that undersigned counsel had been unable to find was overwhelmingly
 4 exculpatory.

5 *B. The discovery that the prosecutor failed to identify in response to counsel's*
 6 *repeated inquiries during the CWA case utterly disproved the government's*
"circumstantial" case; it should have been produced before the guilty pleas.

7 As a frame of reference, in the opposition, the government reminds us that
 8 "[c]onsistently during the plea negotiations the government informed defense counsel
 9 that the basis for its position . . . was circumstantial, resulting from *spikes of ammonia at*
 10 *the plant during the time when the [REDACTED] trucks were dumping . . . and improvement*
 11 *at the plant once the discharges ceased.*"¹⁹ And while the opposition points to a February
 12 24, 2017 email from [REDACTED] to the case agent, stating that "you can definitely see
 13 spikes in [] ammonia . . . between . . . 1400 – 1600 as you mentioned,"²⁰ it fails to identify
 14 for this Court either [REDACTED] follow-up correspondence or the additional data he
 15 provided, which completely debunked the government's circumstantial theory.²¹

16 As an initial matter, the "spikes" first identified by [REDACTED] on the spreadsheet
 17 did not occur exclusively in the mid-to-late afternoon on weekdays. Although a pattern of
 18 elevated readings at that time of day did emerge in May 2016, elevated readings also
 19 occurred at all hours of the day and night and on weekends during March and April
 20
 21

22 ¹⁸ See, e.g., Doc. 110-3 at 17 (Exhibit D to [REDACTED] [REDACTED] motions at 16).

23 ¹⁹ Doc. 134 at 6 (emphasis added).

24 ²⁰ Exhibit C at 1. Just ten minutes after receiving that email, the case agent forwarded
 25 it to Agent Godshall, the prosecutor, and another agent with the enthusiastic directive to
 26 "Please see email below!!" *Id.*

27 ²¹ The case agent's declaration in support of the government's opposition to these
 28 motions similarly omits any reference to [REDACTED] subsequent correspondence, which
 notified the case agent that the ammonia the plant were ongoing and that the
 daily spikes continued for several months after the search warrants. See Doc. 134-1 at 2.

2016.²² Even more importantly, however, the data [REDACTED] initially provided showed elevated readings through July 31, 2016, which was roughly six weeks *after* [REDACTED] had stopped discharging in mid June 2016.²³ Subsequent correspondence from [REDACTED] then established – beyond any doubt – that the same mid-to-late afternoon spikes were ongoing and therefore had nothing to do with [REDACTED] by-then-discontinued practice.

On March 30, 2017, [REDACTED] sent a follow-up email to the case agent to tell her that the plant had suffered another upset on March 3, 2017, and that there had been “a significant increase in ammonia loading from March 2 through March 4, 2017.”²⁴ The case agent immediately recognized that the ongoing problems at the plant were inconsistent with the government’s circumstantial theory and replied:

That’s an interesting update. [REDACTED] should have ceased all illegal dumping after August 25, 2016 – I share this with my counterparts. I am interested in continuing to look at the patterns of elevated ammonia readings for August 2016 through December 2016.²⁶

On April 3, 2017, Guerrero provided that data,²⁷ which showed that the plant was still experiencing elevated ammonia readings on a daily basis through December 15, 2016,

²² See Exhibit B, Spreadsheet 2. [REDACTED] also appears to have arbitrarily identified any value greater than 30 mg/L as a *see id.*

²³ In her November 28, 2016 email to the city, the case agent correctly surmised that “If [REDACTED] was responsible for the elevated ammonia, the elevated readings should stop in [REDACTED] after the Telemundo story ran.” Doc. 82-2 at 8. According to the government’s sentencing memo for the company, [REDACTED] erstwhile shop foreman, the late [REDACTED] (corroborated by [REDACTED] [REDACTED] [REDACTED] [REDACTED] ed that [REDACTED] disa [REDACTED] equipment and st [REDACTED] immediately aft [REDACTED] emundo story. Doc. 110-6 at 36-37 (Exhibit D to [REDACTED] [REDACTED] motions at 35-36).

²⁴ Exhibit C at 12.

²⁵ As noted above, August 25, 2016, was the date of the raid but [REDACTED] stopped discharging to the sewer after the Telemundo story on June 16, 2016

²⁶ *Id.*

²⁷ *Id.* at 11.

