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10 IN THE UNITED STATES DISTRICT COURT FOR THE  
11 EASTERN DISTRICT OF CALIFORNIA

12  
13 UNITED STATES OF AMERICA, ) No. 2:07-cr-266 FCD  
14 )  
Plaintiff, )  
15 v. )  
16 HARRISON JACK, et al., ) Date: May 11, 2009  
Time: 11:30 a.m.  
17 ) Court: Hon. Frank C. Damrell, Jr.  
18 Defendants. )  
\_\_\_\_\_ )

19 GOVERNMENT'S OPPOSITION TO  
20 DEFENDANTS' MOTION TO DISMISS  
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HARRISON JACK, et al., ) Date: May 11, 2009  
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Defendants. ) Court: Hon. Frank C. Damrell, Jr.  
18 )

19 I.

20 INTRODUCTION

21 Cases are decided based on proven facts and the law, not based on  
22 unsubstantiated allegations and colorful rhetoric. In their motion to  
23 dismiss the indictment, defendants "cherry pick" a series of seemingly  
24 supportive facts from the record (frequently out of context), omit  
25 other pertinent non-supportive facts, and then blithely allege that  
26 the Government "concocted" its entire case, lied repeatedly to  
27 judicial officers of this District, and otherwise committed outrageous  
28 government conduct violative of due process. The Court should reject

1 these meritless contentions. Neither agents nor prosecutors engaged  
2 in any form of misconduct in this case, much less "grossly shocking"  
3 and "outrageous" conduct that violates due process standards. The  
4 defense motion to dismiss should be denied.

5 **II.**

6 **SUMMARY OF ARGUMENT**

7 A. Contrary to the defense contentions (Defense Motion ("Mot.")  
8 at 1-2, 4-5, 29-30), the Bureau of Alcohol, Tobacco, Firearms and  
9 Explosives ("ATF") properly targeted defendant Jack for investigation.  
10 Defendant Jack told complainant Namon Hawthorne, among other things:  
11 that Jack was seeking to acquire and transfer 500 AK-47 machine guns  
12 abroad; that the people he was dealing with had made similar purchases  
13 in the past, and that the weapons were to be provided to Hmong  
14 Laotians who purportedly needed protection from an alleged [Lao  
15 government] genocide. On its face, this information suggested that  
16 crimes between Jack and his "people" were presently in the planning  
17 stages or already underway, including a conspiracy to unlawfully  
18 receive, possess, and transfer AK-47s, a conspiracy to unlawfully  
19 export AK-47s, a conspiracy to kill and maim individuals abroad,  
20 and/or a conspiracy to violate the Neutrality Act. See infra § IV.B.

21 B. Contrary to the defense contentions (Mot. at 2, 6, 9, 31),  
22 the ATF Undercover Agent ("UC") did not improperly "goad" and "press"  
23 defendants to acquire more powerful weaponry or engage in more  
24 egregious criminal conduct. A review of the complete record reveals  
25 that willing conspirators sometimes made requests to buy specific  
26 weapons and manpower from the UC (including mercenaries and 100s of  
27 machine guns); other times, the UC recommended weapons for sale to  
28 readily willing and interested conspirators. The UC did not, however,

1 utilize any sort of constitutionally impermissible coercive conduct,  
2 or anything close thereto, to induce defendants to act. See infra §  
3 IV.C.

4 C. Contrary to the defense contentions (Def. Mot. at 2, 6-13,  
5 30-31), the UC did not "formulate" and "direct" the charged  
6 conspiracies for a series of otherwise "incompetent" conspirators.  
7 Defendants were the driving force behind the conspiracies to acquire  
8 arms and overthrow the Lao government and, in fact, made significant  
9 progress in effectuating those objectives. In short, the conspirators  
10 developed the idea of acquiring arms and then staging a coup; the  
11 conspirators developed strategies as to how they should attack the Lao  
12 government; the conspirators gathered intelligence in connection with  
13 Lao troop locations, insurgent locations and possible key assets in  
14 Vientiane (the capital of Laos); the conspirators developed  
15 operational plans; the conspirators ultimately developed a strategic  
16 objective calling for, among other things, the destruction of the  
17 Royal Thao Palace in Vientiane and its occupants, as well as the  
18 arming of insurgent groups outside of Vientiane to attack government  
19 troops; the conspirators selected probable locations for delivery of  
20 arms and agreed to a specific time frame for delivery and exchange of  
21 money and arms; the conspirators placed an initial order with the UC  
22 for both weaponry (namely, 125 AK-47 rifles, 20,000 rounds of  
23 ammunition, four cases of smoke grenades) and mercenaries (who were to  
24 demolish the Royal Lao Palace); the conspirators indicated their  
25 unequivocal intention to make future orders (all with a goal of arming  
26 10,000 insurgents), and the conspirators actively attempted to gather  
27 funds to support their objectives. See infra § IV.D. & E.

28 D. Contrary to the defense contentions (Mot. at 2, 6-7, 9-10),

1 the UC did not somehow "inflamm" the defendants' passions about the  
2 reported genocide in Laos, "dash" their "hopes of a peaceful  
3 solution," or "assure" defendants that the United States government  
4 "would support" the overthrow of the Lao government. See infra §  
5 IV.F.

6 E. Contrary to the defense contentions (Mot. at 2-3, 13-18,  
7 26), the Government did not "fail to apprise" defendants or the  
8 Magistrate Court, during bail proceedings, of purported exculpatory  
9 evidence related to Vang Pao. At the time of indictment, and indeed  
10 at the time of bail proceedings, the Government did not have full  
11 translations of certain Lao/Hmong conversations which arguably suggest  
12 that Vang Pao ultimately opposed the plan. After indictment, and even  
13 before it knew the nature of these foreign language calls, the  
14 Government disclosed the actual Lao/Hmong recordings to the defense.  
15 When the Government received the English translations well after bail  
16 proceedings had concluded, the Government disclosed these as well.  
17 See infra § IV.G.

18 F. Contrary to the defense contentions (Mot. at 2-3, 19-27),  
19 purported agent false statements in affidavits and purported  
20 prosecutor false statements during pre-trial proceedings are not an  
21 appropriate basis for dismissal of an indictment where, as here: there  
22 is no demonstrable prejudice to defendants; any conceivable prejudice  
23 can be neutralized by lesser remedies such as suppression of evidence;  
24 and the allegations, even if assumed true, do not constitute  
25 "flagrantly offensive government conduct" sufficient to meet the  
26 "extremely high standard" required for dismissal. Moreover, contrary  
27 to the defense contentions: the UC did not fabricate incriminating  
28 exchanges between himself and Vang Pao; agents did not intentionally

1 submit any sort of material false or misleading information in their  
2 affidavits related to the investigation; and prosecutors did not make  
3 any sort of false or misleading statements to judicial officers in  
4 connection with pretrial proceedings. See infra §§ V. & VI.

5 **III.**

6 **STATEMENT OF FACTS**

7 A. Detailed Statement of Facts

8 The issues presented for review are very fact-intensive. For the  
9 convenience of the Court, the Government has addressed the relevant  
10 facts and law, as well as its contentions, on an issue-by-issue basis  
11 infra §§ IV.-VI.

12 Also for the convenience of the Court, the Government has  
13 prepared a detailed statement of facts (approximately 50 pages in  
14 length, separately filed as Exhibit A) which summarizes the various UC  
15 contacts with the defendants, should the Court wish to examine some of  
16 these contacts in greater detail.

17 B. Brief Statement of Facts<sup>1</sup>

18 1. Harrison Jack Makes the First Move

19 The case came to the attention of the ATF on September 29, 2006,  
20 when Namon Hawthorne alerted agents in the Phoenix, Arizona office  
21 that Harrison Jack wanted to buy 500 AK-47s, a type of machine gun.  
22 Gov. Ex. 00, ATF Rpt. 1. Jack asked if Hawthorne knew where Jack  
23 "could purchase 500 AK-47 rifles to be used to support Laotians who

---

24  
25 <sup>1</sup> The investigation spanned from the end of September 2006  
26 through the beginning of June 2007. This statement of facts  
27 summarizes only the contacts between the undercover agent and  
28 defendants prior to the defendants' arrests. Other evidence in the  
case includes a voluminous quantity of wiretap intercepts of  
conspirator conversations and seized documents found at conspirator  
and third party locations.

1 are being slaughtered in Laos." Id. Jack further stated that "there  
2 is a genocide taking place in Laos, and [he] needed to help those  
3 persons being ethnically cleansed by providing them with firearms to  
4 protect themselves." Id.

5 Hawthorne made a consensual recorded call to Jack the same day.  
6 In summary, Jack: stated that he needed the AK rifles ASAP because the  
7 Laotians were being slaughtered and were constantly on the move to  
8 escape death; indicated he was willing to pay \$400 to \$1,200 per gun  
9 depending on the method of delivery [inside/outside United States];  
10 inquired whether the firearms could be delivered outside the U.S. and  
11 as close to the Laotian border as possible; and, stated that the  
12 people he was dealing with had conducted this type of transaction in  
13 the past. Id.

14 ATF began its investigation of the defendants based on the  
15 Hawthorne information. (The Federal Bureau of Investigation later  
16 partnered with ATF to conduct a joint investigation.)

17 An undercover ATF agent, "Steve" (the "UC"), contacted Jack on  
18 January 22, 2007, to discuss the sale of the machine guns. Gov. Ex.  
19 PP, 1/22/07 Tr. The UC referred to Jack's "problem in East Asia,  
20 AKs." Jack, while noting that it had been "a long time" since he had  
21 spoken to Hawthorne, quickly set up a meeting with the UC. Id. at 3;  
22 see Gov. Ex. A at 2.

23 That meeting occurred on January 25, 2007. Gov. Ex. E, 1/25/07  
24 Tr. Jack and the UC discussed the availability of 500 fully-automatic  
25 machine guns, ammunition, and delivery options. See, e.g., id. at 4-  
26 6, 8-12. Jack asked whether the UC could "tap into boots on the  
27 ground," specifying, "guys who conduct special ops, small teams." Id.  
28 at 26. During that meeting, Jack noted that he was working on this

1 mission for the Hmong people, and that he was "working personally with  
2 General Vang Pao." Id. at 14.

3 The UC told Jack that the weapons sale was illegal. If something  
4 were to go wrong, "We'll end up in prison." Id. at 38. Jack agreed,  
5 and then brought up the idea of using mercenary teams, opining that "a  
6 decent SEAL team" could handle the operation. Id. at 52. A good  
7 team, Jack further explained, could "take the communications" and "key  
8 infrastructure like an airport." Id. Jack commented, "If you target  
9 the right locations, you either bring it down or control it." Id.,  
10 see Gov. Ex. A at 3-6.

11 On February 1, 2007, the UC spoke with Jack by phone, and told  
12 him that he had delivery information and 24 men available as  
13 instructors or for other specialized purposes, the "boots on the  
14 ground" about which Jack had inquired. Gov. Ex. QQ, 2/1/07 Tr. at 4.  
15 The UC indicated other military materiel, including ammunition, was  
16 available as well. Id. at 4. Jack replied that he could pass along  
17 the information at a meeting he had the next day. Id. at 5. The UC  
18 also said that if Jack's group was interested, they should meet with  
19 the UC so everything could be laid out. Id. at 6; see Gov. Ex. A at  
20 6-7.

21 2. The UC Meets "The Leadership"  
22 and They Admire His Weapons

23 That meeting occurred near noon on February 7, 2007, at the  
24 Amarin Restaurant in Sacramento. Gov. Ex. D, 2/7/07 Tr. at 2; see  
25 generally Gov. Ex. F., ATF Rpt. 8. According to Jack, "[T]he senior  
26 leadership of the entire Hmong community," was in attendance, for an  
27 approximate total of 17 people. Gov. Ex. D, 2/7/07 Tr. at 4. Those  
28 senior leaders included defendants Vang Pao, Lo Thao, Youa True Vang,

1 Hue Vang, Chong Yang Thao, Chue Lo, Seng Vue, and Lo Cha Thao.

2 During the lunch meeting, the UC gave Jack and Lo Cha Thao the  
3 list of weapons available, as he promised during the February 1 call  
4 with Jack. Id. at 6. There was some discussion at the table relating  
5 to the proposed arms.<sup>2</sup> Following the meal, a second undercover ATF  
6 agent arrived in an RV, parked in a nearby parking lot, and posed as  
7 the UC's partner. Id. at 33-34, 38-39. The group went to the lot and  
8 each person, save Vang Pao's wife, entered the RV to view the weapons.  
9 Gov. Ex. F, ATF Rpt. 8, ¶ 32.<sup>3</sup>

10 Video and audio recordings captured the defendants perusing and  
11 commenting on the weaponry. Gov. Ex. D, 2/7/07 Tr. The defendants  
12 expressed their interest in and knowledge of the weapons available.  
13 The most pertinent comments were:

14 ■ Hue Vang, a former law enforcement officer, in response to the  
15 UC's question, stated, "Everything looks good." Id. at 42.

17 <sup>2</sup> A recording device in the UC's watch captured some, but not  
18 all, of the conversations. The UC recalls certain discussions that  
19 were not recorded.

20 <sup>3</sup> One of each of the following weapons was displayed in the RV:  
21 ■ MP5K PDW (9mm sub-machine gun);  
22 ■ MP5SD (silenced 9mm sub-machine gun);  
23 ■ Colt M16A1 with an M203 attachment (machine gun with an attached  
24 40mm grenade launcher);  
25 ■ M16A2 (5.56mm machine gun);  
26 ■ M-14 (7.62mm machine gun);  
27 ■ Polish AKM (7.62mm AK-type machine gun);  
28 ■ PKM (7.62mm belt-fed machine gun);  
■ M79(40mm grenade launcher);  
■ RPG7B (rocket-propelled grenade launcher);  
■ M67 fragmentation grenade (baseball-type hand grenade);  
■ M72A2 LAW (rocket-propelled anti-tank weapon);  
■ M18 Claymore mine (anti-personnel mine); and  
■ M112 Comp (C-4, commonly referred to as "plastic explosives").  
Gov. Ex. F, ATF Rpt. 8 ¶ 33.

