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1. UNITED STATES DISTRICT COURT
2. CENTRAL DISTRICT OF CALIFORNIA
3. SOUTHERN DIVISION
4. UNITED STATES OF AMERICA,
5. Plaintiff,

# 15

1. v.
2. HENRY T. NICHOLAS III and
3. WILLIAM J. RUEHLE,
4. Defendants.

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CASE NO. SACR 08-139-CJC

# WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE PROSECUTORIAL MISCONDUCT;

***FILED UNDER SEPARATE COVER:***

# DECLARATION OF MATTHEW DONALD UMHOFER; and

1. **[PROPOSED] ORDER.**

Judge: The Honorable Cormac J. Carney Trial Date: October 20, 2009

Hearing Date: December 15, 2009

Time: 9:00 a.m.

**WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE PROSECUTORIAL MISCONDUCT; Case No. SACR 08-139-CJC**

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* 1. TO ALL PARTIES AND THEIR COUNSEL OF RECORD:
  2. PLEASE TAKE NOTICE THAT on December 15, 2009, at 9:00 a.m., or as
  3. soon thereafter as the matter may be heard, in the courtroom of the Honorable
  4. Cormac J. Carney, located at 411 West Fourth Street, Santa Ana, California, William
  5. J. Ruehle will, and hereby does, move to dismiss the indictment based on cumulative
  6. prosecutorial misconduct.
  7. This motion is based on the attached memorandum of points and authorities,
  8. the declaration in support, the files and records in this case, and any evidence or
  9. argument that may be presented at a hearing on this matter.
  10. Respectfully submitted,
  11. DATED: December 14, 2009

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SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1. Richard Marmaro

Jack P. DiCanio

1. Matthew Donald Umhofer

# 15

By: /s/ Richard Marmaro

1. RICHARD MARMARO
2. Attorneys for Defendant
3. William J. Ruehle

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# 1

1. **I. INTRODUCTION**

**MEMORANDUM OF LAW**

1. This trial has been remarkable not because of any evidence of misconduct by
2. the accused, but because of the mounting evidence of misconduct by the accusers.
3. The Supreme Court has observed that “[n]othing can destroy a government
4. more quickly than its failure to observe its own laws, or worse, its disregard of the
5. charter of its own existence.” Mapp v. Ohio, 367 U.S. 643, 659, 81 S. Ct. 1684,
6. 1694, 6 L. Ed. 2d 1081 (1961). Sadly, in this case, the government has failed to
7. observe its own laws and shown utter disregard for its charter, the Constitution,
8. through a pattern of misconduct that began early in its investigation and continued
9. throughout the trial. As a result, William J. Ruehle’s rights have been trampled, and
10. the integrity of these proceedings has been irreparably compromised.
11. There is now clear and convincing evidence that the government in this case:
12.  attempted to dissuade a witness from testifying on Mr. Ruehle’s behalf;
13.  threatened an immunized witness with a perjury prosecution if he
14. testified consistently with prior sworn testimony;
15.  suggested how defense and prosecution witnesses should testify;
16.  pressured two witnesses into dubious and invalid plea agreements;
17.  leaked information directly related to an ongoing grand jury
18. investigation in an effort to gain cooperation;
19.  discussed adverse employment consequences for witnesses who did not
20. cooperate;
21.  elicited false and misleading testimony from witnesses;
22.  committed serious violations of Brady and Giglio; and
23.  gave false and misleading testimony directly to this Court.
24. The evidence presented at trial has revealed why the government went to such
25. lengths and crossed so many lines in its pursuit of a conviction in this case: the
26. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. government could not meet its burden to demonstrate crimes were committed
  2. without cutting corners and distorting the facts. Compelling evidence demonstrates
  3. that the accounting opinion the government places at the center of its indictment was
  4. widely misunderstood and misapplied. Both government witnesses and defense
  5. witnesses have acknowledged under oath that nobody involved in Broadcom’s stock
  6. option process intended to deceive shareholders or believed they were committing a
  7. crime. The government – unable to overcome these and other stubborn facts –
  8. resorted to misconduct in an attempt to alter the facts and stack the deck in its favor.
  9. It is fundamentally unfair to subject Mr. Ruehle to another day of this unfair
  10. and misguided prosecution. The time has come to dismiss the indictment.

# II. ARGUMENT

* 1. As the Ninth Circuit recently observed in another stock-options-related case
  2. where prosecutorial misconduct irreparably tainted the result, “In representing the
  3. United States, a federal prosecutor has a special duty not to impede the truth.”
  4. United States v. Reyes, 577 F.3d 1069 (9th Cir. 2009). The prosecution in this case
  5. has failed to heed this maxim, and committed so many serious misdeeds that the
  6. integrity of these proceedings has been called into serious question.
  7. Much of the government’s misconduct has been well documented in two prior
  8. motions, which are incorporated herein by reference and attached hereto. (Ex. 15,
  9. Doc. 135, Motion to Dismiss for Prosecutorial Misconduct (“MTD Pros
  10. Misconduct”), filed 10/20/08; Ex. 16, Doc. 198, Reply in Support of MTD Pros
  11. Misconduct, filed 11/24/08; Ex. 20, Doc. 754, Reconsideration of MTD Pros
  12. Misconduct, filed 12/4/09.)1 This motion attempts to update and synthesize the
  13. litany of instances of improper conduct by the prosecution, which fall generally into
  14. five categories: (1) intimidating and influencing witnesses; (2) eliciting and failing to

# 26

1 All references to “Ex.” are to the Exhibits attached to the Declaration of

1. Matthew Donald Umhofer (“Umhofer Decl.”), filed concurrently herewith.
2. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. correct false and misleading testimony; (3) Brady and Giglio violations; (4) false
  2. testimony by the lead prosecutor; and (5) improper comments about defense counsel.
  3. Each will be summarized in turn.

# A. Intimidating and Influencing Witnesses

* 1. It is now clear that the government brought inordinate pressure on witnesses in
  2. an attempt to persuade government witnesses to shift their testimony in the
  3. government’s direction and dissuade defense witnesses from providing testimony
  4. helpful to Mr. Ruehle. That conduct substantially infringed on Mr. Ruehle’s
  5. constitutional rights to present a defense, confront witnesses, and call witnesses on
  6. his behalf.