1 *five months* after [REDACTED] discharging had stopped.²⁸ Even more specifically, *all* those
 2 elevated readings occurred in the mid-to-late afternoon²⁹ – just like the readings from the
 3 late spring of 2016, which the government had been so quick to attribute to [REDACTED]

4 In its opposition to this motion, the government declares that “The First Evidence
 5 that [REDACTED] Illegal Discharges Might Not Be a Source of the Disruption Appeared on
 6 May 4, 2018” and that “[u]p to May 2018, no evidence or witness testimony ever
 7 undermined the government’s theory . . . that [REDACTED] illegal discharges were a cause
 8 of the NCWRP disruption.”³⁰ That is obviously not true. The circumstantial evidence
 9 supplied by [REDACTED] in March and April 2017 did more than undermine the
 10 government’s theory – it eviscerated it.³¹

11 First, the data completely disproved the alleged correlation between the mid-to-late
 12 afternoon elevated readings and [REDACTED] discharging because the exact-same readings
 13 continued at the plant for at least five months after [REDACTED] had stopped. Again, the case
 14 agent herself recognized that “[i]f [REDACTED] was responsible for the elevated ammonia,
 15 the elevated readings should stop in June 2016 after the Telemundo story ran.”³² Second,
 16 the fact that the plant was still having ammonia problems in March 2017 and had suffered
 17 yet another ammonia breakthrough disproved the claim that there had been an
 18 improvement at the plant since [REDACTED] had discontinued its practice roughly nine
 19 months earlier. The simple fact of the matter is that when the government became aware
 20 of the issues at the NCWRP, it jumped to the conclusion that [REDACTED] was responsible
 21

22 ²⁸ See Exhibit B, Spreadsheet 3 (the elevated readings have been highlighted for the
 23 convenience of the Court and the parties).

24 ²⁹ See *id.*

25 ³⁰ Doc. 134 at 16 (emphasis in original). This sentence from the opposition finally
 26 acknowledges what the defendants have been saying for over three years: that this
 allegation was – first and last – the *government’s* theory and not anybody else’s.

27 ³¹ The February 20, 2017 interview of [REDACTED] also undermined the government’s
 theory because [REDACTED] did not agree with [REDACTED]’s theory when the agents presented it.

28 ³² Doc. 82-2 at 8.

1 because of its proximity to the plant. But there was *never* any credible evidence to
 2 support that conclusion.

3 As noted above, the government has also been less than forthcoming with the
 4 evidence that disproved its theory. Indeed, it still maintains that it was under no
 5 obligation to disclose any of this information before the guilty pleas, characterizing the
 6 February 20, 2017 interview of [REDACTED] as solely “impeachment” evidence, while
 7 misrepresenting that the spreadsheets he provided supported its circumstantial theory.³³
 8 But this was affirmatively – and conclusively – exculpatory. Moreover, although the
 9 defendants were not indicted for disrupting the plant, the government was advocating for
 10 a four-level sentencing enhancement, which would have resulted in considerable jail time
 11 for both [REDACTED] and [REDACTED]. Rather than disclosing this evidence to the defendants
 12 before their guilty pleas, however, the prosecutor kept them in the dark while at the same
 13 time insisting that they stipulate to restitution for the alleged disruption. That non-
 14 disclosure does not comport with the current California Rules of Professional Conduct,
 15 which require a prosecutor to “make timely disclosure to the defense of all evidence or
 16 information known to the prosecutor that . . . tends to negate the guilt of the accused,
 17 mitigate the offense, or mitigate the sentence.”³⁴

18 After losing both the specious plant-disruption allegation and the stipulated
 19 restitution that was based on it, the same prosecutor and the same case agents have
 20 prosecuted the same defendants again. That the government withheld this material from
 21 the defendants the first time around and continues even now to embellish the quality of
 22 its “circumstantial” case is evidence of its vindictive intent.

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 26 ³³ See Doc. 134 at 13, 34. The government principally relies on *United States v. Ruiz*,
 27 which is a Fifth Amendment case limited to “impeachment information relating to
 informants or other witnesses.” 536 U.S. 622, 625 (2002).

28 ³⁴ Cal. R. Prof. Cond. 3.8(d) (2018). This requirement is “not limited to evidence or
 information that is material as defined by *Brady v. Maryland*.” *Id.* at Cmt. [3].