1 ■ Vang Pao, the leader of the Hmong people and a former military  
2 general, pointed to certain armaments and said, in English, words  
3 to the effect of "we need this, that, this, etc."<sup>4</sup> Id. Vang Pao  
4 also commented on the fact that in Laos, there was a great deal  
5 of ammunition for AK-47 machine guns. Id. at 43. Finally, as he  
6 finished surveying the weapons, Vang Pao said something along the  
7 lines of "Well, very good."<sup>5</sup> Vang Pao continued his praise,  
8 commenting, "You have very good material. Yeah, okay, thank you.  
9 I am sold on the whole thing." Id. (emphasis added).

10 When Jack was in the RV, he discussed various weapons with the  
11 UC. Id. at 47. In response to a question from Jack, the UC indicated  
12 that he needed "a lat[itude] and long[itude]" in order to deliver the  
13 goods. Id. at 48. Jack brought Hue Vang back into the RV, and Vang  
14 brought maps with him. Hue Vang explained the coordinates and  
15 identified locations of various Hmong freedom fighter strongholds,<sup>6</sup> as  
16 well as Lao military areas. Id. at 49-50. When the UC wanted to know  
17 the number of Hmong insurgents, Hue Vang answered that "we" had an  
18 approximate number of troops for each of the locations, "but the  
19 General [Vang Pao] has all that information." Id. at 50-51; see Gov.  
20 Ex. A at 7-11.

21 3. "In Motion" - The Conspiracy Progresses

22 a. February 15, 2007 Call

23 On February 15, 2007, the UC called Jack. Gov. Ex. TT, 2/15/2007  
24 Tr. Jack indicated he had just finished up a major strategy session  
25 with all the "senior leadership," noting that they were "in motion"  
26 and had things budgeted according to the UC's submission, apparently  
27

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28 <sup>4</sup> These spoken words are audible on the video of the RV meeting,  
but are currently not reflected on the transcript.

<sup>5</sup> The current transcript reflects, "I think you." Gov. Ex. D,  
2/7/07 Tr. at 43. The phrase on the recording actually appears to be  
"Well, very good."

<sup>6</sup> The current transcript suggests that a "male" identified the  
freedom fighter locations. Per ATF, the male was Hue Vang.

1 referring to the price list submitted at the previous meeting. Id. at  
2 2-3. Jack indicated that the group did not have any rough numbers  
3 yet, id. at 3, but later affirmed, "They've budgeted for virtually  
4 everything that was on that page [again referring to the price list]."  
5 Id. at 6; see Gov. Ex. A at 11 n.23.

6 b. March 5, 2007 Meeting  
7 at Hangar 17 Restaurant

8 Jack met again with the UC, at the Hangar 17 Restaurant in  
9 Sacramento, on March 5, 2007. Gov. Ex. W, 3/5/07 Tr. Jack noted that  
10 the teams on the ground in Laos need to address "key assets" in  
11 Vientiane, such as the airport and communication systems. Id. at 55.  
12 Jack told the UC, "[I]deally, ... the optimum takeover is completely  
13 bloodless." Id. at 56. Jack thought it could happen if they "hit the  
14 key points inside" and "transition this thing." Id.

15 The UC gave Jack a more detailed map of Laos so that the group  
16 could identify where they wanted to make weapons drops. Id. at 66-67.  
17 Later, Jack indicated that he had met with a strategic planner, who  
18 showed him a copy of their initial operations plan, named  
19 "P.O.P.C.O.R.N."<sup>7</sup> Id. at 72-74. According to Jack, "They showed me  
20 an initial cut of an op plan," that identified "the right locations in  
21 Vientiane." Id. at 72. Jack indicated he would give a copy to the  
22 UC. Id.; see Gov. Ex. A at 12-13.

23 c. March 7, 2007 Call

24 On March 7, Jack relayed information he received from meeting  
25 with the Hmong community, upset that "the damn communists are spraying  
26 what appears to be '[y]ellow [r]ain' on villages and personnel, and

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27  
28 <sup>7</sup> It was subsequently determined that this was an acronym for  
"Political Opposition Party's Coup Operations to Rescue the Nation."

1 people are starting to drop." Gov. Ex. BB, 3/7/07 Tr. at 2.  
2 Addressing Jack's concerns, the UC said he had information on the  
3 spraying and that he had three Stinger anti-aircraft missiles  
4 available. Id. at 4-5. Jack was familiar with the missiles, asked  
5 for the UC's prices, possible delivery, and said, "[T]hat might be one  
6 they'd be interested in, you know, very quickly." Id. at 5-6; see  
7 Gov. Ex. A at 14.

8 d. April 5, 2007 Call

9 On April 5, Jack left a message for the UC indicating that,  
10 according to the Hmong leadership, they had collected sufficient funds  
11 to place an "initial order" and wanted to know when the UC could meet.  
12 Gov. Ex. J, 4/5/07 Tr. at 2; see Gov. Ex. A at 15.

13 e. April 12, 2007 Meeting  
14 at Hangar 17 Restaurant

15 During a meeting with Harrison Jack on April 12, the UC provided  
16 Jack with copies of an updated weapons list. Gov. Ex. I, ATF Rpt. ¶  
17 4. Jack and the UC reviewed the list and discussed various weapons.  
18 Gov. Ex. H, 4/12/07 Tr. at 4-5, 16-18. Jack stated that they all  
19 seemed united about one thing -- they wanted to get back to Laos as  
20 soon as possible and wanted to help out family members who were in the  
21 field. Id. at 22. Jack stated that he had asked them about  
22 communications, key assets - all the logistical stuff that is so  
23 critical to maintain an operation, and that they "think well  
24 militarily." Id. at 23; see Gov. Ex. A at 16-17.

25 f. April 13, 2007 Call

26 During a call on April 13, Jack told the UC that there was a  
27 master plan involving operations inside Vientiane and elsewhere. Gov.  
28 Ex. Z, 4/3/07 Tr. at 3.

1 Further, Jack provided the UC with a specific location for the UC  
2 to review to determine if it was suitable as a delivery site. Id. at  
3 4. Jack identified the location as 1801 R.I. Luang Tat, Changrai  
4 Province, Thailand, which is situated on the Thai/Lao border. Id. at  
5 4-5.

6 Jack indicated that they had just sent five to seven people over  
7 there to assess the situation and bring back "intel". Id. at 5. Jack  
8 confirmed that they were still discussing "boots on the ground". Id.  
9 at 8.

10 Jack also relayed to the UC his conversations with Lo Cha Thao,  
11 which included: identifying the location where the Lao government  
12 stockpiles military supplies, Long Cheng; the possibility of securing  
13 helicopters; and the possibility of an initial order of 1,500 M16  
14 machine guns per province. Id. at 7-11.

15 Finally, Jack stated that they planned on securing every route in  
16 and out of the country by blowing up bridges and doing whatever it  
17 took to accomplish that goal. Id. at 13; see Gov. Ex. A at 18-19.

18 4. Further Weapons Flashes -  
19 Machine Guns and Anti-aircraft Missiles

20 a. April 18, 2007 Meeting  
21 at Doubletree Hotel - AK-47s

22 On April 18, the UC met with defendants Harrison Jack, Lo Cha  
23 Thao, Youa True Vang, Hue Vang, Lo Thao, Chue Lo, Chong Yang Thao, and  
24 one other uncharged male in a guest room at the Doubletree Hotel in  
25 Sacramento to show the men AK-47s for potential purchase. Gov. Ex.  
26 YY, 4/18/07 Tr.

27 The men viewed the five AK-47s on display and discussed the  
28 weapons. Id. at 5-7; Gov. Ex. ZZ, ATF Rpt. 24 ¶ 2. Among other

1 things, Hue Vang asked the UC whether he could supply ammunition, and  
2 the UC indicated he could. Id. at 7-8. In response to Hue Vang's  
3 question, the UC indicated he could obtain Stingers and that he could  
4 drop ship ammunition inside Laos. Id. at 8-9. The UC asked about  
5 quantities. Lo Cha Thao indicated that they were sending intelligence  
6 through that day. Id. at 11-12. Hue Vang added that this was not a  
7 little isolated thing; they wanted to have an "impact." Id. at 12.

8 Over the course of the meeting the defendants identified the  
9 various weapons they wanted, including AK-47s, Claymores [anti-  
10 personnel] mines, and M16s [machine guns] mounted with M203 grenade  
11 launchers. Gov. Ex. YY, 4/18/07 Tr. at 17. The defendants also  
12 indicated that they were looking at LAWs [anti-tank] rockets, M79s  
13 [grenade launchers], 203s [grenade launchers], and the Stinger [anti-  
14 aircraft missile]. Jack suggested to the other defendants in the  
15 room, "You need the whole range." Id. at 21. Hue Vang agreed. Jack  
16 also suggested C-4 explosive, "because they've got to demobilize,  
17 destroy, and disrupt." Id. at 29.

18 Of note, Hue Vang estimated that they would need a mixture of  
19 "around 10,000" weapons (including AK-47s). Gov. Ex. YY, 4/18/07 Tr.  
20 at 20; see Gov. Ex. A at 20-23.

21 b. April 24, 2007 Meeting  
22 at the Hilton Hotel - Stingers & More

23 On April 24, the UC met with defendants Lo Cha Thao, Nhia Kao  
24 Vang and other uncharged males in a guest room at the Hilton Hotel in  
25 Sacramento. Gov. Ex. N, 4/24/07 Tr. [6:23 p.m.] at 15-17, 19. Lo Cha  
26 Thao, Nhia Kao Vang, and others viewed: five AK-47 machine guns, three  
27 AT-4 anti-tank rockets, one M-14 machine gun, and one Stinger surface-  
28 to-air missile with a grip stock assembly. Gov. Ex. DDD; ATF Rpt. 30

1 ¶ 2. The men discussed the displayed weaponry. Gov. Ex. N, 4/24/07  
2 Tr. at 19-23, 25-33. Lo Cha Thao, apparently referring to the AT-4s,  
3 stated that they needed two of those. Id. at 23-24. Lo Cha also  
4 stated that they would need two Stingers for the different provinces.  
5 Id. at 24; see Gov. Ex. A at 26-27.

6 5. More Planning

7 a. May 3, 2007 Meeting  
8 at Hangar 17 Restaurant

9 At this meeting on May 3, Harrison Jack and the UC discussed the  
10 military districts that the Hmong had created in Laos and proposed  
11 weapons purchases for each of those six to eight districts. Gov. Ex.  
12 O, 5/3/07 Tr. at 8. The UC gave Jack, per Lo Cha Thao's request,  
13 three updated weapons inventory lists to give to Lo Cha Thao. Id. at  
14 9.

15 Jack discussed the operations plan he had seen, suggesting that  
16 it was not too bad and that the group had the basics down. Id. at 18.  
17 Jack later indicated that the group was "reviewing three individuals  
18 that would be their military field commanders and they want[ed] [Jack]  
19 to interview the guy." Id. at 19-20.

20 The UC told Jack that the first order must be paid in full before  
21 a second order went out. Id. at 28. Jack called Lo Cha Thao from the  
22 meeting and told him, among other things, that the group needed to  
23 schedule a final date for initial payment very soon. Id. at 35-36.  
24 The UC also spoke with Lo Cha Thao to discuss delivery. Id. at 36-38.

25 At the end of the meeting, Jack asked the UC for his opinion of  
26 the critical sites in Vientiane. Gov. Ex. O, 5/3/07 Tr. at 58. The  
27 UC explained that he could help them put something together but that  
28 he would need to meet with their planning guy, go over the intel, give

1 them a laundry list of things needed for better planning, and look at  
2 maps for the areas. Id. at 58-59. The UC then stated that "we" would  
3 put "our" plan together according to "their objectives." Id. at  
4 59-60; see Gov. Ex. A at 28-32.

5 b. May 4, 2007 Call

6 During this call on May 4, Jack indicated that Lo Cha Thao was  
7 prepared to make an initial down payment, and make an initial delivery  
8 by ground and another by air. Gov. Ex. Q, 5/4/07 Tr. [1:40 p.m.] at  
9 3. Jack asked if the UC had a minimum order at his end. Id. The UC  
10 indicated he would "be open" to an order of \$100,000 worth, maybe  
11 \$150,000 worth of weapons. Id. at 4.

12 Later in the call Jack told the UC that part of the group's  
13 intent was securing Long Cheng, an area in northern Laos, as well as  
14 Vientiane, and supplying both locations. Id. at 7. Jack stated that  
15 Long Cheng had minimal security and would be an excellent staging  
16 area, central supply depo[t] and training facility. Id. at 8; see  
17 Gov. Ex. A at 33-35.

18 c. May 7, 2007 Call

19 In the afternoon of May 7, Jack left the UC a message stating  
20 that Jack had spoken with Lo Cha Thao and that Lo Cha wanted the UC to  
21 put them all into item number 6, Alpha Kilos [referring to AK-47s].  
22 Gov. Ex. R, 5/7/07 Tr. [4:01 p.m.] at 2. Jack stated that he  
23 encouraged him [Lo Cha] to include some "smoke" [smoke grenades],  
24 noting that this was an item that the UC had not identified. Id.; see  
25 Gov. Ex. A at 35-37.

26 ///

27 ///

28 ///

1 d. May 9, 2007 Calls

2 On May 9 at 5:05 p.m., Jack told the UC that he had spoken with  
3 Lo Cha Thao and that Lo Cha had received guidance concerning the money  
4 transaction. Gov. Ex. T, 5/9/07 ATF Linesheet at 2. Jack told the UC  
5 that Lo Cha Thao wanted to complete the payment for the shipment in  
6 Mexico, Thailand, or offshore in international waters. Id. at 2-3.  
7 The UC said he would accept payment outside of the United States and  
8 that Thailand would be a good location. Id. at 3.