# 1. Defense Witness David Dull

* 1. The Court is well versed in Mr. Stolper’s conduct toward Mr. Dull. Following
  2. the grant of immunity to Mr. Dull, Mr. Stolper contacted Mr. Dull’s attorneys,
  3. suggested that they try to dissuade Mr. Ruehle’s attorneys from calling Mr. Dull as a
  4. witness (Ex. 28, 12/4/09 RT 4517-18), suggested perjury charges could be brought
  5. against Mr. Dull if he testified consistently with his SEC testimony (Ex. 28, 12/4/09
  6. RT 4519), and related what he “expected” Mr. Dull would be able to say about Mr.
  7. Ruehle (Ex. 28, 12/4/09 RT 4522-23). Mr. Dull’s attorneys understood this to be a
  8. threat (Ex. 28, 12/4/09 RT 4521, 4536), and it triggered in Mr. Dull “surprise, shock,

**20** [and] fear” (Ex. 28, 12/4/09 RT 4445).2

1. But this was not the only instance of government misconduct directed at Mr.
2. Dull. It now appears that Mr. Dull, too, was the victim of government media leaks
3. aimed at increasing the pressure on Mr. Dull in the midst of delicate negotiations
4. concerning Mr. Dull’s status. As detailed in the filing on behalf of Mr. Dull

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1. 2 It is a federal crime to threaten or engage in misleading conduct toward another person, with intent to influence, delay, or prevent the testimony of any
2. person in an official proceeding. 18 U.S.C. § 1512.
3. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. (Supplemental Points and Authorities in Support of Motion for Order Granting
  2. David Dull Transactional Immunity, Doc. No. 775.), a journalist asked pointed
  3. questions rooted in confidential, non-public e-mails that only the government and
  4. select few other parties had access to – questions that tracked topics in which Mr.
  5. Stolper had expressed an interest. (Aronson Decl. Ex. P.) Moreover, the journalist
  6. specifically referenced “federal prosecutors’ scrutiny of Dull’s role in the company
  7. stock option grant process, [and] his knowledge that documents were being
  8. retroactively dated,” and when confronted about whether the government had leaked
  9. information and documents, the journalist stated, “[T]hat might be.” (Aronson Decl.
  10. Ex. P.) Sadly, this conduct is wholly consistent with the government’s other conduct
  11. in this case regarding press leaks to exert pressure and/or intimidate and embarrass
  12. witnesses.

# 2. Defense Witness Dr. Henry Samueli

* 1. The government’s conduct toward defense witness Dr. Samueli is now
  2. undisputed. Mr. Stolper has admitted that because Dr. Samueli was exercising his
  3. Fifth Amendment rights and was not, in Mr. Stolper’s view, cooperating with the
  4. government, Mr. Stolper leaked details of his investigation to the media. (Ex. 31,
  5. 12/9/09 RT 5105-06.)3 Mr. Stolper’s testimony that he was unaware of the DOJ
  6. 3 While aimed at Dr. Samueli, the leaks hit Mr. Ruehle hardest of all. In the
  7. *Wall Street Journal* article, Mr. Ruehle’s portrait appeared alone on the front page of the newspaper, embedded in the first column of text under the headline Probes of
  8. Backdating Move to Faster Track: Stock-Option E-mails At Broadcom Are Focus.
  9. (Ex. 3.) The lead of the article read:
  10. On Jan. 4, 2002, the chief financial officer of Broadcom
  11. Corp. tapped out an email about stock options to his chief executive and others.

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1. “I VERY strongly recommend that these options be priced
2. as of December 24,” he wrote.

*(cont'd)*

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**WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. policy prohibiting communications with the media regarding active Grand Jury
  2. investigations is simply not credible for a prosecutor with his level of experience.
  3. Nor would any prosecutor need to read the specific DOJ policy to know that what he
  4. did was wrong. There was no conceivable legitimate basis for leaking this
  5. information to the media, and Mr. Stolper offered no such basis in his testimony.
  6. The leaks had the effect that Mr. Stolper intended – Dr. Samueli was
  7. humiliated by two prominent newspaper articles providing insider details directly
  8. relevant to the grand jury’s ongoing investigation. (Ex. 30, 12/8/09 RT 4824.) The
  9. timing of the leaks was also closely related to events that had just occurred in front
  10. of the grand jury – the articles suggested Dr. Samueli was not cooperating in an
  11. investigation immediately after Dr. Samueli had invoked his Fifth Amendment rights
  12. before a grand jury. (Ex. 30, 12/8/09 RT 4812, 4817-18.)4 As a result of this
  13. conduct, Dr. Samueli felt “enormous pressure” and felt he was being “strong-armed
  14. by my own government. . . . I literally felt like I was dealing with the mafia.” (Ex.
  15. 30, 12/8/09 RT 4825, 4833.) Dr. Samueli explained that the government’s conduct
  16. “had a significant impact on my state of mind. I was quite afraid at the time because
  17. there was a lot of pressure being put on me.” (Ex. 31, 12/9/09 RT 4860.) The
  18. government’s pressure, and the threat of potentially hundreds of years in prison, led
  19. Dr. Samueli to plead guilty to a something this Court has now concluded was not a
  20. crime.
  21. Moreover, as set forth in the Declaration of Professor Laurie Levenson, DOJ
  22. policies restrict prosecutors from subpoenaing a subject or target of an investigation

# 23

1. (Ex. 3, James Bandler & Charles Forelle, Probes of Backdating Move to Faster Track, Wall St. J., Feb. 16, 2007; see also Ex. 4, Letter from Brian Hennigan
2. to George S. Cardona, dated Feb. 23, 2007, attachment, same.)
3. 4 A violation of grand jury secrecy may be prosecuted as a crime under Fed. R. Crim. P. 6(e)(7) and 18 U.S.C. § 401. United States v. Forman, 71 F.3d 1214, 1215

**27** (6th Cir. 1995).

**28 WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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1. before the grand jury knowing that they are going to invoke his Fifth Amendment
2. privilege. (Levenson Decl. ¶ 9, Doc. 744, filed 12/3/09.) The purpose of this policy
3. is that it may improperly influence the grand jury’s probable cause determination.
4. (Id.) Here, Mr. Stolper, frustrated by counsel’s legitimate desire to establish
5. reasonable ground rules for an informal interview, violated that policy and forced Dr.
6. Samueli to assert his Fifth Amendment rights in front of the grand jury. Courts have
7. consistently found that it is misconduct to intentionally have a person testify before a
8. fact finder knowing that they will invoke the Fifth Amendment. See, e.g., Namet v.

**9** United States, 373 U.S. 179, 186, 83 S. Ct. 1151, 1154-55, 10 L. Ed. 2d 278 (1963)

1. (holding that it is prosecutorial misconduct to attempt to build their case out of
2. inferences arising from the use of the testimonial privilege); United States v. Roselli,
3. 432 F.2d 879 (9th Cir. 1970) (“We wish to add, however, that we do not approve the
4. practice of questioning a witness before the [grand] jury after he has indicated that he
5. will decline to testify . . . .”). The Court was rightly “disturbed” by the government’s
6. conduct toward Dr. Samueli, set aside his plea and dismissed the Information. (Ex.