1 C. *The government not only failed to object to the false statements in the PSR*
 2 *regarding the plant disruption, it affirmatively cited those false statements as*
 3 *evidence in support of its arguments.*

4 The PSR recommended the four-level increase for the plant disruption. That
 5 recommendation was based on four statements that the government knew were false. The
 6 first three were that: 1) the city's consultants determined that [REDACTED] discharging
 7 "correlated with the spikes in ammonia levels"; 2) the "ammonia levels returned to
 8 normal" after the execution of the search warrant; and 3) "the NCWRP was not required
 9 to . . . continue costly treatment of the wastewater" after the search warrant.³⁵ It also
 10 directly credited the case agent with the statement that "the representative [of the plant]
 11 was able to provide enough evidence to indicate that [REDACTED] . . . illegal discharging
 12 was directly related to the NWCRP [sic] closing down."³⁶ Without addressing the other
 13 three false statements, the government now insists that it "corrected [the first false
 14 statement] and alerted the court to the error."³⁷ That claim hardly passes the blush test.

15 It should go without saying that the government lawyer knows how to file an
 16 objection to an inaccurate statement in a PSR. The government, in fact, filed an objection
 17 to a favorable defense recommendation in the PSRs in this case the very *next* day after
 18 the PSRs were filed. And in that pleading, the government extensively relied on the
 19 PSR's findings of fact regarding the disruption without correcting the mistake or alerting
 20 the court to the error.³⁸ In fact, although the government filed several pleadings
 21 addressing this specific allegation, it *never* filed an objection to the false statements
 22 regarding the NCWRP that the probation officer relied upon to recommend the
 23

24 ³⁵ 17cr1305 Doc. 38 at ¶ 71.

25 ³⁶ *Id.* at ¶ 56. As set forth in detail in [REDACTED] original points & authorities, the
 26 plant representative [REDACTED] did not a [REDACTED] opinion until his "ah-ha" moment on
 27 March 1 or 2, 2018.

27 ³⁷ Doc. 134 at 10.

28 ³⁸ *See* Doc. 110-6 at 24-27 (Exhibit D to [REDACTED] motions at 23-26).

enhancement.³⁹

In its opposition to [REDACTED] [REDACTED] objections, the government did accurately state that the city's consultants had not identified [REDACTED] as the problem. But that observation was merely a prefatory clause to the prosecutor's argument that "neither of the consultants was aware that just a short distance downstream, a large slug of ammonia was being illegally discharged on a daily basis."⁴⁰ And most importantly, the prosecutor made no reference whatsoever in that pleading – or in any other – to the false statement in the PSR that the government now claims it was trying to correct.

The government also failed to object to (or otherwise correct) the false statements that the ammonia levels returned to normal and that the plant was not required to continue costly treatment after the search warrant. Again, [REDACTED] told the case agent on March 31, 2017, that the plant was still experiencing problems with elevated ammonia levels and had recently suffered another breakthrough. He also told her on February 21, 2017, that the plant was still operating on a 10-day (costly) SRT.⁴¹ The government, however, left the contrary, false statements in the PSR undisturbed. Worse, it affirmatively cited them to advance its arguments. For example, in its objection to the PSRs' recommendations for downward departures for [REDACTED] [REDACTED] and [REDACTED] [REDACTED] the government explicitly cited the PSR for the false statement that "[o]nce the [REDACTED] discharges ceased, ammonia levels at the plant drastically improved."⁴²

³⁹ The government filed an objection to the PSRs, a sentencing memo for the corporation, a motion to continue, sentencing memos for both individual defendants, oppositions to the individual defendants' requests for departures and objections, a motion to find [REDACTED] and [REDACTED] in breach, a notice of expert testimony, a response in opposition to [REDACTED] [REDACTED] objection to the government's expert notice, at least three sentencing submissions for each defendant, and two motions for downward departure without ever lodging a single objection or otherwise "alerting the court" to this false statement.

⁴⁰ Doc. 110-6 at 101 (Exhibit D to [REDACTED] [REDACTED] motions at 100).

⁴¹ Exhibit C at 2.

⁴² Doc. 110-6 at 25 (Exhibit D to [REDACTED] [REDACTED] motions at 24) (emphasis added) (citing PSR ¶ 43).