9 At another point, the UC advised Jack that he had all the weapons  
10 and could deliver them on May 28, 2007. Id. The UC told Jack that he  
11 had 125 AK-47 rifles, 20,000 rounds of ammunition, four cases of smoke  
12 grenades, six 30-round magazines per firearm, and cleaning kits. Id.  
13 at 5-6. They both discussed the nature of that and other equipment.  
14 Id.

15 The UC asked what might be ordered for the second shipment. Jack  
16 stated that he believed it would be a continuation of the first order  
17 "up to 10,000." Id. at 7. Jack was not sure about "anti-aircraft"  
18 equipment, opining that he thought they were interested in individual  
19 arms. Id. Jack also opined that money on their end would not be an  
20 issue. Id.

21 At 5:34 p.m., Jack telephoned the UC. Jack said he had spoken  
22 with Lo Cha Thao, everything went well, and Lo Cha was good with the  
23 UC's numbers and conditions. Gov. Ex. T, 5/9/07 ATF Linesheet at 11;  
24 see Gov. Ex. A at 37-38.

25 e. May 10, 2007 Calls

26 On May 10 at 2:13 p.m., Jack told the UC that Lo Cha Thao  
27 affirmed that he was ready to pay in full upon arrival of the first  
28 equipment and then make a half payment on the next order. Gov. Ex.

1 AA, 5/10/07 ATF Linesheet at 2. According to Jack, Lo Cha told him  
2 that they had a minimum of "150" [\$150,000] in hand right now for the  
3 first order. Id.

4 At approximately 2:40 p.m., the UC provided Jack some dates in  
5 connection with the transaction: meeting and payment on the 9th,  
6 flying "it" into Thailand on June 11th, and delivery to the safehouse  
7 on June 12th. Id. at 9. Jack indicated that he would get this  
8 information to Lo Cha Thao. Id.; see Gov. Ex. A at 39-40.

9 6. May 11, 2007 Meeting -  
10 Destruction "Like September 11th"

11 On May 11, the UC met with Jack and Lo Cha Thao at Hangar 17.  
12 Gov. Ex. U, 5/11/07 Tr. Lo Cha indicated that they: were ready to  
13 roll; had the date from the Colonel [Jack]; would be there with the  
14 funds; would have eight to ten people overseas already and each of  
15 them would carry [\$]9,999 because of "international law." Id. at 9.

16 Lo Cha Thao told the UC that their mission was to hire the UC's  
17 men to do a "quick set-up" in Vientiane, and "if there's a bombing  
18 there" or a disaster, all the government will fly out or be exiled.  
19 Id. at 12-13; see also id. at 22. Jack reconfirmed, "Is that what you  
20 plan on doing, to create a diversion like that and then just slide  
21 in?" Id. at 13. Lo Cha Thao responded affirmatively, adding that  
22 they would also have all the people in the provinces mobilized. Id.  
23 Lo Cha explained that once Vientiane was "being terrorized," the  
24 current Lao leaders would either be killed or flee, and "our coup's  
25 leader [would] stand up" to present the new democracy plan. Id. at  
26 13-14.

27 The UC asked, "[W]hat do you need my guys to do," since he was  
28 "not really clear on it." Gov. Ex. U, 5/11/07 Tr. at 15. Lo Cha Thao

1 explained that they had "several government buildings," they wanted  
2 "to wipe ... off." Id. The UC asked, "Blow them up?" Id. Lo Cha  
3 replied, "Yeah." Id. Jack then asked, "Oh, really? Why," and  
4 commented that he did not understand. Id. at 15-16. Lo Cha then  
5 explained that he had pictures of the buildings and one of them was  
6 where the "cabinet" met. Id. at 18-19. The UC asked, "You sure you  
7 don't want them to leave the infrastructure in place?" Id. at 16-17.  
8 Lo Cha responded no, twice. Id. at 17. Lo Cha Thao elaborated on  
9 "our plan," noting that if we could shut down the "heartbeat" in Laos,  
10 there was no other place where they [referring to the  
11 government/military ] could fly to or meet. Id. at 22-23. Lo Cha  
12 explained that once the command center fell, and the community called  
13 for freedom and democracy, the group would have plenty of guys  
14 equipped with "what they are going to get from" the UC to fight the  
15 military in each province. Id. at 24.

16 The UC asked Lo Cha, "How 'down' do you want them? Do you want a  
17 pile or rocks, or do you just -." Lo Cha, interrupting, stated, "Like  
18 September 11th." Gov. Ex. U, 5/11/07 Tr. at 31. The UC asked,  
19 "Really," and Lo Cha replied, "Yeah." Id.

20 The UC later stated that he needed a date, video and photographs  
21 of the locations. Id. at 45. Lo Cha said he would get that to the UC  
22 right away and that all the funds for the equipment were available.  
23 Id. Lo Cha added that he and General Vang Pao appreciated knowing the  
24 UC and that they had been looking for things like this for "35 long  
25 years." Id. at 45-46. Lo Cha continued, "We just want the country.  
26 We just want our homeland back." Id. at 46. Both Jack and Lo Cha  
27 Thao suggested that with a blitz, the coup could be over in two days  
28 to a week. Id. at 59.

1 The UC asked if there were certain items from his arms inventory  
2 that Lo Cha wanted. Gov. Ex. U, 5/11/07 Tr. at 80. Lo Cha indicated,  
3 in response to UC questions: LAWs, AT4s, rockets, AKs, Claymores.  
4 Id. at 80-81. They agreed on delivery dates and the UC suggested to  
5 Lo Cha that they meet with the group's master planners "on the 13th,"  
6 after they get "the load." Lo Cha agreed. Id. at 85; see Gov. Ex. A  
7 at 40-45.

8 7. May 23, 2007 Meeting -  
9 Cutting Off the Head of the Snake

10 The UC attended a meeting with Jack, Lo Cha Thao, Lo Thao and  
11 Chong Yang Thao at Hangar 17 on the evening of May 23. Gov. Ex. C,  
12 5/23/07 Tr. at 12. The UC had brought several satellite images  
13 downloaded from Google. Id. at 5-7, 13, 15. The images were of the  
14 area around the Vientiane Wattay International airport and the Lao  
15 Royal Palace in Vientiane. Id. at 5-8. The UC asked if the palace is  
16 "what you want worked on?" Id. at 17. Lo Cha responded, "Right, this  
17 is what we want to work on." Id. at 17.

18 Lo Cha pulled out a map of Thailand and Laos and identified both  
19 primary and alternative drop-off points for the weapons. Id. at  
20 22-26; ATF Rpt. 68 ¶ 9. Lo Cha indicated that there were three other  
21 staging points and that they had more than ten groups of insurgents.  
22 Id. at 37-38, 43; ATF Rpt. 68 ¶ 12.

23 The UC indicated he had some questions about insertion and  
24 extraction points, transportation, and the use of mercenaries.  
25 Id. 48-50; ATF Rpt. 68 ¶ 13. A Hmong/Lao conversation followed and Lo  
26 Cha Thao ultimately replied, "We'll get this to you right away." Gov.  
27 Ex. C, 5/23/07 Tr. at 51. The men then discussed the timing of the  
28 destruction in Vientiane, payment for the current order, and

1 scheduling for future orders. Id. at 52-66, 69-75.

2 At the end of the meeting, the UC asked, "Now Lo, General Vang  
3 Pao is okay with all this, right?" Id. at 95. Lo Cha replied, "Oh,  
4 yeah." Id. The UC asked, "Like we're not going to run into any  
5 problems there with him, right?" Id. Lo Cha replied, "No." Id. The  
6 UC asked, "Everything's good?" Id. Lo Cha replied, "[W]e're supposed  
7 to be the masterminds of ... all of these ... so the General don't  
8 [sic] get in trouble, right?" Gov. Ex. C, 5/23/07 Tr. at 95; see Gov.  
9 Ex. A at 45-51.

10 IV.

11 THERE WAS NO AGENT MISCONDUCT  
12 IN CONNECTION WITH THE UNDERCOVER INVESTIGATION

13 A. Legal Framework

14 "'Outrageous government conduct is . . . a claim that government  
15 conduct in securing an indictment was so shocking to due process  
16 values that the indictment must be dismissed.'" United States v.  
17 Holler, 411 F.3d 1061, 1065 (9th Cir.), cert. denied, 546 U.S. 996  
18 (2005). Courts evaluate government conduct under the "blood pressure  
19 test," which asks whether the conduct was "so grossly shocking and so  
20 outrageous as to violate the universal sense of justice." United  
21 States v. Luttrell, 889 F.2d 806, 811 (9th Cir. 1989)(quotations  
22 omitted), amended, 923 F.2d 764 (1991)(en banc), cert. denied, 503  
23 U.S. 959 (1992). The government's conduct warrants dismissal of the  
24 indictment only if "that conduct is so excessive, flagrant,  
25 scandalous, intolerable and offensive as to violate due process."  
26 United States v. Garza-Juarez, 992 F.2d 896, 904 (9th Cir. 1993),  
27  
28

1 cert. denied, 510 U.S. 1058 (1994).<sup>8</sup> A defendant bears the burden of  
2 proving that the government's conduct violated due process. United  
3 States v. Edmonds, 103 F.3d 822, 825 (9th Cir. 1996). This is an  
4 "extremely high standard" for a defendant to meet. Id. at 826; United  
5 States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991).

6 The standard of outrageous government conduct is met if "the  
7 government engineer[s] and direct[s] a criminal enterprise from start  
8 to finish." United States v. Gurolla, 333 F.3d 944, 950 (9th Cir.)  
9 (internal quotation marks and citations omitted), cert. denied, 540  
10 U.S. 995 (2003); see also United States v. Emmert, 829 F.2d 805, 811  
11 (9th Cir. 1987)(met if "the police completely fabricate the crime  
12 solely to secure the defendant's conviction"); Luttrell, 889 F.2d at  
13 812 (met if the government "operate[s], for an extended period of  
14 time, an actual and illegal apparatus").

15 This standard "is not met when the government merely infiltrates  
16 an existing organization, approaches persons it believes to be already  
17 engaged in or planning to participate in the conspiracy, or provides  
18 valuable and necessary items to the venture." Gurolla, 333 F.3d at  
19  
20  
21

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22 <sup>8</sup>Defendants suggest that "four factors determine whether the  
23 government's conduct is sufficiently outrageous to warrant dismissal,"  
24 and then list those four supposed factors. (Mot. at 28, n.119)(citing  
25 United States v. Twigg, 588 F.2d 373, 377 (3rd Cir. 1978); United  
26 States v. Batres-Santolino, 521 F. Supp. 744, 751-53 (N.D. Cal.  
27 1981)). This is incorrect. Neither cited case indicates that there  
28 is a dispositive four-factor test to determine whether the government  
has engaged in outrageous government conduct. The governing standard  
in this Circuit (utilized for decades) is the "blood pressure test,"  
examining whether the conduct as a whole was "so grossly shocking and  
so outrageous as to violate the universal sense of justice."  
Luttrell, 889 F.2d at 811.

1 950.<sup>9</sup> In essence, the government may permissibly "attach itself to an  
2 on-going . . . operation for the purpose of closing it down and  
3 prosecuting the operators." United States v. Citro, 842 F.2d 1149,  
4 1153 (9th Cir.), cert. denied, 488 U.S. 866 (1988). See, e.g.,  
5 Emmert, 829 F.2d at 811 ("Emmert was drawn into this conspiracy by  
6 Powell. When the government agents first targeted Emmert for  
7 investigation, he had expressed interest in receiving a portion of the  
8 finder's fee in exchange for brokering cocaine supplied by Cioe. He  
9 was therefore contemplating criminal activity and further  
10 investigation was appropriate."); Gurolla, 333 F.3d at 950 ("In this  
11 case, the government knew before it launched the sting investigation  
12 that Mexican banks were involved in money laundering, although it was  
13 not aware of the specific identity of all the participants. Because  
14 the government did not initiate the criminal activity, but rather  
15 sought to crack an ongoing operation, its conduct was not outrageous .  
16 . . ."); United States v. Wiley, 794 F.2d 514, 516 (9th Cir.  
17 1986)("The drug distribution scheme between defendant and Garbiso was  
18 in existence before the government became involved; the government  
19 merely activated it." . . . "By using the informant and the FBI agent  
20 posing as a courier, the government merely provided an impetus to  
21 Wiley and Garbiso to attempt once again to smuggle drugs into the  
22

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23  
24 <sup>9</sup>In fact, "this circuit has clearly established that  
25 investigations of individuals require no reasonable suspicion under  
26 the Fifth Amendment [due process clause]." United States v. Mayer,  
27 503 F.3d 740, 751 (9th Cir. 2007)(emphasis added), cert. denied, 128  
28 S.Ct. 1105 (2008); see Luttrell, 923 F.2d at 764 ("we . . . explicitly  
reject[] a 'reasoned grounds' requirement for investigation of an  
individual under the due process clause."); Garza-Juarez, 992 F.2d at  
904 (not outrageous to target individual for investigation without any  
reason to suspect he was engaging in illegal conduct).

1 prison." ).

2 Courts have consistently concluded that there is no due process  
3 violation when the government provides contraband to a defendant, as  
4 well as an opportunity to commit a crime, and the defendant  
5 facilitates part of the crime. For example, in Citro, the court found  
6 no due process violation where the government "initially raised the  
7 idea of a counterfeit credit card scheme" with defendant and "supplied  
8 the counterfeit credit cards" because "[defendant] not the government,  
9 was the one who identified potential collusive merchants and made the  
10 necessary introductions." Citro, 842 F.2d at 1153; see United States  
11 v. So, 755 F.2d 1350, 1354 (9th Cir. 1985) (no violation even though  
12 the government "provid[ed] the funds and opportunity to launder  
13 money," "the creative inspiration for the charged crimes was provided  
14 by [defendants]"); United States v. Lomas, 706 F.2d 886, 890-91 (9th  
15 Cir. 1983) (no outrageous conduct where defendant and his associates  
16 were actively searching for a cocaine source and informant offered to  
17 provide the same and facilitated its purchase by permitting the  
18 group's members to make payment at the time of delivery; "[informant]  
19 was not the driving force behind the conspiracy"; defendants  
20 "requested meetings with [informant] and his purported supplier to  
21 negotiate terms" and "organized the syndicate to provide the necessary  
22 funds"), overruled on other grounds, Segura v. United States, 468 U.S.  
23 796, 814 n.9 (1984); Smith, 924 F.2d at 897 (no violation even though  
24 "undercover agent encouraged an 18- year-old patient in a  
25 drug-treatment center to deal drugs," defendant had shown a tendency  
26 for dealing drugs independent of any action on the part of DEA and  
27 "was the driving force behind the drug discussions and transaction").