**16** 31, 12/9/09 RT 5062.)

# 3. Government Witness Nancy Tullos

1. The pressure the government brought to bear on Ms. Tullos is well
2. documented. Assistant United States Attorney Andrew Stolper has now admitted
3. that after Ms. Tullos exercised her Fifth Amendment rights and refused to cooperate
4. with him, he made a telephone call to her new employer that resulted in the loss of
5. her job. As he put it, “Ms. Tullos was not cooperating at that point and we were
6. attempting or I was attempting to get Ms. Tullos to do so.” (Ex. 31, 12/9/09 RT
7. 5101-02.) On that call, Mr. Stolper took unsolicited actions that had the foreseeable
8. result of causing Ms. Tullos to lose her job – he told the QLogic’s General Counsel
9. that “QLogic might have some sort of legal obligation to inform its shareholders that
10. Broadcom’s internal investigation found [Ms. Tullos] at fault.” (Ex. 12, Letter from
11. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. R. Sachs to T. O’Brien, dated 11/30/07; Ex. 31, 12/9/09 RT 5101.) Mr. Stolper must
  2. have known that Ms. Tullos losing her job was a likely, if not certain, result of his
  3. conduct. Moreover, Mr. Stolper’s conduct had the desired effect – as Ms. Tullos’s
  4. attorney put it, Mr. Stolper’s conduct pressured her into entering into a cooperation
  5. plea agreement with the government.
  6. Q Did you feel that she was pressured into the plea?
  7. A Yes.
  8. (Ex. 31, 12/9/09 RT 5079.) Ms. Tullos herself confirmed the impact of the
  9. prosecution’s conduct in that it sent “a signal about the power of the federal
  10. government to interfere with [her] life.” (Ex. 23, 11/3/09 RT 1151.) But the
  11. government was not done sending such messages. Indeed, after pressuring Ms.
  12. Tullos into the plea, the government leaked her plea agreement to the public before
  13. the agreement was public and Ms. Tullos had an opportunity to prepare herself or
  14. notify her family. (Ex. 12, Letter from R. Sachs to T. O’Brien, dated 11/30/07; Ex.

**15** 31, 12/9/09 RT 5083.) 5

1. Ms. Tullos’s cooperation, however, was not enough for the government.
2. The government required that she plead guilty to a felony offense, and Mr. Stolper’s
3. “principal rationale[]” for insisting on a felony was not that she was guilty of a

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1. 5 Ms. Tullos’s guilty plea bears all the signs of a fiction forged by the government’s desire to secure her cooperation. Ms. Tullos specifically testified that
2. she herself did not delete the e-mail she pled guilty to instructing another to delete,

and in fact had copied another person on the message. (Ex. 23, 11/3/09 RT 1154-55.)

1. Moreover, she had no inkling she had committed a crime at the time she sent the e- mail and did not think she had committed a crime at Broadcom until after she met

**24** with the prosecutors. (Ex. 23, 11/3/09 RT 1175; Ex. 25, 11/10/09 RT 2134.) Her e-

mail was sent so long before the government began investigating stock option

1. practices at Broadcom that Ms. Tullos had to waive the statute of limitations in order to facilitate her own guilty plea. (Ex. 26, 11/12/09 RT 2344.) And both Ms. Tullos’s
2. testimony and the sentencing guidelines calculation in the plea agreement indicate

that even the government did not believe she was obstructing a criminal investigation.

**27** U.S.S.G. § 2J1.2(c); (Ex. 23, 11/3/09 RT 1174-75.)

**28 WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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**1** felony, but that “a felony would make Ms. Tullos a more credible witness to the

**2** jury.” (Ex. 31, 12/9/09: RT 5090.)

1. Even with felony plea and cooperation, the government still needed more from
2. Ms. Tullos – it needed her to testify in a manner that supported its theory and
3. undermined the defense. Accordingly, after Ms. Tullos’s lawyers provided an initial
4. proffer of what her testimony would be, the government “expressed some
5. dissatisfaction with the testimony we had proffered and stated that if Ms. Tullos
6. wanted the benefit of a cooperation agreement, she would have to testify
7. differently.” (Ex. 31, 12/9/09 RT 5085.) That fact was communicated to Ms. Tullos.
8. (Ex. 31, 12/9/09 RT 5087.) Ms. Tullos ultimately received the benefit of a
9. cooperation agreement, suggesting that her testimony shifted to the prosecution’s
10. liking.6
11. The pressure on Ms. Tullos continued through “very aggressive” and
12. “relentless” trial preparation. (Ex. 31, 12/9/09 RT 5088, 5089.) It spanned over 150
13. hours and 26 separate sessions. (Ex. 31, 12/9/09 RT 5088.) Mr. Stolper repeatedly
14. “stated or instructed or advised Ms. Tullos that certain types of responses to
15. questions would better suit the government’s interest than other responses.” (Ex. 31,
16. 12/9/09 RT 5077.) Throughout, “Mr. Stolper was trying to encourage Ms. Tullos to
17. testify in a certain manner.” (Ex. 31, 12/9/09 RT 5088-89.)7
18. The impact of the prosecution’s pressure tactics are nowhere more clear
19. than in the contrast between Ms. Tullos’s pre-cooperation statements to Broadcom’s
20. outside lawyers in 2006 and her post-cooperation testimony in 2009: while in June

# 23

6 The government’s conduct toward Ms. Tullos was quite similar to the

1. government’s conduct to witness Sue Collins. As detailed in Mr. Ruehle’s original misconduct motion and reply, Mr. Stolper told counsel for Ms. Collins that she
2. would not be prosecuted if she offered particular testimony suggested by Mr. Stolper.
3. 7 A blanket reprise of “just tell the truth” does nothing to ameliorate this pressure. Given Ms. Tullos’ cooperation agreement, Mr. Stolper defined the “truth,”
4. and he held the key to a substantial assistance recommendation. ’
5. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. 2006, Ms. Tullos initially would not say that backdating occurred and that Bill
  2. Ruehle did not do that (Ex. 13, Ruehle 9461R (Irell Notes of Nancy Tullos
  3. Interview)), Ms. Tullos testified quite differently at trial. Indeed, she admitted that
  4. “the facts for me have not changed” but as a result of her education from the
  5. government, “[w]hat has changed over time is my opinion of those facts.” (Ex. 24,