Moreover, the government routinely used the uncorrected PSR as its security blanket, wrapping itself in the erroneous plant-disruption findings whenever the defense challenged the sufficiency of its evidence. For example, when defense counsel alerted Judge Benitez to the paucity of evidence in discovery, the prosecutor responded that:

I think we did produce in the initial discovery information to support the four-level enhancement. In fact, we presented enough that the probation officer recommended it in the PSR. So clearly there was something there, enough for the probation officer to conclude that the four-level enhancement was appropriate.⁴³

Similarly, the government also relied on the PSR to argue that “there is *no doubt* in this case that there has been significant environmental harm resulting from the defendants’ actions. As the Probation Officer noted, ‘the treatment facilities were ultimately impacted.’”⁴⁴

Finally, the government also ignored the false statement the PSR attributed to the case agent, that the plant representative “was able to provide enough evidence to indicate that [REDACTED] involvement in the illegal discharging was directly related” to the plant disruption. In short, rather than disavowing the false statements in the PSR, the government either looked the other way or expressly relied on them to advance its argument, which did not enjoy any legitimate evidentiary support.

D. The plant-disruption issue was central to the alleged breaches of the plea agreements; the government’s attempt to claim otherwise has no support in the record.

In their sentencing pleadings, [REDACTED] and [REDACTED] both objected to paying restitution related to the NCWRP, which was required by their plea agreements.⁴⁵ In response, the prosecutor threatened to file a motion for breach. When they did not withdraw their objections, the government made good on its threat by filing a motion

⁴³ Doc. 110-3 at 18 (Exhibit A to [REDACTED] motions at 17).

⁴⁴ Doc. 110-6 at 27 (Exhibit D to [REDACTED] motions at 26) (emphasis added) (citing PSR ¶ 73).

⁴⁵ Both also filed other objections that the government claimed violated the plea agreements. As addressed below, those were *not* the primary focus of the dispute.

1 asking the court to enforce the plea agreements. [REDACTED] and [REDACTED] counterclaimed
 2 that the government had breached the plea agreements by withholding exculpatory
 3 evidence related to the NCWRP during the plea negotiations. The government now
 4 asserts that “The Significant Breaches of the Plea Agreement were Unrelated to the
 5 NCWRP.”⁴⁶

6 The government’s own motion for breach says otherwise. The very first instances
 7 of breach alleged in that motion were de [REDACTED] objection “to paying as restitution the
 8 \$202,061 paid by the NCWRP for any alleged disruption” and [REDACTED] objection (in
 9 its sentencing memo) “to the specifically agreed upon sums payable to Encina and San
 10 Diego as lacking nexus to the offense.”⁴⁷ This was also the first allegation of breach at the
 11 March 9, 2018 hearing before Judge Benitez, it was the focal point of the argument at that
 12 hearing, and it was the basis for the defendants’ responsive allegations that the
 13 government had breached the plea agreement by withholding the exculpatory evidence
 14 before the guilty pleas.⁴⁸ The parties then revisited the issue at a hearing on April 20,
 15 2018, where the prosecutor insisted that the defendants had to pay the restitution whether
 16 they were responsible for the plant disruption or not:

17 The Court: [T]he city wants to be reimbursed for this money that they had
 18 to spend or were cheated out of by virtue of the fact that
 19 [REDACTED] Environmental was illegally dumping portapotty
 the sewer line. Right?

20 Ms. Pierson: We have two issues here. And this sort of ties into my breach
 21 of the plea agreement. Because in the plea agreement, the
 22 defendants agreed to pay the costs – the reimbursement for the
 23 consultants of the – for the wastewater treatment. . . . *They*
agreed to pay that. That’s off the table. . . . So his testimony
 about – that only has to do with the four-level increase – . . .
 on the guidelines for the two individuals. It has nothing to do
 with how much money the city is going to get in response. . . .

24 The Court: Wait. Say that again. Now I got lost on that.

26 ⁴⁶ See Doc. 134 at 12-13.

27 ⁴⁷ Doc. 110-6 at 118-19 (Exhibit D to [REDACTED] motions at 117-18).

28 ⁴⁸ See Doc. 110-3 at 14, 26-37 (Exhibit A to [REDACTED] motions at 13, 25-36).

Ms. Pierson: He is testifying on the issue whether or not they caused a disruption to the North City Water Reclamation Plant. That is only relevant to the issue of whether there's a four-level increase on the guidelines for these two individuals –

The Court: But doesn't that also go to restitution?

Ms. Pierson: No.

The Court: No.