28 Encouragement of a defendant to commit a crime, even aggressive

1 encouragement, does not constitute a due process violation. For  
2 example, in Garza-Juarez, the Ninth Circuit held that no due process  
3 violation occurred in a firearms trafficking case even though the  
4 government could not articulate a "reasoned ground for investigating"  
5 defendants, and even though the "Agent [took] the lead during most of  
6 the investigation," "initiated all contacts" with defendants, and  
7 "raised the subject of illegal firearms and offered to supply the  
8 materials" to defendants. Garza-Juarez, 992 F.2d at 904; see United  
9 States v. McClelland, 72 F.3d 717, 721 n.1, 722 (9th Cir.  
10 1995)("Although [informant] did encourage [defendant] at various  
11 times, that does not constitute manufacturing the crime. Only when  
12 'government agents engineer and direct the criminal enterprise from  
13 start to finish,' does their behavior constitute manufacturing a crime  
14 and violate due process."), cert. denied, 517 U.S. 1148 (1996);  
15 Emmert, 829 F.2d at 811 (no violation where government approached and  
16 offered \$200,000 to a college student to secure a supply of cocaine  
17 for a government agent); United States v. Williams, 791 F.2d 1383,  
18 1386 (9th Cir.), cert. denied, 479 U.S. 869 (1986) (no violation for  
19 the assistance and encouragement of escape attempts); United States  
20 v. Simpson, 813 F.2d 1462, 1465-71 (9th Cir.), cert. denied, 484 U.S.  
21 898 (1987)(no violation for use of an informant who engaged in regular  
22 intercourse with the defendant to induce him to sell narcotics to  
23 undercover agents); Luttrell, 889 F.2d at 811 (no violation even  
24 though government made an "unsolicited offer of almost \$1,000,000 to  
25 appellants to persuade them to make illegal use of [credit card  
26 drafts,] a resource that they had obtained legally" and "ignor[ed] the  
27 appellant's attempts to withdraw from the scheme").

28 Coaching a willing defendant in connection with a crime also does

1 not offend due process. See Shaw v. Winters, 796 F.2d 1124, 1125-26  
2 (9th Cir. 1986)(in playing out their undercover roles, . . . agents  
3 may "coach" their willing suspects), cert. denied, 481 U.S. 1015  
4 (1987); United States v. Williams, 705 F.2d 603, 620 (2d Cir.), cert.  
5 denied, 464 U.S. 1007 (1983)(no violation where "[t]he most that  
6 [informant] did was to spell out for the [defendant] how to commit the  
7 crimes, but his 'coaching' involved neither pressure nor persistent  
8 exploitation of personal weakness. . . .")

9 Indeed, the Ninth Circuit has indicated that even threatening a  
10 defendant expressing hesitation about consummating an illicit  
11 transaction can be considered to be "ordinary bargaining tactics in  
12 [certain criminal] deals." Emmert, 829 F.2d at 811-12 (undercover  
13 agents' threats to defendants who expressed hesitation about a drug  
14 deal were "ordinary bargaining tactics in drug deals"); United States  
15 v. McQuinn, 612 F.2d 1193, 1195-96 (9th Cir.)(informant's repetition  
16 of agent's purported threat to kill defendant because defendant had  
17 not completed illegal plan, while not commendable, did not violate due  
18 process), cert. denied, 445 U.S. 954 (1980).

19 With this legal framework in mind, it should be readily apparent  
20 that the UC's conduct in this case was wholly consistent with due  
21 process standards.

22 B. ATF Properly Targeted Defendant Jack for  
23 Investigation as It Had Reason to Believe That Jack  
and Others Were Already Engaged in or Planning Crimes

24 Defendants first argue that they were not active participants in  
25 the crime before the government got involved and that a criminal  
26 enterprise was not ongoing prior thereto. (Mot. at 29.) Per  
27 defendants, Jack merely contacted an acquaintance and asked about  
28 purchasing guns for Hmong villagers to use in self-defense, and,

1 "these allegations fail to establish any prior criminal involvement by  
2 defendant Jack, let alone by the remaining defendants." (Mot. at 4,  
3 29.) This argument lacks merit.

4 First, the initial complaint by Namon Hawthorne gave ATF good  
5 reason to suspect that Jack and others were either currently planning  
6 crimes or already engaged in crimes. On or about September 29, 2006,  
7 Jack: asked Hawthorne if he knew where Jack "could purchase  
8 five-hundred (500) AK-47 rifles" [machine guns] for various Laos  
9 reportedly being "slaughtered" or ethnically cleansed; indicated that  
10 he was willing to pay between \$400 and \$1,200 per gun [or an aggregate  
11 total amount of \$200,000 to \$600,000]; indicated that he wanted the  
12 weapons to be delivered outside the U.S. potentially by the Laos  
13 border; and, of note, stated that the people he was dealing with had  
14 conducted this type of transaction in the past. Gov Ex. 00, ATF Rpt.  
15 1. These statements, at a minimum, indicated that: (1) Jack was  
16 acting as an agent for a group of people who were seeking to acquire  
17 and transfer 500 machine guns abroad; (2) these people intended to  
18 give these arms to certain Hmong Laotians for their potential use  
19 against agents of the Laotian government reportedly engaged in  
20 genocide; and (3) these people had made a similar purchase of weapons  
21 for that purpose in the past.

22 It is unlawful to conspire to receive, possess, and transfer  
23 machine guns, such as AK-47s. See 18 U.S.C. §§ 371, 922(o), 26 U.S.C.  
24 § 5861 (Conspiracy to Receive and Possess Firearms and Destructive  
25 Devices). It is unlawful to conspire to export AK-47s without  
26 appropriate licensure. See 18 U.S.C. § 371, 22 U.S.C. § 2778  
27 (Conspiracy to Export Listed Munitions Without a State Department  
28 License). It is unlawful to conspire to murder or maim individuals

1 abroad. See 18 U.S.C. § 956(a)(Conspiracy to Kill, Kidnap, and Maim).  
2 It also is unlawful to conspire to provide or prepare a means for a  
3 military expedition or enterprise to be carried on against a foreign  
4 nation with which the United States is at peace. See 18 U.S.C. §§  
5 371, 960 (Conspiracy to Violate the Neutrality Act). Moreover, these  
6 are crimes regardless of a defendant's motive (that is, obtaining arms  
7 for planned offensive use or defensive use).

8 On its face, the Jack requests suggested that crimes between Jack  
9 and his "people" were presently in the planning stages or already  
10 underway. The requests also suggested that Jack's people had  
11 potentially committed such crimes in the past. Prudence required  
12 further investigation to determine the nature and scope of the  
13 criminal conduct, to determine the participants associated therewith,  
14 and to ultimately prosecute those in violation of the law. Indeed,  
15 ATF would have been remiss in the execution of its duties if it had  
16 done otherwise.

17 Second, contrary to defendants' suggestion, the first meeting  
18 between Jack and the UC on January 25, 2007, only served to confirm  
19 that there was potential criminal conduct afoot which merited further  
20 investigation. During this meeting, the UC indicated that he could  
21 obtain more than 500 "fully auto" AKs and M16-A2s [machine guns], and,  
22 per Jack's request, gave Jack price quotes, delivery information and  
23 information regarding the availability of ammunition. Gov. Ex. E,  
24 1/25/07 Tr. at 4-5, 8-9, 21. Of significance, Jack (not the UC) asked  
25 if the UC could "tap into boots on the ground," clarifying that he  
26 meant "guys who conduct special ops, small teams." The UC indicated  
27 that he could, to which Jack replied, "Well, that's good, I mean  
28 that's part of the equation." Id. at 26.

1           Moreover, at another point, Jack indicated that he was "working  
2 personally with General Vang Pao," had done so for the last ten years,  
3 and that this was the first time he was working with the General on  
4 formal military operations. Id. at 14. Jack stated that he was not  
5 exactly sure what they (referring to his Hmong contacts) were going to  
6 do, but then indicated, that priorities could shift drastically, and  
7 that, among other things, "they may want to harm X number of people  
8 immediately." Id. at 29.

9           Finally, toward the end of the meeting, it was Jack (not the UC)  
10 who discussed the idea of potentially staging a coup in Laos. In the  
11 context of a discussion about what the "group" intended to do, the UC  
12 asked Jack "what are they capable of doing?" Id. at 50. Jack then,  
13 at length, opined that "a decent SEAL team" could handle "something  
14 like this." He noted that the [Lao] military leadership was pro-  
15 Democratic and that they were vulnerable internally. A good team, he  
16 stated, could "take the communications," and "take key infrastructure  
17 like an airport." Id. at 51. "If you target the right locations,"  
18 Jack added, "you either bring it down or control it." Thereafter,  
19 Jack suggested that once it is said that "free elections are pending,  
20 etc.," the military could exit if it chose to. Id. The UC stated he  
21 was surprised that the Hmong and the military had not set up some hit  
22 teams to take care of key communist problems. Id. Jack replied,  
23 "They could be talking about that right now. Three [persons] started  
24 talking tonight under General Vang Pao's direction." Id. at 52.<sup>10</sup>

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25  
26           <sup>10</sup>At one point during the call, Jack did indicate, as the defense  
27 suggests, that the group preferably did not want to use force and did  
28 not care about taking over the government. Id. at 46. Shortly  
thereafter, however, the UC indicated that he was not sure what the  
group was talking about doing or needing to do. Id. at 50. Later,

1 Thus, the first UC encounter with Jack confirmed that crimes  
2 between Jack and his "people" were presently in the planning stages or  
3 already underway. Now it appeared that conspirators not only were  
4 interested in obtaining 500 machine guns, but also potentially were  
5 interested in obtaining mercenaries to stage some sort of action  
6 against Laotian infrastructures and targets. At this juncture, again,  
7 further investigation was plainly required and appropriate.

8 Third, in May 2007 Jack admitted that, in approximately November  
9 2006 (after Jack had contacted Hawthorne in September 2006 but before  
10 ATF had contacted Jack in late January 2007), Jack had discussed  
11 issues related to potential offensive military action against the Lao  
12 government with Lo Cha Thao and other individuals. Some background is  
13 needed. During the final May 23, 2007 meeting between the UC and  
14 Jack, Jack viewed a list of intelligence requests brought by the UC  
15 which pertained to the use of mercenary troops in Laos. Gov. Ex. B,  
16 ATF Rpt. 68, ¶ 5<sup>11</sup>. Jack then stated that "about six months ago [i.e.,  
17 on or about November 23, 2006], they [referring to Lo Cha and  
18 unidentified individuals] asked [him] for some basic planning  
19 information." Gov. Ex. C, 5/23 Tr. at 6. Jack indicated that he "sat  
20 down ... ran them through the wringer and then ... started spreading a  
21 bunch of stuff like this" [apparently referring to the intelligence  
22

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23 Jack then discussed his belief as to how a good team in Laos could  
24 take out Lao infrastructure, etc. Id. at 51-52.

25 <sup>11</sup>The list detailed intelligence and operational requirements to  
26 carry out a mission on the Laos Royal Palace with mercenary troops and  
27 included the need for: a secure and defendable helicopter landing  
28 zone, transportation from the landing zone, access to a blocking force  
and special intelligence requests concerning the Royal Palace. Gov.  
Ex. B, ATF Rpt. 68, ¶ 13

1 requests]. Id. Per Jack, he ran them through "some governmental  
2 development aspects as far as putting together their administration,"  
3 "had them try to target ... key assets ... wherever they might be as  
4 far as critical points into the country, out of the country, et  
5 cetera." Jack explained that he did not hear from "them" for about  
6 three months. Id. Jack stated that he later heard back from Lo Cha  
7 who, apparently after speaking with a senator, said that Jack  
8 definitely knew what he was talking about. Id. at 7. In short, this  
9 conversation, seemingly confirms that, well before ATF ever approached  
10 Jack, Jack was discussing issues relating to potential offensive  
11 military action against the Lao government with Lo Cha Thao and  
12 others.<sup>12</sup>

13 In sum, ATF had every reason to target Jack and his then unknown  
14 associates for investigation based on the information it learned from  
15 complainant Hawthorne in September 2006 suggesting that Jack and  
16 others were planning or already engaged in criminal conduct. ATF had  
17 good reason to continue its investigation of Jack and his "people"  
18 based on the information it learned from Jack himself on January 25,  
19 2007. "Because the government did not initiate the criminal activity,  
20 but rather sought to crack an ongoing operation, its conduct was not  
21 outrageous and did not violate due process." Gurrola, 333 F.3d at  
22 950.

23 Finally, setting defendant Jack aside, it is important to note  
24 that all the remaining defendants voluntarily accepted an invitation  
25

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26 <sup>12</sup>Of course, ATF did not predicate its case based on this  
27 information. This information, however, underscores the fact that, at  
28 the time ATF did approach Jack, potential planning to commit a crime  
was already afoot.