**6** 11/6/09 RT 1727.)

# 4. Government Witness Carol Prado

1. While there is less visibility into the prosecution’s conduct toward Carol Prado,
2. the impact of the prosecution’s tactics on Ms. Prado are nonetheless apparent. At the
3. time of the events alleged in the indictment, Ms. Prado did not believe a conspiracy
4. was afoot and had no intent to deceive shareholders. (Ex. 21, 10/29/09 RT 691-92,
5. 714.) Accordingly, like Ms. Tullos, Ms. Prado made no mention of “backdating” in
6. her first few interviews with outside counsel for Broadcom. (Ex. 21, 10/29/09 RT
7. 657.) And through eight interviews regarding Broadcom’s stock option process, Ms.
8. Prado made no mention of any conversation with Mr. Ruehle about concerns Ms.
9. Prado had with the propriety of Broadcom’s stock option program. However, the
10. government’s pressure ultimately won out, and Ms. Prado had a vision in the middle
11. of the night that led her, for the first time, to recount a conversation she claimed to
12. have with Mr. Ruehle that fit the government’s theory perfectly. (Ex. 21, 10/29/09

**20** RT 673, 679, 692-93.)

1. The recent revelations that Mr. Stolper “stated or instructed or advised [a
2. witness] that certain types of responses to questions would better suit the
3. government’s interest than other responses” (Ex. 31, 12/9/09 RT 5077) and “was
4. trying to encourage [a witness] to testify in a certain manner” (Ex. 31, 12/9/09 RT
5. 5088-89), strongly suggest that he engaged in similar conduct toward Ms. Prado.
6. Add to this the prosecution’s undisclosed promise of non-prosecution, which is

# 27

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1. discussed later, and it becomes apparent that the prosecution’s carrot-and-stick
2. approach to Ms. Prado decisively shaped her testimony against Mr. Ruehle.

# B. Icing Defense Witnesses

1. The SEC testimony of Dr. Samueli and Mr. Dull presented a problem for the
2. government – it was favorable to Mr. Ruehle and Dr. Nicholas, and inconsistent with
3. the government’s theory of the case. The government attempted to solve the
4. problem of these exculpatory witnesses by “icing” them -- offering Dr. Samueli a
5. questionable plea agreement8 and placing Mr. Dull in limbo. Over a year ago, Mr.
6. Ruehle expressed the concern that the government’s conduct had the effect, and
7. perhaps the intent, of ensuring that Dr. Samueli and Mr. Dull would assert their Fifth
8. Amendment rights and make themselves unavailable as witnesses on Mr. Ruehle’s
9. behalf.
10. What has transpired since then indicates that Mr. Ruehle’s concerns were well
11. founded. Dr. Samueli and Mr. Dull offered powerful exculpatory testimony on Mr.
12. Ruehle’s behalf. The government, however, did everything it could to prevent their
13. testimony, including refusing to grant immunity; opposing the defense request for
14. court ordered immunity; and improperly attempting to dissuade Mr. Dull from
15. testifying at all. And then, despite insisting in its opening that Dr. Samueli and Mr.
16. Dull were co-conspirators, the government conducted perfunctory cross-
17. examinations of both of them, thus exposing their co-conspirator claims in the
18. opening as hollow and misleading.
19. Mr. Ruehle had a right under the Sixth Amendment to present witnesses in his **23** defense. Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S. Ct. 646, 652-53, 98 Ed. 2d **24**

# 25

8 Indeed, the question and answer that provided the purported factual basis for

**26** Dr. Samueli’s plea was later corrected by Dr. Samueli a mere 17 lines later in his testimony before the SEC. (Ex. 10, 5/25/07 Samueli SEC testimony at 122:3-9,

**27** 122:23-123:1.)

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1. 798 (1988) . The evidence now shows that throughout its investigation and this trial,
2. the government undertook extraordinary efforts to frustrate that right.

# C. Eliciting and Failing to Correct False and Misleading Testimony

1. As the Ninth Circuit recently observed in the Reyes case, “it is improper for
2. the government to present to the jury statements or inferences it knows to be false or
3. has very strong reason to doubt.” Reyes, 577 F.3d at 1077. The prosecution,
4. however, ignored this warning and shirked its constitutional obligation to correct
5. several instances of false and misleading testimony presented to the jury. Napue v.

**9** Illinois, 360 U.S. 264, 269-70, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959)

1. (describing a prosecutor’s “responsibility and duty to correct what he knows to be
2. false and elicit the truth”).

# 1. False Testimony of Nancy Tullos

1. During direct examination, the prosecution elicited unqualified testimony from
2. Ms. Tullos that she was never promised a no-prison recommendation:
3. Q What do you understand the government -- what are you hoping the government will do as a result of your
4. decision to plead guilty and cooperate?
5. A They will recommend no jail time.
6. Q That’s what you are hoping for?
7. A That’s what I’m hoping for.
8. Q Has that been promised to you?
9. A No.

**22** (Ex. 22, 10/30/09 RT 822.)

1. Counsel for Nancy Tullos exposed this testimony as false. During questioning
2. by the government, counsel stated, “At the close of every session, Mr. Stolper
3. indicated that he was satisfied, or if not, quite pleased with her level of cooperation,
4. and that her assistance had been substantial. And that it continued to be his intention

# 27

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1. to recommend that she not receive any prison sentence.” (Ex. 31, 12/9/09 RT 5095,

# 5100.) The government never disputed this testimony.

1. It is, then, quite clear that Ms. Tullos was twice promised a no-jail
2. recommendation, but testified that she received no such promise. The government
3. elicited this false testimony, was well aware of its falsity, and failed to correct it.
4. And because the government failed to disclose these promises (despite numerous
5. pre-trial requests for Brady/Giglio information), the defense was deprived of its
6. opportunity to expose the lie in her testimony. The government’s promises to Ms.
7. Tullos went to the heart of her credibility, and her false testimony was the very kind
8. of testimony the prosecution failed to correct in Napue. Accordingly, by eliciting
9. and failing to correct Ms. Tullos’s false testimony concerning promises made to her
10. concerning her sentencing, the government committed misconduct of a constitutional
11. dimension.
12. Ms. Tullos’s testimony was false in another respect, as well. Ms. Tullos
13. testified that she met with the government between 9 and 15 times (or 30 hours) for
14. trial preparation. (Ex. 23, 11/3/09 RT 1133-35.) Her counsel, however, testified that
15. he participated in approximately 26 trial preparation sessions comprising 125-150
16. hours, and the government did not dispute that testimony. (Ex. 31, 12/9/99 RT 5088.)
17. The government was well aware that this testimony was false, but failed to correct it.
18. This, too, was a Napue violation. And because the government failed to disclose the
19. correct number of meetings with Ms. Tullos to the defense, Mr. Ruehle was deprived
20. of an opportunity to correct the record on cross-examination.