Ms. Pierson: Because they already agreed to pay the costs of –⁴⁹

Judge Benitez then accurately summarized the reciprocal allegations of breach and their significance in the life of the CWA case:

Is the government contending that there was a breach in the plea agreement? If – if the government wants me to make a finding that there was a breach of the plea agreement, I think Conforti, himself, is saying that you breached the plea agreement. So I'm at the point, frankly, where I'm willing to say, hey, it doesn't matter who breached the plea agreement. It seems pretty clear to me that whatever happened, there is no agreement. And, in which case, we'll take all of those pleas, set them all aside, we'll have a trial, we'll have a hearing, and off we go. . . . Fine. I find you both breached the plea agreement. There's no agreement. How's that? Okay?⁵⁰

A review of the hearing transcripts demonstrates that the government's insistence that the defendants pay restitution to the NCWRP regardless of whether they were actually responsible for the disruption was the single, most important issue related to the alleged breaches of the agreements. And after the court took a recess during the April 20 hearing, it was the government's concession to amend the plea agreements to condition that restitution on a finding of liability that prevented Judge Benitez from voiding the agreements entirely.⁵¹

The government also now claims for the first time that – by failing to recommend restitution in his sentencing summary chart – [REDACTED] [REDACTED] [REDACTED] also breached his plea

⁴⁹ See *id.* at 48-49 (Exhibit A at 47-48) (emphasis added).

⁵⁰ *Id.* at 53-55 (Exhibit A at 52-54).

⁵¹ See *id.* at 72-74 (Exhibit A at 71-73).

1 agreement.⁵² That is simply disingenuous. There is obviously no rule requiring restitution
 2 to appear in a sentencing summary chart.⁵³ Unlike ■■■■ and ■■■■ who both
 3 specifically objected to the restitution award for the NCWRP, ■■■■ (an employee of
 4 the company who would not be making those payments anyway) did not. And that –
 5 rather than the NCWRP issue not being the focus of the reciprocal finger pointing – is the
 6 reason the government did not include ■■■■ in its motion for breach. The prosecutor
 7 herself expressly recognized that fact at the time, going out of her way to tell Judge
 8 Benitez that “I would state, for the record, that *we have no claim* that Mr. ■■■■ has
 9 violated his plea agreement in *any way*.”⁵⁴

10 Finally, the fact that the plant-disruption issue was the focus of the breach
 11 allegations is underscored by the prosecutor’s misrepresentations to the court. When the
 12 defendants complained that the prosecutor had violated her ethical obligations by not
 13 producing the exculpatory plant-disruption evidence during plea negotiations, the
 14 prosecutor misstated both what the defendants had asked for and what the government
 15 had provided:

16 I totally dispute that we breached the plea agreement in any way. We
 17 provided full discovery, and we had full discussions prior with counsel and I
 18 showed them the nature of the evidence that we had. I asked them if there
 19 was any additional documentation that they would like to see before they
 entered the plea because I was willing to show them all the documents I had.
 They never requested to see anything other than what I provided to them.⁵⁵

20 Those statements were not true. The government had *not* provided “full discovery”
 21 on this issue. It had provided none whatsoever. Moreover, the defendants *had* requested

22 ⁵² Doc. 134 at 12-13.

23 ⁵³ The local rules provide that “[t]he sentencing summary chart must contain all
 24 pertinent calculations to summarize counsel’s requested analysis of the *guidelines*
 25 application in the case.” Criminal Local Rule 32.1 (emphasis added). Accordingly, ■■■■
 26 ■■■■ sentencing summary chart did not recommend *any* restitution – not just the
 ion related to the plant disruption. It also did not include a fine or a special
 assessment. See 17cr1305 Doc. 68.

27 ⁵⁴ Doc. 110-3 at 15 (Exhibit A to ■■■■ motions at 14) (emphasis added).

28 ⁵⁵ *Id.* at 32 (Exhibit A at 31).