1 from another conspirator to meet the UC; ATF did not immediately  
2 target all of the now indicted defendants or initiate contacts with  
3 them. ATF first had information related to defendant Jack, whom they  
4 contacted. Thereafter, as the investigation unfolded, defendant Jack  
5 proceeded to reference other potential conspirators and ultimately  
6 introduced the UC to defendant Lo Cha Thao. See Gov. Ex. D, 2/7 Tr.  
7 at 4. Later, defendants Jack and Lo Cha Thao referenced and  
8 ultimately introduced other conspirators to the UC, principally during  
9 a series of meetings to display weapons available for sale. See,  
10 e.g., Gov. Ex. D, 2/7 Tr. at 8 (Vang Pao, Hue Vang). The important  
11 point is that these additional defendants, based on their contacts  
12 with a conspirator, voluntarily chose to meet with the UC. Under  
13 these circumstances, it cannot be suggested that ATF somehow  
14 improperly targeted these defendants for investigation. See Emmert,  
15 829 F.2d at 812 ("[defendant] Emmert did not become a target of the  
16 investigation until he voluntarily accepted [defendant] Powell's  
17 invitation to meet with [informant] Mosteller. At that first meeting  
18 between Emmert and Mosteller, Powell introduced Emmert as someone who  
19 could arrange a drug sale. Targeting Emmert was thus the result of  
20 Powell's and Emmert's own voluntary conduct, and was not  
21 outrageous." ).

22 C. The UC Did Not Improperly "Press"  
23 Defendants to Acquire More Powerful Weaponry  
24 or Engage in More Egregious Criminal Conduct

24 The defense suggests that the UC improperly "goaded" and  
25 "pressed" defendants to "aim higher, to move more quickly, and to use  
26 more, and more powerful weapons." (Mot. at 6, 9, see also Mot. at 31  
27 (UC allegedly "coaxed and prodded.")) These claims are wholly  
28 unsupported by the record.

1 The complete record, in context, demonstrates that Jack and the  
2 UC engaged in what can best be characterized as typical "arms-length  
3 bargaining" that you would expect between a willing arms broker (who  
4 had openly expressed an interest in buying a variety of arms) and a  
5 willing arms dealer (who was trying to make a sale). Frequently the  
6 conspirators made requests to buy specific weapons and manpower from  
7 the UC. Other times, the UC recommended other weapons for sale to  
8 readily willing and interested conspirators, at most, encouraging  
9 conspirators to consider their acquisition. The UC did not, however,  
10 utilize any sort of shocking or coercive conduct, or anything close  
11 thereto. A summary of the relevant communications regarding the  
12 actual weapons, equipment and personnel negotiations makes this  
13 abundantly clear:

- 14 ■ During the September 29, 2006 conversations with complainant  
15 Hawthorne, Jack inquired about the purchase of 500 AK-47s  
[machine guns]. Gov. Ex. OO, ATF Rpt. 1.
- 16 ■ During the January 25, 2007 (Amarin Restaurant) meeting between  
17 Jack and the UC, the UC, answering Jack's initial inquiry,  
18 indicated that he could obtain more than 500 "fully auto" AKs or  
M16-A2s [both machine guns]. Jack requested (and received)  
19 information about ammunition. Jack requested (and received)  
information about mercenary troops ("boots on the ground," "merc  
20 teams"). Gov. Ex. E, 1/25/07 Tr. at 4-5, 8-9, 21, 26, 45-46.  
The UC also indicated that he could show Jack examples of  
everything if Jack wanted. Id. at 11, 25.
- 21 ■ During the February 1 call, Jack told the UC it was "outstanding"  
22 that delivery was possible into the location they had discussed.  
2/1/07 Tr. at 3. The UC indicated that he had 24 "boots on the  
23 ground," additional items such as ammunition, "belt fed things"  
and "anti-armor ... things." Jack immediately indicated that the  
24 information could be passed along at a meeting he had the next  
day. Id. at 4-5. When the UC indicated that he had a laundry  
25 list of exactly how many he had of each, including some "rock and  
roll stuff," Jack replied, "Yeah, yeah," and expressed a desire  
26 to meet the very next day. Id. at 7.
- 27 ■ During the February 7 (Amarin Restaurant) meeting (attended by  
many defendants including Vang Pao), the UC gave Jack and Lo Cha  
28 Thao a list of weapons that he had available, listing quantity

1 and price. Gov. Ex. D, 2/7 Tr. at 6.<sup>13</sup> In response to Jack's  
2 inquiry, the UC indicated that there were 24 "spec op" guys  
3 available. Id. at 6-7. After lunch, groups of individuals left  
4 the restaurant and entered an undercover RV to view weaponry on  
5 display<sup>14</sup>. Gov. Ex. F, ATF Rpt. 8, ¶ 36. Vang Pao, Hue Vang, Lo  
6 Cha Thao, Chong Yang Thao, Chue Lo, Lo Thao, Youa True Vang, Seng  
7 Vue and Harrison Jack viewed the weapons. While viewing the  
8 weapons, many of these individuals engaged in discussion related

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9 <sup>13</sup>The February 7 list included the following weapons with the  
10 noted price per item and quantities available:

- 11 1. MP5K PDW [Machine gun] (\$1,500.00/15);
- 12 2. MP5SD [Machine gun with suppressor](\$2,000.00/12);
- 13 3. Colt M16A1 with M203 [Machine gun with grenade launcher]  
14 (\$1,200.00/110);
- 15 4. M16A2 [Machine gun](\$600.00/2450);
- 16 5. M14 [Machine gun] (\$600.00/750);
- 17 6. Polish AKM 7. 62 x 39 [Machine gun] (\$800.00/640);
- 18 7. PKM Machine gun [Belt-fed machine gun] (\$1,500.00/44);
- 19 8. M79 [Grenade launcher] (\$400.00/640);
- 20 9. Bulgarian RPG7B [Rocket propelled grenade launcher]  
21 (\$800.00/250);
- 22 10. M67 frag grenade [Anti-personnel grenade] (\$500.00/466);
- 23 11. M72A2 LAW [Anti-tank rocket] (\$300.00/1,200);
- 24 12. M18 Claymore Mine [Anti-personnel mine] (\$350.00/1,400);
- 25 13. M112 Demolition Charges [Composition 4, aka C-4 or "plastic  
26 explosives"] (600.00/840).

27 Under the heading "Troops" the list stated that the rate would be \$400  
28 per day for "operations" (for a time period of "three months max"),  
and \$300 per day for "training."

<sup>14</sup>The following items were on display inside the RV: 1. a MP5K  
PDW (9mm sub-machine gun); 2. a MP5SD (silenced 9mm sub-machine gun);  
3. a Colt M16A1 with M203 attachment (machine gun with an attached  
40mm grenade launcher); 4. a M16A2 (5.56mm machine gun); 5. a M-14  
(7.62mm machine gun); 6. a Polish AKM (7.62mm AK-type machine gun); 7.  
a PKM (7.62mm belt-fed machine gun); 8. a M79 (40mm grenade  
launcher); 9. a RPG7B (rocket-propelled grenade launcher); 10. a M67  
fragmentation grenade (baseball-type hand grenade); 11. a M72A2 LAW  
(rocket-propelled anti-tank weapon); 12. a M18 Claymore mine  
(anti-personnel mine); 13. M112 Comp (C-4, commonly referred to as  
"plastic explosives"). Gov. Ex. F, ATF Rpt. 8, ¶ 33.

1 thereto, some in English, much in Hmong/Lao. Id. at 41-52.<sup>15</sup> Of  
2 note, Vang Pao, while pointing to various weaponry, stated, in  
3 English, that we need this, that, this one, etc.<sup>16</sup> Vang Pao also  
4 made a comment, in English, regarding the AK 47 style weapon and  
5 noted that there was a lot of ammunition in his country. Id. at  
6 43; Gov. Ex. F, ATF Rpt. 8, ¶ 35. Finally, Vang Pao stated  
7 something along the lines of "Well, very good,"<sup>17</sup> and continued,  
8 "you have very good material. Yeah, okay, thank you. I'm sold  
9 on the whole thing." Gov. Ex. D, 2/7/07 Tr. at 43 (emphasis  
10 added).

11 ■ During a March 7 call, Jack told the UC that he met with the  
12 Hmong community and that "The damn communist[s] are spraying what  
13 appears to be [y]ellow [r]ain on villages and personnel, and  
14 people are starting to drop." 3/7/07 Tr. at 2. The UC told Jack  
15 that he received some excellent information from his guys "as far  
16 as this flying and spraying stuff" and had obtained three  
17 Stingers. Id. at 4-5. Jack expressed immediate interest. Jack  
18 indicated that he knew enough about such weapons, that he  
19 [wanted] figures on them, that "that might be one they'd be  
20 interested in, you know, very, very quickly," and asked how soon  
21 the Stingers could be made available. Id. at 5<sup>18</sup>.

22 ■ On April 5, Jack left a phone message for the UC indicating that,  
23 per the Hmong leadership, they had collected sufficient enough  
24 funds to place an "initial order," and wanted to know when the UC  
25 could meet. Gov. Ex. J, 4/5 Tr. at 2<sup>19</sup>.

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26 <sup>15</sup>The government is still in the process of identifying the  
27 speakers in connection with a large amount of Hmong/Lao comments  
28 captured on the video as well as translating and transcribing, speaker  
by speaker, those comments.

<sup>16</sup>Again, this is audible on the recording, but not presently  
reflected on the current transcript.

<sup>17</sup>Again, this is audible on the recording, but not correctly  
reflected on the current transcript.

<sup>18</sup>On April 3, the UC told Jack that the [weapons inventory] list  
was no longer accurate as he had made some recent sales, so he needed  
to get Jack another list. Id. at 5. Jack indicated, "I hear you,"  
and that he did not think they could move that fast anyway. Id. at 6.  
One week later, on April 10, Jack left the UC a message indicating  
that Lo Cha Thao wanted an updated list of equipment and mentioning  
that Lo Cha potentially had a second [arms] buyer to introduce to the  
UC. Gov. Ex. G, 4/10 Tr. at 2.

<sup>19</sup>During a call on April 9, the UC told Jack he would make up a  
new inventory list and that they could talk about a partial order.

1 ■ During the April 12 (Hangar 17 Restaurant) meeting, the UC gave  
 2 Jack three updated lists showing available weapons and  
 mercenaries. Gov. Ex. I, ATF Rpt. 19 ¶4.<sup>20</sup> Jack and the UC  
 3 reviewed the list and discussed many of the weapons thereon. Id.  
 at 3-5, 16-18.

4 ■ During the April 13 call, Jack told the UC that they were still  
 5 talking about "boots on the ground." 4/13/07 Tr. at 6. Jack  
 advised the UC that Lo Cha was actually talking about trying to  
 6 secure helicopters and that each [military] region [within Laos]  
 would need their own stockpile of equipment. Id. at 10. Jack  
 7 later indicated that Lo was sensitive to the Stingers and that  
 they wanted to take some of these choppers out that are

8 \_\_\_\_\_  
 9 Gov. Ex. K, 4/9 Tr. at 4. The UC indicated that he wanted this to be  
 part of a bigger order and that was his understanding of it. Id.  
 10 Jack indicated that this was a question he had for Lo, but that Jack  
 thought the situation over there was critical, that they wanted to  
 11 move as fast as they could, and that that would result in "probably  
 incremental orders" like the UC had identified. Id.

12  
 13 <sup>20</sup>The April 12 list included the following weapons with the noted  
 price per item and quantities available:

- 14 1. MP5K PDW [Machine gun] (\$1,500.00/10);
- 15 2. MP5SD [Machine gun with suppressor](\$2,000.00/8)
- 16 3. Colt M16A1 with M203 [Machine gun with grenade launcher]  
 \$1,700.00/35);
- 17 4. M16A2 [Machine gun] (\$600.00/1500);
- 18 5. M14 [Machine gun] (\$600.00/750);
- 19 6. Polish AKM 7.62x39 [Machine gun] (\$800.00/535);
- 20 7. PKM Machine gun [Belt-fed machine gun](\$2,000.00/5);
- 21 8. M79 [Grenade Launcher] (\$400.00/344);
- 22 9. Bulgarian RPG7B [Rocket propelled grenade launcher]  
 (\$800.00/6);
- 23 10. M67 Frag Grenade [Anti-personnel grenade] (\$500/250);
- 24 11. M72A2 LAW [Anti-tank rocket] (\$300.00/1,200);
- 25 12. M18 Claymore Mine [Anti-Personnel Mine] (\$350.00/458);
- 26 13. M112 Demolition Charges [Composition 4, aka C-4 or "plastic  
 explosives"](\$600.00/255);
- 27 14. FIM-92A Stinger Launcher [Anti-aircraft missile launcher]  
 \$55,000.00/1);
- 28 15. FIM-92A Stinger Missiles [Anti-aircraft missiles]  
 (\$10,000.00/3).

Under the heading "Troops" the list indicated that "12 men [were]  
 available until 5/15/07, at a rate of \$500 per day for "[o]perations,"  
 and \$400 per day for "[t]raining."

1 delivering "yellow rain." Id. at 11. Per Jack, Lo was also  
 2 talking about an initial order of 1500 M16s [machine guns] per  
 3 province. Id. at 11. Jack stated that they planned on securing  
 4 every route in and out of the country - blowing up bridges and  
 5 taking care of whatever it took. In reply, the UC asked, "So  
 6 probably C4 then I would imagine also," to which Jack replied,  
 7 "Yep, yep. Fair amount of demolitions all the way around." Id.  
 8 at 13.