# 2. False and Misleading Testimony by the Case Agent

1. The case agent offered the following testimony concerning Mr. Stolper’s leak
2. of information concerning Dr. Samueli to the Los Angeles Times and the Wall Street
3. Journal:

# 27

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1. Q Does that refresh your recollection regarding this complaint [about media leaks by Mr. Stolper] filed by Mr.
2. Hennigan?
3. A Only that it was turned out to be not true and I don’t know the specifics.

# 4

(Ex. 27, 11/24/09 RT 3579.)

# 5

Mr. Stolper himself made it clear that Mr. Hennigan’s allegation was true and

# 6

that Agent Bonin’s testimony was false and misleading.

# 7

Q Mr. Stolper, did you leak any information regarding

1. Dr. Samueli to the press?
2. A I did.
3. (Ex. 31, 12/9/09 RT 5104.) Mr. Stolper knew well that the agent’s testimony was
4. false and misleading, but did nothing to correct it. This was a Napue violation.
5. The agent also misled the jury concerning Mr. Stolper’s removal from
6. participation in the investigation and prosecution of Dr. Samueli:
7. Q Now, Mr. Bonin, isn’t it true that the United States Attorney disciplined Mr. Stolper in connection with that investigation?

# 15

A I’m unaware of that.

# 16

Q Isn’t it true that the United States Attorney, as a

**17** result of the leak allegations, precluded Mr. Stolper from participating in certain aspects of the investigation?

# 18

A I’m unaware of that. Something about that is

**19** striking a c[h]ord but I don’t think it was -- I’ll have to think about that.

# 20

Q Let me see if I can refresh your recollection. Did

1. the United States Attorney prevent Mr. Stolper from any involvement in the investigation of Dr. Samueli as a result
2. of the leaks?
3. **A** No, he did not.
4. (Ex. 27, 11/24/09 RT 3590.) The truth is now apparent: the Acting United States
5. Attorney in fact prevented Mr. Stolper from making decisions in the investigation of
6. Dr. Samueli. (Ex. 5, letter from G. Cardona to G. Greenberg, dated 2/28/07; Ex. 29,
7. 12/7/09 RT 4589-90.) It is of no moment if the agent’s testimony was
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* 1. unintentionally false – a prosecutor’s duty under Napue encompasses such
  2. statements. Jenkins v. Artuz, 294 F.3d 284, 294 (2d Cir. 2002) (“That a statement
  3. standing alone is factually correct obviously does not mean that it cannot mislead
  4. based on the natural and reasonable inferences it invites. ADA Lendino’s attempt to
  5. hide Morgan’s plea agreement from the jury and to use the false impression of its
  6. absence to bolster his credibility leaves us with no doubt that her behavior violated
  7. Jenkins’s due process rights.”); United States v. Iverson, 637 F.2d 799 (D.C. Cir.
  8. 1980) (“[I]t makes no difference whether the testimony is technically perjurious or
  9. merely misleading.”). Accordingly, the government violated Napue with respect to
  10. the case agent’s testimony.
  11. Lastly, the government falsely suggested to the jury that Dr. Samueli’s
  12. concerns relating to the confidentiality of the Grand Jury proceedings were related
  13. solely to the pending civil actions:
  14. Q. Mr. Stolper was willing to forgo your appearance before the
  15. Grand Jury if he was provided with a letter simply saying you were
  16. going to assert your Fifth Amendment privilege; isn’t that true?
  17. A. I don’t recall the exact exchange between Mr. Greenberg and Mr.
  18. Stolper, but I believe the confidentiality issue was a part of that exchange.

# 19

1. Q. And the reason the confidentiality issue was that you didn’t want the letter to get into the hands of lawyers in the civil cases against you;
2. right?

# 22

* 1. I honestly don’t know the reason Mr. Greenberg was requiring

**23** confidentiality.

**24** (Ex. 31, 12/9/09 RT 5026.)

1. The government then tried to drive the point further by introducing GX 4732
2. (Ex. 2), which discussed, among other things, Mr. Greenberg’s general concerns
3. relating to the pending civil actions against Dr. Samueli.
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* 1. This line of questioning was intentionally misleading, as Mr. Greenberg’s
  2. contemporaneous objection demonstrated. (Ex. 31, 12/9/09 RT 5029.) As the
  3. government well knew, Mr. Greenberg spoke with Mr. Stolper about submitting a
  4. letter in lieu of a personal appearance. However, Mr. Greenberg specifically told Mr.
  5. Stolper that he “was concerned about leaks and wanted the protection mandated by
  6. Rule 6(e)” for that letter. (Doc. 744, Greenberg Decl. ¶ 20, filed 12/3/09.) Because
  7. Mr. Stolper never agreed that a letter in lieu of a personal appearance would be
  8. covered by Rule 6(e)’s nondisclosure requirements, no letter was sent. (Id.)
  9. Again, the government knew the true and complete facts relating to the letter
  10. in lieu of a personal appearance. But it chose to present an incomplete and
  11. materially distorted version of those facts to the jury, knowing that Mr. Ruehle’s
  12. counsel was ill equipped to put the lie to it at the time, as counsel noted. (Ex. 31,

**13** 12/9/09 RT 5045.)

# D. Brady and Giglio Violations

1. The trial in this case has also exposed several serious Brady and Giglio
2. violations by the government.
3. In a prior filing with the Court, the government made the following statement:
4. The government has complied with its obligations to
5. provide agreements with any government witnesses and any consideration witnesses have received from the government.
6. There are no promises or inducements to witnesses other than those contained in the materials already produced to
7. the defense.
8. (Opposition to Defendants Ruehle’s Renewed Motion to Compel Discovery, at 9,
9. Doc. 432, filed 7/20/09.) This statement was false. The testimony of Ms. Tullos’s
10. attorney revealed that the government failed to disclose its statements to Ms. Tullos
11. that she had provided substantial assistance and the government intended to make a
12. no-jail recommendation at the time of her sentencing. Such information is
13. quintessential Giglio – indeed, Giglio involved a prosecutor’s failure to disclose an
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* 1. alleged promise to a key witness. Giglio v. United States, 405 U.S. 150, 150-51, 92
  2. S. Ct. 763, 764, 31 L. Ed. 2d 104 (1972) (“the Government had failed to disclose an
  3. alleged promise made to its key witness that he would not be prosecuted if he
  4. testified for the Government”). 9
  5. Similarly, the government failed to disclose additional “evidence affecting
  6. credibility,” as required by Giglio, id. at 154, including government’s warning to Ms.
  7. Tullos that her testimony would have to change if she wanted a cooperation deal
  8. from the government. (Ex. 31, 12/9/09 RT 5087.) Also undisclosed until the end of
  9. the trial was the fact that attorneys for Ms. Tullos participated in five attorney proffer
  10. sessions in which they told the government what her testimony would be – one of
  11. which involved the government’s insistence that Ms. Tullos’s testimony would have
  12. to change if she wanted a cooperation deal. (Ex. 12, Letter from R. Sachs to T.