1 this discovery in advance of the pleas and the prosecutor had refused to provide it.⁵⁶

2 In the opposition, the government now attempts to recast these statements as true in
3 the context of the plea agreement, explaining that [REDACTED] information did not relate
4 to the factual innocence of the defendants” and that when the prosecutor told the court
5 that “‘all requested information’ had been disclosed, that statement related to the
6 evidence required under the plea agreement to have been disclosed in advance of the
7 plea.”⁵⁷

8 That is an audacious recharacterization. Again, when the prosecutor made those
9 representations to the court, the parties and the court were specifically addressing the
10 government’s failure to provide the plant-disruption discovery before the guilty pleas.
11 Furthermore, the prosecutor told the court that she had provided “full discovery” – not
12 that she had provided no discovery because she wasn’t required to do so. She told the
13 court that she “was willing to show [defense counsel] all the documents” – not that she
14 had refused to show them anything because she didn’t have to. And she told the court that
15 defense counsel “never requested to see anything other than what [she] provided” – not
16 that defense counsel had made a specific request for this discovery and that she had
17 refused it. The prosecutor’s statements to Judge Benitez were both unequivocal and
18 untrue. They cannot be made true after the fact by overlaying what the prosecutor
19 believes are her bare-minimum obligations under the Fifth Amendment and the rules of
20 professional conduct.

21 The defendants’ objections to paying restitution based on the plant disruption, the
22 government’s claim of breach, and the defendants’ responsive allegations of misconduct
23 are at the very heart of the bitterly contested issues in the CWA case. And the
24 government’s conduct in this regard is additional evidence of its vindictive intent.

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27 ⁵⁶ See Doc. 110-5 at 2-5 (Exhibit C to [REDACTED] motions at 1-4).

28 ⁵⁷ Doc. 134 at 13; *see also id.* at 35.

III.

This prosecution is presumptively vindictive because it was indicted after the conclusion of the previous case and after the successful exercise of the defendants' rights; the government cannot rebut that presumption because it could easily have investigated the CAA allegations in 2016 had it been so inclined.

As set forth in [REDACTED] motions, the defendants are entitled to a presumption of vindictiveness because the government had been aware of the filter-tampering allegations all along, it did not begin its investigation until the previous case had erupted into contentious litigation, and it did not bring the successive indictment until after the defendants' successful exercise of their rights. In response, the government largely relies on inapposite cases where vindictive-prosecution motions were brought before trial in the same proceeding.⁵⁸ Those authorities make clear, however, that the "cases involving increased charges or punishments after trial are to be *sharply* distinguished from cases in which the prosecution increases charges in the course of pretrial proceedings."⁵⁹

Attempting to characterize both the CWA litigation and its investigation of the filter-tampering allegations as "routine,"⁶⁰ the government also relies on *United States v. Griffin*,⁶¹ which is nothing like this case. In *Griffin*, "two unrelated agencies of government" independently investigated the defendant with respect to conduct that was "wholly unrelated."⁶² Further, the second indictment in *Griffin* was returned *before* the judge in the first case dismissed the previous indictment based on "a novel interpretation of the common law," so it was "unlikely . . . [that] the government was anticipating that

⁵⁸ See, e.g., *United States v. Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982); *United States v. Goodwin*, 457 U.S. 368 (1982).

⁵⁹ *Gallegos-Curiel*, 581 F.2d at 1167 (emphasis added).

⁶⁰ There is obviously nothing "routine" about either this prosecution or the complex litigation that preceded it.

⁶¹ 617 F.2d 1342 (9th Cir. 1980).

⁶² *Id.* at 1347.

1 the assertion [of rights] would be dispositive of the [first] case.”⁶³ Here, in contrast, the
 2 *same* two agencies, the *same* two case agents, and the *same* prosecutor successively
 3 investigated the *same* three defendants for alleged misconduct at the *same* place of
 4 business at roughly the *same* time. Moreover, the government restarted its investigation
 5 into the filter-tampering at the same time that the parties were skirmishing over several
 6 issues related to the government’s spurious plant-disruption claim and it brought the
 7 indictment after the defendants won those battles and received substantially mitigated
 8 sentences.⁶⁴

9 The government also declares it “unthinkable” that the CAA prosecution would
 10 have been authorized in 2016 based on the statements of one witness [REDACTED]
 11 alone.⁶⁵ [REDACTED] was a credible witness, however, who testified to the exact-same
 12 facts (hole punching and ECM manipulation) before the grand jury. At a minimum, the
 13 government had sufficient evidence to obtain additional search warrants, had it been so
 14 inclined. And contrary to its misleading statement in the opposition,⁶⁶ the government had
 15 ready access to a then-current employee, the late [REDACTED] [REDACTED] shop foreman),
 16 for whom it had obtained a grant of immunity. As [REDACTED] foreman, [REDACTED] was
 17 intimately familiar with all aspects of [REDACTED] day-to-day business regarding the
 18 disposal of trucked waste. He was also both credible and forthcoming. So much so, in
 19 fact, that the government viewed him as essential to both the CWA case and the Ron
 20 Fabor perjury case and took his deposition to preserve his testimony when it became
 21 aware that he was terminally ill.