9 ■ During the April 18 (Doubletree Hotel) meeting (attended by  
 10 Harrison Jack, Lo Cha Thao, Youa True Vang, Hue Vang, Lo Thao,  
 11 Chue Lo, Chong Yang Thao), Hue Vang asked the UC whether he could  
 12 supply ammunition; the UC indicated he could. Gov. Ex. YY,  
 13 4/18/07 Tr. at 7-8; Def. Ex. 1, Complaint Aff. ¶ 59. In response  
 14 to Hue Vang's question, the UC also indicated he could obtain  
 15 Stingers [anti-aircraft missiles] and that he could drop ship  
 16 ammo inside Laos. Id. at 8-9. In response to the UC's inquiry,  
 17 Lo Cha later indicated that they wanted to obtain AK47s, ammo and  
 18 a couple of Stingers. Id. at 16-17. Hue Vang then added that  
 19 they wanted the M16 [machine gun] with the M203 grenade launcher  
 20 on it, and explained the strategy behind these selections. Id.  
 21 at 17-18. Hue Vang later remarked that, "in terms of my working  
 22 with our leadership and the individuals who are responsible in  
 23 strategizing, we're estimating about 10,000." Id. at 20. Jack  
 24 asked if they were looking at LAWs [anti-tank weapons], which the  
 25 UC then said he highly recommended. Hue Vang replied, "Yeah."  
 26 Id. at 20. Jack recommended that they take care of the  
 27 "personal" [weaponry] and then look at the distance - M79  
 28 [grenade launcher], 203s [grenade launchers], LAW and a Stinger  
 up above, suggesting that you need the whole range. Id. at 20-  
 21. Hue Vang replied, "Okay." Id. Jack asked about Claymores  
 [anti-personnel mines]; Hue Vang stated, "yes," that it would be  
 "within our scope." Id. at 29. Jack indicated first they should  
 have C4 [plastic explosives], because they had to "demobilize,  
 destroy, disrupt." Hue Vang agreed, stating "Yeah. Yeah." Id.<sup>21</sup>

19 ■ During an April 20 call, Jack asked what a minimum order was from  
 20 the UC's perspective. The UC indicated a thousand weapons, but  
 21 then added that a 3-400 weapon order would be fine. Id. at 5-6.

21 ■ During April 23 and 24 calls, Lo Cha told the UC that they,  
 22 including the organization's secretary general and the treasurer,  
 23 wanted to meet. He further requested the UC to bring [AK] 47s,  
 24 Stingers, the M14 [machine gun] and the M18 Claymore mines. Gov.  
 25 Ex. M, 4/23 Tr. at 4-5; Gov. Ex. N, 4/24 [8:49 a.m.] Tr. at 2.

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24  
 25 <sup>21</sup>On April 16, Jack asked the UC to put together a master list  
 26 of what he potentially had at his disposal, not what he currently had  
 27 in hand. Gov. Ex. L, 4/16 [5:39p.m.] Tr. at 4. During the April 18  
 28 (Doubletree Hotel) meeting, the UC indicated to conspirators gathered  
 to examine weapons that he could not put together such a master list  
 and that they would just need to ask for what they wanted. Id. at 7.

1 ■ During the April 24 (Hilton Hotel) meeting between the UC, Lo Cha  
 2 Thao and Nhia Kao Vang, the UC showed the group AK-47 machine  
 3 guns, a M-14 machine gun, three AT-4 anti-tank rockets, and a  
 4 Stinger. Gov. Ex. N, 4/24 [6:23 p.m.] Tr. at 17-23. When shown  
 5 a Stinger, Lo Cha remarked that [the Stinger] was what they  
 6 needed for all those helicopters. Id. at 20. Toward the  
 7 conclusion of the meeting, Lo Cha indicated that they needed two  
 8 AT-4s and two Stingers. Id. at 24-25.

9 ■ During the May 3 (Hangar 17 Restaurant) meeting, the UC indicated  
 10 that Lo Cha had asked him to make up a new list and give it to  
 11 Jack. Gov. Ex. O, 5/3 Tr. at 9. The UC then gave Jack three  
 12 updated weapons inventory/price lists.<sup>22</sup> Id.; Gov. Ex. P, ATF  
 13 Rpt. 34, ¶ 9.

14 ■ During a May 4 call, Jack asked if the UC had a minimum order at  
 15 his end. Gov. Ex. Q, 5/4 [1:40 p.m.] Tr. The UC stated that the  
 16 bare bones minimum order was \$100,000, with \$50,000 down next

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17 <sup>22</sup>The May 3 list included the following weapons, with noted price  
 18 and quantities:

- 19 1. MP5K PDW [Machine gun] (\$1,500.00/10);
- 20 2. MP5SD [Machine gun with suppressor] (\$2,000.00/8)
- 21 3. Colt M16A1 with M203 [Machine gun with grenade launcher]  
 22 (\$1,700.00/30);
- 23 4. M16A2 [Machine gun] (\$600.00/1500)
- 24 5. M14 [Machine gun] (\$600.00/750);
- 25 6. Polish AKM 7.62x39 [Machine gun](\$800.00/535);
- 26 7. PKM Machine gun [Belt-fed machine gun] \$2,000.00/5);
- 27 8. M79 [Grenade launcher] (\$400.00/344);
- 28 9. Bulgarian RPG7B [Rocket propelled grenade launcher]  
 (\$800.00/6);
10. M67 Frag Grenade [Anti-personnel grenade] (\$500.00/250);
11. M72A2 LAW [Anti-tank rocket] (\$300.00/1,200);
12. M18 Claymore Mine [Anti-personnel mine](\$350.00/458);
13. M112 Demolition Charges [Composition 4, aka C-4 or "plastic  
 explosives"] (600.00/255);
14. AT-4 Rocket [Anti-tank rocket] (1,200.00/44);
15. FIM-92A Stinger Launcher [Anti-aircraft missile  
 launcher](65,000.00/2);
16. FIM-92A Stinger Missiles [Anti-aircraft missile launcher]  
 (10,000.00/6).

The list noted, under "Troops," that "12 men [were] available until  
 5/15/07," with a rate of \$500 per day for "[o]perations," and \$400 per  
 day for "[t]raining." (24)

1 week, and a promise that future orders would be coming. Id.<sup>23</sup>

2 ■ During a May 7 call, Jack left a message for the UC indicating  
3 that he talked to Lo Cha and that Lo wanted him to put them all  
4 into "item number 6, Alpha Kilos." Per Jack, he encouraged Lo  
5 Cha to include some "smoke" [smoke grenades]. Gov. Ex. R, 5/7  
[4:01 p.m.] Tr. at 2. On 5/8, Jack explained to the UC that he  
thought they should have 10 to 20 smokes at 10 different  
locations. Gov. Ex. S, 5/8 Tr. at 2.

6 ■ During a May 9 call, the UC advised Jack that he had 125 AK-47  
7 rifles, 20,000 round of ammunition, four cases of smoke grenades,  
8 six 30 round magazines per firearm and cleaning kits, and they  
9 both discussed the nature of that and other equipment. The UC  
10 asked what would be ordered for the second shipment and Jack  
stated that he believed it would be a continuation of the first  
11 order up to 10,000. Jack was not sure about "anti-aircraft"  
equipment, opining that he thought they were interested in  
individual arms. Gov. Ex. T, 5/9 ATF Linesheet [5:05].

12 ■ About half an hour later on May 9, Jack told the UC that he had  
13 spoken with Lo Cha, that everything went well, and that Lo Cha  
14 was good with the numbers and conditions that the UC had. Gov.  
15 Ex. T, 5/9 ATF Linesheet [5:34 p.m.].

16 ■ During a May 10 call at 3:56 p.m., Jack told the UC that Lo Cha  
17 Thao wanted a meeting on Friday to discuss having "boots on the  
18 ground" [mercenaries] two weeks after the equipment arrived "in  
19 country." Gov. Ex. AA, 5/10 ATF Linesheet.

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20 <sup>23</sup>The defense (apparently referencing a May 4 conversation  
21 between Jack and the UC) suggests that the UC "pushed Jack and Lo Cha  
22 Thao to buy bigger quantities of weapons -- warning them for example,  
23 that his 'partner was not happy with the size of the first order.'" (Mot. at 9.) The UC did not improperly or coercively "push" Jack, and  
24 reference to the complete conversation at issue makes this perfectly  
25 clear. On May 4 at 4:25 p.m., Jack told the UC by phone that Lo Cha  
26 Thao indicated he would have the items selected and faxed to Jack by  
27 Monday [May 7, 2007]. Gov. Ex. Y, ATF Rpt. 36 ¶¶ 2, 3. The UC,  
28 indeed, told Jack that his partner was not happy with the size of the  
first order. Id. ¶ 4. Jack, however, immediately replied that the UC  
already had agreed to the minimum weapons order and that this was the  
first of many orders to come. Id. ¶ 5. Jack said that Lo Cha was  
hesitant to place too large an order and that this first order was to  
test the UC's ability to deliver the weapons. Id. Jack also said Lo  
Cha's people had lost orders in the past, that the UC's partner could  
be angry if he wanted, but that they needed to complete the initial  
order to verify that the UC could actually deliver the weapons. Id.  
After hearing this, the UC indicated that he would speak with his  
partner to smooth things out, and that the first weapons order would  
be delivered as promised. Id. ¶ 6.

1 ■ During the May 11 (Hangar 17 Restaurant) meeting, Lo Cha  
2 outlined, in great detail, his "mission" to hire mercenaries from  
3 the UC to blow up government buildings in Laos. Gov. Ex. U, 5/11  
4 Tr. at 12-37.<sup>24</sup> The UC asked if there were certain areas from  
his inventory that Lo Cha wanted him to build. Lo Cha indicated,  
in response to UC questions: LAWs, AT4s, Rockets, AKs, Claymore  
mines. Id. at 80-81.

5 ■ Finally, during the May 23 (Hangar 17 Restaurant) meeting  
6 (attended by defendants Jack, Lo Cha Thao, President Lo Thao and  
7 Chong Yang Thao), Lo Cha Thao identified the Laos Royal Palace as  
8 one of the principal target locations. Gov. Ex. C, 5/23 Tr. at  
9 17-43. Defendant Lo Cha and Jack engaged in detailed discussions  
10 regarding the planned mercenary attack in Vientiane and delivery  
11 of weaponry related thereto. Id. Following this, the UC said he  
12 had a list of things that Lo Cha's intel guys needed to identify  
13 over there for the team so that the UC's guys could be prepared.  
Id. at 46; Gov. Ex. B, ATF Rpt. 68, ¶ 13. Lo Cha indicated that  
14 "We'll get this to you right away." Id. at 51. In response to  
15 Jack's question, Lo Cha indicated that he wanted to bring all of  
16 the equipment in by the end of June. Id. at 58-59. In response  
17 to questions from Jack, Lo Cha affirmed that he was looking at  
18 roughly three or four orders to take care of his needs, that is,  
19 sufficient equipment to take care of 10,000 men on the ground.  
20 Id. at 74; see also Id. at 72-73.<sup>25</sup>

21 In short, the UC did not engage in any sort of constitutionally  
22 impermissible misconduct during the course of these arms negotiations.  
23 The conspirators, by their own words and actions, made it perfectly  
24 clear that they were eager and willing to purchase a variety of arms  
25 and personnel from the UC. Of note, defendants (specifically Jack and  
26 Lo Cha Thao) were the ones who originally told the UC (or complainant  
27 Hawthorne) that they wanted to acquire, among other things, AK-47s,  
28

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22 <sup>24</sup>Lo Cha, following up on a Jack question, asked if the UC could  
23 provide medical and communications equipment, to which the UC replied  
24 he could. Id. at 49-51. The UC asked "what else, communications?"  
25 Jack responded, "working walkie talkies," and the UC then explained  
26 some options. Id. at 55.

27 <sup>25</sup>Lo Cha also asked about rain gear (noting that President Thao  
28 observed it would be the rainy season at the time of the mission).  
The UC indicated he could get some and Lo Cha indicated he would give  
the UC some numbers. Id. at 79-82. Finally, the UC later asked if  
they wanted medical kits and night vision, to which Lo Cha indicated  
they would call him with that. Id.

1 ammunition, smoke grenades and mercenaries. After weeks of  
2 discussions, defendants ultimately placed their first order for these  
3 very items and personnel. As for Stingers, the UC offered these  
4 weapons for sale only after Jack described the Hmong's problem with  
5 "yellow rain." Jack, Lo Cha Thao, and Hue Vang, at various times  
6 thereafter, all expressed readily apparent interest in acquiring these  
7 weapons. As for quantities of weapons, defendants Hue Vang, Lo Cha  
8 Thao and Jack, again, were the ones who consistently suggested that  
9 defendants were seeking arms sufficient to equip 10,000 insurgents.  
10 The UC, thus, did not "twist the arms of the conspirators" to induce  
11 them to buy more weapons or more powerful ones; he did not coerce  
12 them; he did not unduly pressure them; or anything of the sort.  
13 Defendants' claims to the contrary should be rejected.<sup>26</sup>

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14  
15 <sup>26</sup>The defense alleges other purported improper acts by the UC,  
16 which they claim were all part of the UC's supposed efforts to "move  
17 [the coup plan] along." (Mot. at 12-13.) Each of these claims misses  
18 the mark.

19 First, the defense claims that the UC "told them types of medical  
20 supplies they needed." (Mot. at 13.) In fact, Lo Cha first expressed  
21 an interest in obtaining medical supplies on May 11. Gov. Ex. U, 5/11  
22 Tr. at 49. The UC asked whether they wanted medical kits for an  
23 individual person or medical supplies for a trauma unit, and explained  
24 what supplies would be available. Id. at 50-53. Lo Cha ultimately  
25 indicated he would let the UC know. Id. at 53. When the UC inquired  
26 on May 23 about medical kits, Lo Cha told the UC again that Lo Cha  
27 would call him "with that." 5/23/07 Tr. at 83.

28 Second, the defense suggests that the UC "demanded maps of the  
29 area" and ultimately "provided them himself" when the conspirators  
30 proved incapable of procuring any useful ones. (Mot. at 13.) This is  
31 not an accurate statement. During the February 7 Amarin meeting, Jack  
32 indicated that, "We've got maps and coordinates" - "All the  
33 information you needed in order to price things, coordinate things  
34 ...." Ex. D, 2/7 Tr. at 7. Jack later asked "how do we close ... the  
35 planning, the op side of this thing as far as grid coordinates,  
36 meeting ... all that kind of stuff." Id. at 48 (emphasis added). The  
37 UC indicated that he needed a lat[itude] and long[itude] to drop  
38 anything. Id. at 48. Thereafter, at Jack's request, Hue Vang brought

1 D. Defendants Were the Driving Force Behind Developing  
2 Plans to Obtain Weaponry and Mercenaries, Overthrow  
3 the Lao Government, and Effectuating Those Plans

4 Defendants argue that the UC, not defendants, was the individual  
5 who "encourage[d] and orchestrate[d]" an offensive action to overthrow  
6 the government of Laos. (Mot. at 5.) Per the defense, the ATF agent  
7 "provided all the expertise, organization and direction" for the  
8 criminal conduct, while the "defendants contributed," at most,

9 maps to the RV, showed Lao troop/insurgent locations to the UC, and  
10 suggested that drop points [for delivery of weapons] were "possible."  
11 Id. at 48-50. During the subsequent March 5 meeting, the UC  
12 (following up on Jack's previous request/comments) gave Jack "[f]ly  
13 zone maps." Per the UC, these maps showed "no fly zone areas and good  
14 areas of approach from Thailand so they could plan accordingly on  
15 where they would pick up or where they would want to drop ...." Gov.  
16 Ex. W, 3/5 Tr. at 64.