**13** O’Brien, dated 11/30/07; Ex. 31, 12/9/09 RT 5087.)

1. The government failed to disclose the fact that, by Mr. Stolper’s own
2. admission, Ms. Tullos gave several answers during trial preparation that conflicted
3. with the government’s view of the case. (Ex. 31, 12/9/09 RT 5107.) Any answers
4. Ms. Tullos gave that conflicted with the government’s view of the case were, by
5. definition, exculpatory, and therefore should have been disclosed to Mr. Ruehle
6. when they were made. The fact that Mr. Stolper failed to disclose such answers and
7. instead sought to change Ms. Tullos’s answers (Ex. 31, 12/9/09 RT 5107) is further
8. evidence of misconduct.
9. And despite having claimed it had produced all “agreements” with
10. government witnesses, the government produced during trial an agreement that had
11. never before been disclosed to the defense – a confidentiality agreement requiring

# 25

9 As detailed in Mr. Ruehle’s Motion to Compel Brady Discovery, Doc. 694,

1. filed 11/11/09, Mr. Ruehle made repeated requests for such information before trial, and the government assured Mr. Ruehle and the Court that all such information had
2. been provided. (Motion at 3, 4, 5, 8, 9, 10.)
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* 1. Ms. Tullos to keep the contents of the reverse proffer confidential. (Ex. 9, Letter
  2. Agreement from Andrew Stolper, dated 4/18/07.) The agreement was quintessential
  3. Jencks – “‘a written statement made by said witness and signed or otherwise adopted
  4. or approved by [her],’” relating to the subject matter of her testimony.. 18 U.S.C. §
  5. 3500(b), (e); see also United States v. Brumel-Alvarez, 991 F.2d 1452, 1464 (9th Cir.
  6. 1992) (citation omitted).
  7. Ms. Tullos was not the only subject of Brady violations by the government.
  8. The government also failed to disclose the fact that despite its expressed belief that
  9. Ms. Prado was a co-conspirator, it provided her a benefit in the form of assurances
  10. that she was not a target and would not be prosecuted. (Ex. 19, Letter from R.
  11. Adkins to R. Marmaro, dated 9/18/09; Ex. 21, 10/29/09 RT 671-72 (“I had verbal
  12. assurances that I was not a target, yes.”).) This, too, was a Brady violation. Benn v.
  13. Lambert, 283 F.3d 1040 (9th Cir. 2002) (prosecutors must “disclose any benefits that
  14. are given to a government informant”); United States v. Guerrero, 847 F.2d 1363,
  15. 1367 (9th Cir. 1988) (examples of “benefit” in a criminal setting include “no
  16. prosecution, reduced charges, or a recommendation of a lenient sentence”).
  17. The government claimed throughout the discovery process that it was aware of
  18. its discovery obligations and would comply with them. It is now apparent that this
  19. claim was not true. The defense and the Court trusted the government to fulfill its
  20. constitutional obligations, and the government utterly failed.
  21. These Brady violations are no mere foot-faults. They involve information
  22. central to the credibility of the only two Broadcom employees the government called
  23. who were involved in the stock option program at the time relevant to the indictment.
  24. Every piece of information relevant to their credibility was crucial to Mr. Ruehle’s
  25. defense, and the government’s failure to provide the information before trial was
  26. inexcusable. It is only because the government’s misconduct has been so egregious
  27. in other respects that this misconduct has gone largely unnoticed.
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# E. Misleading Testimony by the Lead Prosecutor

* + 1. Under oath before this Court, Mr. Stolper added misleading testimony to his
    2. catalog of transgressions.
    3. Mr. Stolper’s testimony regarding his admitted grand jury leaks was
    4. misleading, if not false, in at least two respects.10 First, Mr. Stolper claimed that he
    5. was unaware that of the several prohibitions against media contact by prosecutors.

**7** (Ex. 31, 12/9/09 RT 5104; Ex. 1, U.S. Attorney’s Manual §§ 1-7.111; 1-7.500; 1-

1. 7.530 (USAM 1997).)11 According to this part of his testimony, then, Mr. Stolper
2. believed at the time he leaked investigation details to the press that he had done
3. nothing wrong. This testimony, however, cannot be squared with Mr. Stolper’s later
4. testimony that he reported his leaks to the United States Attorney before any
5. complaints were lodged. (Ex. 31, 12/9/09 RT 5112.) If Mr. Stolper thought he had
6. done nothing wrong, then why self-report to his supervisors an act he did not believe
7. to be wrong? Mr. Stolper’s testimony on this point was misleading and not credible.
8. Even more misleading was the impression his testimony left that his leaks in

**16** February 2007 were an isolated incident and that he did not know the extent of his

1. own prior media leaks.
2. Q Is that the first time you had ever leaked information on an investigation to the press?

# 19

A I don’t know the answer to that question.

# 20

Q So you may have engaged in that kind of behavior before?

# 21

A Yes. I just don’t know.

# 22

(Ex. 31, 12/9/09 RT 5104-05.) This testimony conflicts directly with compelling

# 23

evidence now that Mr. Stolper was a serial leaker of information to the media

# 24

1. 10 It is a federal crime to give false testimony under oath. 18 U.S.C. § 1621.
2. 11 Such a claim strains credulity on its face, given Mr. Stolper’s involvement in the heavily-reported-on Enron prosecution, and other prosecutions that have
3. garnered media attention.
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* 1. throughout the course of this investigation. As explained in the attached declaration
  2. of Greg Weingart, former chief of the major frauds section in the United States
  3. Attorney’s Office and former counsel for Dr. Henry T. Nicholas III, Mr. Stolper
  4. leaked information directly related to grand jury subpoenas to a journalists in July
  5. 2007. (Ex. 11, Weingart Decl. at ¶¶ 18-35.) And now, counsel for David Dull has
  6. revealed evidence of similar leaks by Mr. Stolper in November 2007, around the
  7. same time Nancy Tullos’s plea agreement was leaked. (Aronson Decl. at ¶¶ 4-9,
  8. Doc. 775) These additional “prior and subsequent similars” by Mr. Stolper cast
  9. serious doubt on the credibility of Mr. Stolper’s testimony that he did not leak Ms.
  10. Tullos’s plea agreement. (Ex. 31, 12/9/09 RT 5103.)
  11. The court was correct: “A prosecutor does not try his case in the press.” (Ex.
  12. 29, 12/7/09 RT 4588.) But more than that, a prosecutor should not use the press as a
  13. tool to exert pressure on people who choose to exercise their constitutional rights in
  14. the face of a government investigation. And certainly, a prosecutor should not give
  15. misleading sworn testimony about such leaks. Justice demands more of a prosecutor.