22 ⁶³ *Id.* at 1348.

23 ⁶⁴ The prosecutor acknowledged at sentencing that the government would have asked
 24 Judge Benitez to “send [Mr. [REDACTED] to jail” but for his assistance in the Fabor case and
 25 the court’s ruling on the pla [REDACTED] n issue. Doc. 110-3 at 341 (Exhibit A to [REDACTED]
 [REDACTED] motions at 340).

26 ⁶⁵ Doc. 134 at 28.

27 ⁶⁶ *See id.* at 9, n.5 (“The government was unable to interview any current [REDACTED] by
 28 the company and refused to provide information without a formal grant of immunity.”).

1 contemplated by the Constitution.”⁷¹

2 And while the Ninth Circuit has not yet dismissed an indictment or suppressed
3 evidence for a violation of this rule, the previous cases arose in the *preindictment* context.
4 This case is *sui generis*. As the government well knew, the same three defendants were
5 under indictment for environmental crimes and represented by defense counsel when the
6 government deployed the informant. The analysis from the preindictment cases is
7 therefore not instructive.⁷² Moreover, the subject matter of the undercover activity was
8 already alleged against the defendants in the PSRs and their defense counsel had filed
9 objections to those allegations. The government did more than just tiptoe up to an ethical
10 boundary here; it crossed it. At a minimum, this Court should suppress the evidence.

12 V.

13 Conclusion

14 It is axiomatic that the prosecution bears the burden of proof, has a duty as a
15 “minister of justice,” and is required to deal with defendants in good faith. Throughout
16 this case, however, the government has pushed ethical boundaries, misrepresented facts
17 to the district court, and otherwise stood the natural order on its head – taking defense
18 counsel to task for failing to inquire “if there were other unrelated offenses,”⁷³ or
19 “additional areas of liability that were of concern”⁷⁴ and asserting that, until May 2018,
20 there was no evidence that [REDACTED] was *not* responsible for the plant disruption.

21 This last, burden-shifting assertion is particularly revealing. As the government
22 acknowledges in the opposition, it was the *prosecutor’s* theory that [REDACTED] was
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25 ⁷¹ *Id.*

26 ⁷² *See United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993).

27 ⁷³ Doc. 134 at 5.

28 ⁷⁴ *Id.* at 13, n. 6.

1 responsible for the problems at the NCWRP.⁷⁵ And until the prosecutor led [REDACTED]
 2 [REDACTED] to his “ah-ha” moment on March 2, 2018, there was *no* evidence that [REDACTED]
 3 was responsible for the disruption. Indeed, the only evidence – circumstantial or
 4 otherwise – was that [REDACTED] had nothing to do with it.⁷⁶ Yet the prosecutor – without
 5 the support of [REDACTED] the city’s consultants, or any other evidence – had represented
 6 to defense counsel for six months before the guilty pleas that the government could prove
 7 that [REDACTED] was the culprit. And for another *nine* months after the pleas – until
 8 [REDACTED] finally had his March 2, 2018 epiphany⁷⁷ – the prosecutor continued to
 9 represent to both the court and counsel that [REDACTED] was responsible, relying in large
 10 part on the statements in the PSR that were made from whole cloth. In other words, this
 11 issue was intensely personal. And it was while the defendants were exercising their rights
 12 to contest this specious, personal allegation that the government took a renewed interest
 13 into the alleged filter-tampering of a handful of trucks that it had already known about for
 14 two years. This prosecution is vindictive in both appearance and in fact and this Court
 15 should dismiss the indictment.

16
 17 Respectfully Submitted,

18
 19 DATED: June 2, 2020

20 /s/ John C. Lemon
JOHN C. LEMON
 Attorney for Mr. [REDACTED] [REDACTED]

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 24 ⁷⁵ See Doc. 134 at 16.

25 ⁷⁶ As addressed in Section II, until March 2018, the *only* evidence was a series of
 26 late-afternoon, elevated ammonia readings that continued for five months after [REDACTED]
 27 had stopped discharging, as well as another ammonia breakthrough at the plant
 28 occurred nine months after [REDACTED] stopped.

⁷⁷ [REDACTED] epiphany was roughly six months after the date originally scheduled
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