17 Third, the defense suggests that the UC "pushed" conspirators to  
18 hold planning meetings, citing principally to the March 5, 2007  
19 meeting. (Mot. at 13, n.48.) On March 5, the UC gave Jack the fly  
20 zone maps and explained that, if someone called him in the future and  
21 wished to "talk lat and long and positions," they could reference the  
22 map. Id. at 65. Thereafter, the UC stated, "And then when we get  
23 down to getting more specific, when we get together for a planning  
24 meeting, which is - we're going to have to do sooner rather than  
25 later, we're going to have more detailed maps for that." Id. Given  
26 the nature and circumstances of the comment, it cannot be said that  
27 the UC was "pushing" or engaging in any sort of "outrageous"  
28 pressuring in connection with planning meetings.

29 Fourth, the defense suggests that the UC "pressed" the  
30 conspirators to produce a written operational plan. (Mot. at 13.)  
31 The record does not support this claim, either. During the February 5  
32 Amarin meeting (after Jack had made it known that he was interested in  
33 potentially obtaining both weapons and mercenaries), the UC informed  
34 Jack that he "needed" to get an operational briefing as well as copies  
35 of an operations plan. Def. Ex. 1, Complaint Aff. ¶ 25. On  
36 subsequent occasions, Jack advised the UC that a separate strategic  
37 planner had developed an operations plan. For example, during the  
38 March 5 meeting, Jack indicated that he met with a strategic planner,  
39 who showed him a copy of their initial operations plan, titled  
40 "P.O.P.C.O.R.N." Id. at 71; see also Id. at 64. There is no evidence  
41 that the UC somehow pressured or pressed the conspirators to develop  
42 this plan. At most, the UC said he would need to see a copy of a  
43 plan. The conspirators, on their own, developed the plan.

1 "delusional wishes." (Mot. at 30; see also Mot. at 11 (agent  
2 "provided the direction and the most rudimentary operational  
3 competence needed to form the alleged scheme.")) These defense claims  
4 are completely contrary to the record. In fact, a review of the  
5 record related to the UC contacts<sup>27</sup> demonstrates that the conspirators  
6 themselves developed the ideas and objectives to obtain weaponry and  
7 mercenaries and to overthrow the Lao government. Moreover, defendants  
8 were the driving force working to effectuate those objectives.

9 1. The Idea of Acquiring Arms and Staging a Coup

10 The conspirators first suggested the idea of acquiring arms and  
11 planning a coup in Laos to the UC, not vice-versa. During his initial  
12 contacts with Hawthorne, Jack made it clear that he and his people  
13 wanted to acquire 500 AK-47s. Gov. Ex. 00, ATF Rpt. 1. During the  
14 very first meeting with the UC on January 25, 2007, Jack confirmed his  
15 interest in acquiring machine guns and ammunition, Gov. Ex. E, 1/25  
16 Tr. at 4-11, 21, inquired about the availability of mercenary teams,  
17 Gov. Ex. E, 1/25/07 Tr. at 26, 45-46, and opined about utilizing a  
18 decent SEAL team in Laos to "bring down" or "control" key  
19 infrastructure and locations inside Laos in an effort to effectuate  
20 the departure of the present military and bring about a democratic  
21 government. Gov. Ex. E, 1/25/07 Tr. at 50-52.

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22  
23  
24 <sup>27</sup>There are Court approved wiretap intercepts as well as seized  
25 documents that further demonstrate that the conspirators were the  
26 driving force behind the conspiracy. A motion to dismiss predicated  
27 on outrageous government conduct requires an examination of the nature  
28 of the government's conduct or behavior under an objective standard.  
See, e.g., Emmert, 829 F.2d at 811-12. Given that, the government,  
for the most part, has focused the Court on those portions of the  
record that relate to direct government interaction with the  
conspirators.

1           2.    Coup Strategies

2           The conspirators (not the UC) developed various potential  
3 strategies to effectuate an attack on the Lao government and  
4 ultimately informed the UC of their chosen strategy.

5           For example, during the March 5, 2007 meeting, Jack indicated  
6 that one of the areas he believed teams on the ground needed to  
7 address were key assets in Vientiane, such as the airport and  
8 communications. Gov. Ex. W, 3/5/07 Tr. at 53. Jack later suggested  
9 that "the optimum takeover is completely bloodless," and that "if you  
10 can hit the key points" you might be able to "transition this thing  
11 [referring to the Lao government]." Id 54.

12           During the April 12 meeting, Jack stated that he asked "them"  
13 about communications, key assets - "all the logistical stuff that's so  
14 critical to maintain an operation and getting it off the ground."  
15 Gov. Ex. H, 4/12/07 Tr. at 23. He then noted that they [referring to  
16 unidentified conspirators] "think well militarily." Id.

17           During the May 3 meeting, Jack explained to the UC the  
18 importance of having a strategy that would lend itself to taking  
19 control of Vientiane, specifically, the military compound "that  
20 secures all the political." Per Jack, that compound was the "head of  
21 the snake." Gov. Ex. O, 5/3/07 Tr. at 18. Jack noted that "if they  
22 could secure that compound, change the guards at the gate, cut off  
23 communications, you can go from there and do what you need to do."  
24 Id. at 19. Jack noted that he explained that to him [apparently  
25 referring to Lo or one of the conspirators] and was told that it was a  
26 good idea and that "we'll discuss that." Id.

27           During a May 4 call, Jack advised the UC that for planning  
28 purposes and orientation of your personnel, part of their intent was

1 securing Long Cheng as well as Vientiane and supplying both locations.  
2 Gov. Ex. Q, 5/4 [1:40 p.m.] Tr. at 7. Jack then stated that Long  
3 Cheng apparently had minimal security and would be an excellent  
4 staging area, central supply depo and training facility. Id. at 8.

5 During the May 11 meeting, Lo Cha announced the decision to hire  
6 mercenaries for a "coup d'etat." Gov. Ex. U, 5/11/07 Tr. at 28. Lo  
7 Cha stated that "his mission" was to hire UC's men to do a "quick  
8 set-up" and "September 11" "demo" of "several government buildings" in  
9 Vientiane with the hope that once the capital was "being terrorized,"  
10 current government leaders would fly out of Vietnam, new coup leaders  
11 would stand up, and a democratic plan could be presented. Id. at 12-  
12 16, 22-3, 31-3, 37-8.<sup>28</sup> Lo Cha further indicated that, once the  
13 command center fell, and all the community called for freedom and  
14 democracy, they would have plenty of guys equipped with "what they are  
15 going to get from" the UC to fight back the military in each province.  
16 Id. at 24.<sup>29</sup>

17 Finally, during the May 23 (Hangar 17 Restaurant) meeting,  
18 conspirators again actively discussed their plans to attack locations  
19 in Vientiane. The UC (following up on a previous request from Jack)<sup>30</sup>  
20

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21 <sup>28</sup>The UC asked if there were any major communications outlets  
22 there and recommended that they take that out. Lo Cha stated "Yeah,  
23 yeah." Id. at 23. Jack added that this was a point he apparently had  
24 already discussed with Lo Cha: "First thing I asked [Lo Cha] about  
today. That's what I spent time talking about." Id.

25 <sup>29</sup>After Lo Cha described all of these objectives, the UC then  
26 indicated that he needed a date, video of the locations and  
27 photographs of where they were located. Id. at 45; see also Id. at  
73-74. Lo Cha indicated that he would get that to the UC right away  
and that all the funds for the equipment were available. Id.

28 <sup>30</sup>On May 21, after the meeting where Lo Cha had expressed a  
desire to hire mercenaries to blow up government buildings in

1 displayed certain satellite images for Jack, Lo Cha and others,  
2 showing the area around the Vientiane Wattay international airport and  
3 the Laos Royal Palace in Vientiane. Gov. Ex. B, ATF Rpt. 68, ¶ 6. Lo  
4 Cha confirmed that the palace was "what we want to work on." Gov. Ex.  
5 C, 5/23 Tr. at 17. Lo Cha pulled out a map of Thailand and Laos,  
6 identified various drop-off points for the weapons and labeled various  
7 parts of the map accordingly. Id. at 22-26; Gov. Ex. B, ATF Rpt. 68,  
8 ¶ 9, see also id. at 37-38. The UC (following up on his previous  
9 discussion with Jack)<sup>31</sup>, indicated that he had a list of things that Lo  
10 Cha's intel guys needed to identify over there for the team so that  
11 the UC's guys could be prepared. Id. at 46; Gov. Ex. B, 5/23/07 ATF  
12 Rpt. 68, ¶ 13.<sup>32</sup> Lo Cha indicated that "We'll get this to you right  
13 away." Id. at 51. Lo Cha (responding to Jack's inquiry) indicated

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14  
15 Vientiane, Gov. Ex. U, 5/11 Tr. at 12-33, Jack called the UC to  
16 confirm if the previously set dates were good to go. During the call,  
17 Jack indicated that they were having difficulty obtaining coverage  
18 apparently of the primary facilities for targeting and asked the UC if  
19 he had access to any DOD satellite coverage [imagery]. The UC stated  
20 he had some coverage, but did not think he had it on that. Gov. Ex.  
21 X, 5/21 ATF Linesheet [5:23 p.m.].

22 At the May 23 meeting (following up on Jack's previous request to  
23 the UC for satellite coverage), the UC brought various satellite  
24 images for Jack, Lo Cha and others. Gov. Ex. C, 5/23 Tr. at 17; Gov.  
25 Ex. B, ATF Rpt 68.

26 <sup>31</sup>During the May 21 call to the UC, Jack said that, apparently  
27 per Lo Cha, they had a man on ground for intel and that the primary  
28 facilities were guarded by a thirty foot wall. Gov. Ex. X, 5/21 ATF  
Linesheet [5:23 p.m.]. Jack noted that he asked Lo Cha some basic  
questions [related thereto], but that Lo Cha did not have the  
information directly. Id. The UC said he would come up with a  
"laundry list" for Lo Cha, to which Jack replied, "Good."

At the May 23 meeting, following up on his previous conversation  
with Jack, the UC brought Jack and Lo Cha a list of various items that  
Lo Cha's "intel guys" needed to identify.

<sup>32</sup>Jack asked Lo Cha if he remembered seeing that before and that  
it was the same thing that Jack gave Lo Cha. Lo Cha responded,  
"Yeah." Id. at 47.

1 that he wanted to bring all of the equipment in by the end of June.  
2 Id. at 58-59. Jack later stated that at five o'clock, when "this  
3 thing comes down," people ought to be outside of those buildings,  
4 ready to "take over and do what they need to do," adding, "That's the  
5 way you cut off the head of the snake." Id. at 64-65. After  
6 discussion, the UC, Jack and Lo Cha agreed on a time frame: the dollar  
7 handover meeting was set for [June] 11th and delivery of weapons on  
8 the 12th. Id. at 69-72. Lo Cha, responding to Jack's inquiry, later  
9 affirmed that he was looking at roughly three or four orders to take  
10 care of his needs, that is, sufficient equipment to take care of  
11 10,000 men on the ground. Id. at 74. Moreover, Lo Cha, responding to  
12 Jack's questions, stated that he saw this thing coming off in July  
13 sometime and that his leadership had discussed the same. Id. at 83.

14 3. Weaponry and Mercenaries

15 As described in greater detail supra § IV.C., conspirators  
16 actively requested and selected both weaponry and mercenaries.  
17 Defendant Jack initially expressed interest in purchasing AK-47s  
18 machine guns and subsequently expressed an interest in procuring  
19 mercenary troops. Thereafter, all of the defendants (except David  
20 Vang) participated in one or more meetings and/or phone calls with the  
21 UC regarding the purchase of weaponry, military equipment, and  
22 mercenaries.<sup>33</sup> Ultimately, defendant Lo Cha Thao (or Jack acting on  
23 his behalf) informed the UC that: (1) the first order would include  
24 mercenaries (with a mission to destroy government buildings in  
25 Vientiane, including the Laos Royal Palace) as well as 125 AK-47  
26 rifles, 20,000 round of ammunition, and four cases of smoke grenades

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27  
28 <sup>33</sup>Defendants Jack and/or Lo Cha Thao participated in all of these meetings and/or phone calls and were the principal points of contact with the UC.

1 (to be provided to freedom fighters); and (2) subsequent orders would  
2 be made, all with an objective of acquiring sufficient arms for 10,000  
3 men. See supra § IV.C. (detailed recitation of facts and  
4 corresponding record citations); see generally Gov. Ex. T, 5/9 ATF  
5 Linesheet [5:05]; Gov. Ex. T, 5/9 ATF Linesheet [5:34 p.m.]; Gov. Ex.  
6 U, 5/11 Tr. at 12-37; Gov. Ex. C, 5/23 Tr. at 13-21, 46-75.

7 4. Weapons and Money Exchange Locations

8 Jack and other conspirators (not the UC) developed and suggested  
9 potential weapons drop locations and money exchange locations. For  
10 example, during the February 7, 2007 meeting, Hue Vang brought in  
11 various maps and explained possible drop points. Gov. Ex. D, 2/7 Tr.  
12 at 48-51.