# F. Improper Attack on Defense Attorney

* 1. During cross examination, the case agent made a gratuitous and wholly
  2. inappropriate comment about defense counsel.
  3. Q All I was asking was whether or not you would agree that on about 11 occasions you interviewed witnesses
  4. before you were formally assigned to the case?
  5. A I’m not going to create a false impression, because I have seen what you have done with that.

# 22

Mr. Marmaro: Your Honor, I move to strike that comment.

**23** I think that’s outrageous, Agent B. We have seen the conduct of the government in the case.

# 24

The Witness: I think it’s outrageous that you --

# 25

The Court: Wait a minute. Stop it, sir. That’s enough.

# 26

(Ex. 32, 12/10/09 RT 5176.) It is well established that such government attacks on

# 27

defense attorneys are prohibited. United States v. Frederick, 78 F.3d 1370, 1380 (9th

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1. Cir. 1996) (“[T]he comment in which the prosecutor said that she sought to
2. compliment the defense lawyer on ‘confusing’ the witness would seem to imply that
3. his methods were somewhat underhanded and designed to prevent the truth from
4. coming out. The prosecutor’s comments were improper ”); Bruno v. Rushen,
5. 721 F.2d 1193, 1195 (9th Cir. 1983) (“Neither is it accurate to state that defense
6. counsel, in general, act in underhanded and unethical ways, and absent specific
7. evidence in the record, no particular defense counsel can be maligned.”).
8. The particular danger of such comments was that they implied that the agent
9. had personal knowledge of evidence not in the record that suggested that counsel for
10. Mr. Ruehle had created a “false impression” throughout the trial. Territory of Guam
11. v. Quichocho, 973 F.2d 723, 726 (9th Cir. 1992) (“the remarks were still improper
12. because the prosecution may not say anything to the jury implying that evidence
13. exists but has not been admitted into evidence”). The case agent has been an agent
14. of the FBI for over 14 years, and has testified many times in federal court--he knew
15. better. The case agent’s unprovoked attack on defense counsel was inexcusable.

# G. Additional Misconduct

1. Mr. Stolper’s conduct has included contemptible intrusions into the personal
2. lives and families of his targets. In the midst of Dr. Nicholas’s painful divorce, Mr.
3. Stolper issued a subpoena to Dr. Nicholas’s wife. (Ex. 6, Letter from D. Martinez to
4. A. Stolper, dated 3/22/07 (redacted to protect identity of minor).) When Ms.
5. Nicholas indicated through counsel that she would assert the spousal testimonial
6. privilege, Mr. Stolper threatened to bring criminal charges against her because of her
7. privilege assertion – when Mr. Stolper had previously claimed he had “zero criminal
8. interest” in her. (Id. at 1.) Mr. Stolper, however, was not done. He then issued the
9. outrageous threat that if Ms. Nicholas persisted in her privilege assertion, he would
10. but Dr. Nicholas’s 13-year-old son in the grand jury if Dr. Nicholas’s wife asserted
11. privilege and refused to testify before the grand jury. (Ex. 7, Letter from B. Deixler
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* 1. to A. Stolper, dated 4/9/09, at 2; Ex. 8, Letter from A. Stolper to B. Deixler, dated
  2. 4/10/07, at 5 (redacted to protect identity of minor).) Indeed, Mr. Stolper was
  3. unapologetic for that threat and insisted he was “duty bound” to put a boy into the
  4. grand jury to offer testimony in a case against his father. (Ex. 8, Letter from A.
  5. Stolper to B. Deixler, 4/10/07, at 5.) This Court was rightly troubled by that
  6. conduct.12
  7. As the Court is also aware, Mr. Stolper took the extraordinary step of forcing a
  8. decorated Navy veteran to jail because he refused to offer testimony against Dr.
  9. Nicholas. (Ex. 14, E. Scott Reckard, Ex-SEAL jailed in exec’s case, LA Times,

**10** 5/6/08.)

1. So many instances of misconduct by Mr. Stolper have come to light that it
2. simply cannot be said that the problem is limited to Mr. Stolper. There is a bigger
3. problem here – a failure of supervision. Mr. Stolper’s supervisors have apparently
4. overlooked and dismissed instance after instance of serious misconduct, permitting
5. and enabling ever more serious incidents of misconduct to occur. Had Mr. Stolper’s
6. supervisors intervened and taken proper action sooner, perhaps the acts of
7. misconduct that have defined this investigation and have continued throughout this
8. trial could have been avoided.

# H. Prejudice to Mr. Ruehle

1. Mr. Ruehle has suffered real and substantial prejudice as a result of the
2. government’s misconduct. In the pre-indictment context, the Supreme Court has
3. stated that there is prejudice sufficient to warrant dismissal where there is “‘grave’

# 23

1. 12 Mr. Stolper also issued a subpoena for the confidential transcript of Ms. Nicholas’s deposition. Counsel for Ms. Nicholas filed a motion to quash. (Ex. 7,
2. Letter from B. Deixler to A. Stolper, dated 4/9/07, at 1 (redacted to protect identity

of minor).) While the motion was pending, Mr. Stolper circumvented the pending

1. motion and evaded judicial review by issuing a subpoena to the deposition videographer and presenting the disputed evidence to the grand jury before the
2. motion could be heard. (Id. at 2.)
3. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. doubt that the decision to indict was free from the substantial influence of [the
  2. misconduct].” Bank of Nova Scotia v. United States, 487 U.S. 250, 256, 108 S. Ct.
  3. 2369, 2374, 101 L. Ed. 2d 228 (1988) (citation omitted). In this case, there is no
  4. doubt that the investigation, indictment, and trial have all been substantially
  5. influenced by pervasive and cumulative misconduct.
  6. The prejudice has taken several forms. First, the evidence presented by the
  7. government has been irreparably compromised, both by the intense pressure tactics
  8. of the government and the numerous Brady violations. Ms. Tullos in particular was
  9. subjected to such extraordinary and improper pressure that no amount of adversarial
  10. process or curative instructions can render her testimony worthy of consideration in a
  11. criminal trial. The government’s failure to disclose its intention to recommend a no-
  12. jail sentence for Ms. Tullos deprived Mr. Ruehle of the full opportunity to present
  13. the jury with quintessential evidence relevant to her credibility, which is a critical
  14. issue in this case. And the government’s conduct toward Ms. Tullos creates grave
  15. doubt about its conduct toward Carol Prado, whose testimony tacked sharply in the
  16. government’s direction over the course of several lengthy and intimidating
  17. government interviews. Under the circumstances, Mr. Ruehle was deprived of his
  18. right to confront witnesses untainted by improper government influence.
  19. The government’s misconduct also infected his defense case. By icing two
  20. key defense witnesses for more than a year before trial, the government effectively
  21. impeded Mr. Ruehle’s preparation of his defense. By pressuring those two witnesses
  22. with improper media leaks designed to coerce cooperation, invalid plea offers, and
  23. outright threats even in the wake of this Court’s decision to grant immunity, the
  24. government permanently tainted those witnesses in a way that even court-ordered
  25. immunity could not cure. Mr. Ruehle is left to wonder what his defense could have
  26. been if the government had not improperly attempted to thwart it in so many ways.

# 27

**28 WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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1. There is, then, grave doubt as to whether this jury can make a decision free
2. from the substantial influence of the government’s misdeeds. This is the ultimate
3. prejudice to Mr. Ruehle – a trial consisting of evidence so pervasively tainted by
4. government malfeasance that even with substantial curative efforts, there can be no
5. confidence in the integrity of these proceedings.

# I. The Court’s Authority to Dismiss the Indictment

1. It cannot be disputed that this Court has the authority to dismiss an indictment
2. due to prosecutorial misconduct. United States v. Owen, 580 F.2d 365, 367 (9th Cir.
3. 1978) (“Under its inherent supervisory powers, a federal court is empowered to
4. dismiss an indictment on the basis of governmental misconduct. As such, dismissal
5. is used as a prophylactic tool for discouraging future deliberate governmental
6. impropriety of a similar nature.”) (citations omitted.) Dismissal is appropriate when
7. the government has “caused substantial prejudice to the defendant and been flagrant
8. in its disregard for the limits of appropriate professional conduct.” United States v.
9. Lopez, 989 F.2d 1032, 1041 (9th Cir. 1993), amended and superseded, 4 F.3d 1455
10. (9th Cir. 1993). “[E]ven unintentional misconduct may be sufficient” to warrant
11. dismissal of an indictment. United States v. De Rosa, 783 F.2d 1401 (9th Cir. 1986).
12. The government’s investigation and prosecution has included violations of a
13. constitutional and potentially criminal magnitude that far exceeds the limits of
14. professional conduct. The facts of this case demonstrate that the “Government
15. conduct has placed in jeopardy the integrity of the criminal justice system.” United
16. States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979). Witness intimidation and
17. tampering, media leaks designed to embarrass and coerce, eliciting and failing to
18. correct false testimony, Brady violations, and the offering of misleading testimony
19. by an unrepentant lead prosecutor – considered in their totality, these violations leave
20. no question that dismissal is both appropriate and necessary. United States v.
21. Marshank, 777 F. Supp. 1507, 1524 (N.D. Cal. 1991) (“Having considered the
22. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. totality of the circumstances, the court concludes that the conduct of the government
  2. in the investigation and prosecution of Steven Marshank was so outrageous that it
  3. shocked the universal sense of justice. Because the government’s conduct was
  4. fundamentally unfair, the indictment is DISMISSED.”); see also United States v.
  5. Dederich, 825 F.2d 1317, 1320 n.6 (9th Cir. 1987) (“We have upheld dismissal of
  6. indictments based on cumulative prosecutorial errors and indiscretions before the
  7. grand jury.”); United States v. Omni Int’l Corp., 634 F. Supp. 1414, 1440 (D. Md.
  8. 1986) (“Thus, in exercising the supervisory power entrusted to it to ensure the
  9. smooth and proper administration of justice, the Court has determined that the
  10. indictment should be dismissed. The indictment must be dismissed as a
  11. prophylactic sanction for the consistent course of entrenched and flagrant
  12. misconduct.”).

# III. CONCLUSION

* 1. Unfortunately, this case is not an outlier. In the past year alone, an indictment
  2. against a sitting United States Senator was dismissed based on prosecutorial
  3. misconduct, and the Chief Judge of the District Court of Massachusetts wrote a
  4. scathing opinion lamenting repeated instances of government misconduct in his
  5. district. (Ex. 17, Del Quentin Wilber, Judge Orders Probe of Attorneys in Stevens
  6. Case, Washington Post, 4/8/09.); United States v. Jones, 609 F. Supp. 2d 113, 115 (D.
  7. Mass. 2009). Here in this very district, recent instances of prosecutorial misconduct
  8. have resulted in the dismissal of significant cases and stern judicial warnings. See,
  9. e.g., (Ex. 18, Scott Glover, Judges dismisses supermarket mogul’s racketeering
  10. convictions, LA Times, 6/10/09) (discussing dismissal of charges due to Brady
  11. violation); United States v. Hector, No. CR 04-00860 DDP, 2008 WL 2025069, at
  12. \*21 (C.D. Cal. May 8, 2008) (where prosecution failed to investigate informant and
  13. produce information relevant to credibility, court “seriously considered dismissing
  14. the indictment”). This is not an isolated case.
  15. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* + 1. The prosecution appears to have lost sight of its role in our criminal justice
    2. system. The prosecution would do well to return to the words of Justice Sutherland:
    3. The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose
    4. obligation to govern impartially is as compelling as its

obligation to govern at all; and whose interest, therefore, in

* + 1. a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and
    2. very definite sense the servant of the law, the twofold aim

of which is that guilt shall not escape or innocence suffers.

* + 1. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is
    2. not at liberty to strike foul ones. It is as much his duty to

refrain from improper methods calculated to produce a

* + 1. wrongful conviction as it is to use every legitimate means to bring about a just one.

# 10

**11** Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935) .

1. More concerned with securing a conviction than doing justice, the
2. prosecution in this case attempted to transform accounting errors made in good faith
3. at hundreds of companies by thousands of individuals into a conspiracy to commit
4. securities fraud at a single company, perpetrated by a single man. As a result, Mr.
5. Ruehle and his right to a fair trial have suffered great and incurable prejudice, and
6. the integrity of our criminal justice system has been tarnished. Under the
7. circumstances of this case, only dismissal can undo the damage the prosecution has
8. wrought.
9. For the foregoing reasons, the indictment should be dismissed.
10. DATED: December 14, 2009
11. SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
12. Richard Marmaro

Jack P. DiCanio

1. Matthew Donald Umhofer
2. By: /s/ Richard Marmaro RICHARD MARMARO
3. Attorneys for Defendant
4. William J. Ruehle
5. **WILLIAM J. RUEHLE’S RENEWED MOTION TO DISMISS INDICTMENT BASED ON CUMULATIVE**

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* 1. PROOF OF SERVICE
  2. I hereby certify that I caused the foregoing to be filed with the Clerk of the
  3. Court by using the ECF system which sent notification of the filing to the following:
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# 13

By: /s/ Richard Marmaro

**14** RICHARD MARMARO

# 15

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**PROOF OF SERVICE; Case No. SACR 08-139-CJC**