13 During an April 13 phone call (5:33 p.m.), Jack provided a  
14 location for the UC to check out where equipment could be delivered in  
15 the Golden Triangle area along the border of Thai/Laos, and stated  
16 that there were five individuals at the location and established  
17 satellite communications with these individuals. Gov. Ex. Z, 4/13/07  
18 Tr. at 4-5.

19 During a May 2 call, Jack told the UC that "they" were securing  
20 safe houses and wanted the UC to accompany Jack to Thailand so they  
21 could see the safe houses and thereby ensure delivery. Gov. Ex. CC,  
22 ATF Rpt. 33.

23 During a May 9 call, Jack told the UC that Lo Cha had received  
24 guidance over the weekend concerning the money transaction, and that  
25 Lo wanted to complete the payment for the shipment in Mexico, Thailand  
26 or offshore in international waters. The UC agreed to the request.  
27 Gov. Ex. T, 5/9 ATF Linesheet.

28 During a May 10 call at 2:13 p.m., Jack told the UC that, per Lo

1 Cha, they were going to move operational planning and support to  
2 Thailand. Jack then asked the UC if all weapons transactions and  
3 funding could be done over there. The UC told Jack they could. Gov.  
4 Ex. AA, 5/10 Linesheet [2:13 p.m.].

5 Finally, during the May 23 meeting, Lo Cha pulled out a map of  
6 Thailand and Laos and identified both primary and alternative drop-off  
7 points for the weapons. Gov. Ex. C, 5/23/07 Tr. at 22-38; Gov. Ex. B,  
8 ATF Rpt. 68, ¶ 9 Lo Cha then suggested that a delivery be made at a  
9 dead end road where fifty people were reportedly available to "move  
10 stuff." Id. at 32-6.

11 5. Intelligence Gathering

12 Conspirators (not the UC) gathered intelligence regarding the Lao  
13 government, military, and potential assets for targeting. For  
14 example, during a March 7 call, Jack reported that he received "intel"  
15 that the communist leadership in Laos seemed to be centrally situated  
16 in Vientiane and protected by disloyal military security. Gov. Ex.  
17 BB, 3/7/07 Tr. at 3-4. Per Jack, the Hmong leadership was working  
18 "right now" trying to get their foothold and put plans in place to  
19 gain inside organizational effort that would allow them to "turn the  
20 switch here whenever they need[ed] to." Id. at 4.

21 During an April 13 call (5:33 p.m.), Jack stated that they just  
22 sent five to seven people over there recently to assess and bring back  
23 intel.<sup>34</sup> Gov. Ex. Z, 4/13 [5:33 p.m.] Tr. at 5.

24 During the April 18 meeting, Lo Cha indicated that they were  
25 sending intelligence through that day. Gov. Ex. YY, 4/18/07 Tr. at

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26  
27 <sup>34</sup>Jack indicated that he recommended to Lo Cha that they try to  
28 take an area known as Long Cheng where the Lao PDR had located,  
staged, secured, and warehoused a tremendous amount of military  
stockpile. Id. 6, 7.

1 12.

2 During the May 3 meeting, Jack informed the UC that they had an  
3 intel team apparently in Laos. Gov. Ex. O, 5/3/07 Tr. at 58.

4 During the May 11 meeting, when asked if they had intel on the  
5 government buildings that Lo Cha wanted destroyed, Jack and Lo Cha  
6 responded that they had people in downtown Vientiane "right now," and  
7 Jack stated that "we just have to give them the requirements." Gov.  
8 Ex. U, 5/11 Tr. at 18. Lo Cha further explained that he had pictures,  
9 and that there were not many buildings: one for the cabinet and others  
10 described as "war banks." Id. at 19.

11 Finally, during a May 21 call, Jack advised the UC that, per Lo  
12 Cha, they had a man on the ground in Vientiane for intel, and that the  
13 primary facilities were guarded by a 30-foot wall. Gov. Ex. X, 5/21  
14 ATF Linesheet.

15 6. Operations Plans

16 Conspirators (not the UC) developed the operations plans for the  
17 planned coup. During the March 5 (Hangar 17 Restaurant) meeting,  
18 Jack indicated he met with a strategic planner, who showed him a copy  
19 of their initial operations plan. Gov. Ex. W, 3/5 Tr. at 71; see also  
20 Id. at 64.

21 During an April 13 phone call (5:33 p.m.), Jack explained, among  
22 other things, that: they had a master plan that involved operations  
23 inside Vientiane and other military regions; that they were doing an  
24 intelligence assessment; and that each district would be seeking their  
25 own equipment, so potentially there were four to five orders that  
26 would take place. Gov. Ex. Z, 4/13 Tr. at 3. Jack further indicated  
27 that he had a "somewhat operations order" in hand and that he had been  
28 impressed with "their" planning. Id. at 36-7.

1 During a May 3 meeting, Jack explained that the Hmong leadership  
2 had divided up Laos into as many as five military districts, and that  
3 each clan had responsibility for raising their own funds and coming up  
4 with their own equipment requirements. Gov. Ex. O, 5/3 Tr. at 8.  
5 Jack also indicated that "they [were] reviewing [three] individuals  
6 that would be their military field commanders and they want[ed] him  
7 [Jack] to interview the guy." Id. at 19-20.

8 During the May 11 meeting, Jack indicated again that he met with  
9 the master planner and was impressed. Gov. Ex. U, 5/11 Tr. at 83.  
10 Jack indicated that he gave the master planner some advise on basic  
11 stuff such as "put[ting] out the head of the snake to start with,"  
12 dealing with key assets, managing the communications, and making sure  
13 you have backups. Id. at 83.

14 7. Fund-raising

15 Defendants Jack and/or Lo Cha repeatedly told the UC during the  
16 course of the investigation that fund-raising was afoot and,  
17 ultimately, that funds to purchase weaponry and mercenaries were  
18 available.

19 Between March 30 and April 5, Jack advised the UC that they had  
20 commenced the collection process and were "generating bucks." Gov.  
21 Ex. DD, 3/30 Tr. at 3; Gov. Ex. EE, 4/3 Tr. at 3.

22 On April 5, Jack left a message for the UC indicating that, per  
23 the Hmong leadership, they had collected sufficient funds to place an  
24 "initial order." Gov. Ex. J, 4/5 Tr. at 2.

25 On April 12 and April 20, Jack then stated that he did not know  
26 how much money had been collected. He suggested, however, that they  
27 had Air America sending in 100 \$500 checks on an individual basis and  
28 that in May they were going to Washington for an event called Rolling

1 Thunder, a Harley Vet owners' fund-raiser. Gov. Ex. H, 4/12 Tr. at  
2 28; Gov. Ex. FF, 4/20 Tr. at 46.

3 On May 4, Jack said that Lo Cha was prepared to make an initial  
4 down payment and had the money in hand. Gov. Ex. Q, 5/4 Tr.[1:40  
5 p.m.] at 2, 6.

6 On May 9, Jack confirmed that money at their end would not be an  
7 issue. Gov. Ex. T, 5/9 ATF Linesheet. On May 10 at 2:13 p.m., Jack  
8 told the UC that, per Lo Cha, they had a minimum of "150" in hand  
9 right now for the first order. Gov. Ex. AA, 5/10 ATF Linesheet.

10 And ultimately, during the May 11 meeting, Lo Cha indicated that:  
11 they were "ready to roll," they had the date from the Colonel [Jack];  
12 they would be there with the funds; they would have eight to ten  
13 people overseas already, and each of them would carry [\$]9,999. Gov.  
14 Ex. U, 5/11 Tr. at 9-10<sup>35</sup>.

15 \_\_\_\_\_  
16 <sup>35</sup>As a separate matter, Jack and Lo Cha also considered and  
17 discussed potential scenarios for the successor Lao government. As  
18 early as approximately November, 2006, Jack had a conversation with  
19 unidentified conspirators seemingly related to, among other things,  
20 "putting together" a new administration in Laos. See Gov. Ex. C, 5/23  
21 Tr. at 7; Gov. Ex. B, ATF Rpt. 68, ¶¶ 5, 13.

22 During the March 5 meeting, Jack discussed issues related to the  
23 "take over" of Laos with the UC, such as whether there would be  
24 sufficient administrative staff, whether the military and political  
25 issues could be handled, the fact that Vang Pao was recognized, etc.  
26 Gov. Ex. W, 3/5 Tr. at 48. Jack later stated that certain Hmong  
27 leadership met with the California Highway Patrol ("CHP") commissioner  
28 as part of an effort to recruit and train Hmong. He noted that there  
is a "residual to that". "[I]f these guys are successful ... pulling  
this thing off internal to Laos," then the CHP would become a training  
asset, that is, Hmong trained by the CHP could then be used to handle  
internal security operations. Id. at 45.

During a May 7 call, Jack stated that he was thinking down the  
road of putting together a team for in-country operations in Laos and  
that an assistant commissioner chief for the CHP he knew would be an  
excellent person to bring in and develop the equivalent of a country-  
wide CHP. Gov. Ex. R, 5/7 [11:51(sic)] Tr. at 4-5.

During the May 11 meeting, Lo Cha told Jack and the UC that after  
the operation, he anticipated that there would be a temporary

1 In short, all the above described acts of defendants make it  
2 clear that defendants were the driving force behind developing and  
3 effectuating the plans to acquire arms and overthrow the Lao  
4 government. The conspirators engineered and directed this criminal  
5 enterprise, not the UC.<sup>36</sup>

6 E. The Conspirators, Many of Whom Had  
7 a Military Background, Appeared  
8 Willing and Able to Commit the Charged Crimes

9 Defendants suggest that the alleged conspirators were incompetent  
10 to engage in any form of realistic planning for the coup other than  
11 fanciful dreaming. (Mot. at 12, 30.) Defendants further suggest that  
12 "in the absence of government support ... it is inconceivable that the  
13 defendants could have formulated and carried out any part of the  
14 alleged plot on their own." (Mot. at 31)(emphasis added.) Not so.

15 When one views the evidence from the perspective of the  
16 investigating ATF and FBI agents (as is appropriate in the context of

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17 government, free elections and then Laos would become a neutral  
18 country just like Switzerland. Gov. Ex. U, 5/11 Tr. at 38.

19 <sup>36</sup>Defendants cite to the few reported decisions where courts have  
20 found outrageous government conduct and suggest that "the facts here  
21 mirror or exceed the facts" of those cases. (Mot. at 32-5.) A review  
22 of these cases proves just the opposite. For example, in Greene v.  
23 United States, 454 F.2d 783, 786-787 (9th Cir. 1971), the Ninth  
24 Circuit found outrageous government conduct where the government agent  
25 contacted the defendant, urged him to run an illegal still, provided  
26 materials for the still, employed veiled threats to convince him to  
27 keep the still running, and was the sole customer. Greene is the  
28 paradigm for manufacturing a crime from start to finish. "[T]he key  
factor distinguishing [cases like] Greene from [other Ninth Circuit  
cases like] Bagnariol and Citro [where government conduct was found  
permissible] is that the government in [the latter cases] had not  
established an actual, complete, and long-functioning criminal  
apparatus." Luttrell, 889 F.2d at 811. In this case, the Government  
did not create and operate any such "criminal apparatus," or anything  
close thereto.

1 a motion such as this one objectively evaluating the investigative  
2 conduct of law enforcement), there was abundant evidence indicating  
3 that the conspirators were very dangerous individuals, able and  
4 willing to plan potentially horrific crimes of violence.

5 First, early in the investigation, the UC learned that Jack had  
6 an extensive military background. A resume Jack provided to the UC  
7 during the January 25 (Amarin Restaurant) meeting (as well as a review  
8 of the West Point Registry of Graduates and military records)  
9 indicated that Jack was a graduate of the United States Military  
10 Academy at West Point, class of 1968, was commissioned into the  
11 Infantry, went to Airborne School and Ranger School, served on active  
12 duty in the United States Army until 1977 (thus serving nine years of  
13 active duty), served at least one combat tour in Southeast Asia, and  
14 took a commission from the California National Guard, from which he  
15 retired as a Lieutenant Colonel. 3/28/07 Wiretap Application (2:07-  
16 sw-082 FCD) ¶ 52. According to his resume and various government  
17 records, Jack also had numerous contracts and assignments with the  
18 California National Guard as well as the California Department of  
19 Homeland Security. Id. ¶ 53.

20 Second, during the early stages of the investigation, Jack, and  
21 then others, advised the UC that they were working with Vang Pao, the  
22 political and military leader of the Hmong community. During the  
23 January 25 meeting, Jack explained that he was "working personally  
24 with General Vang Pao," and that this was the first time he was  
25 working with him on "anything militarily." Gov. Ex. E, 1/25 Tr. at  
26 14. Per Jack, Vang Pao was the spiritual, political and military  
27 leader for the Hmong people, the "hub" to whom the Hmong people  
28 "defer[red]" Id. at 53-54. Within less than two weeks, Vang Pao came

1 to view weaponry at the February 7 (Amarin Restaurant) meeting, and  
2 remarked that the UC had "good material" and that he was "sold on the  
3 whole thing." Gov. Ex. D, 2/7 Tr. at 43.

4 Third, the UC also was informed that many of the then subjects,  
5 now defendants, were leaders of the Hmong community and had military  
6 backgrounds. Jack told the UC that the individuals who had gathered  
7 at the February 7 (Amarin Restaurant) meeting to view weaponry were  
8 "senior leaders from the Hmong community." See Gov. Ex. D, 2/7 Tr. at  
9 4. At that meet, the UC then learned that some of these leaders were  
10 very much abreast of the current military efforts of Lao freedom  
11 fighters. (E.g., Hue Vang showing maps with Lao military strong  
12 points/freedom fighters and indicating that Vang Pao had information  
13 related to approximate troop locations in Laos. Id. at 50-51). Later  
14 in the investigation, the UC was informed (again by Jack) that Vang  
15 Pao and the senior leadership all had field combat backgrounds. Gov.  
16 Ex. R, 5/7 [11:51] Tr. at 15.

17 Fourth, the UC (and the original complainant) were also  
18 repeatedly advised that the individuals involved in the conspiracy had  
19 conducted or attempted to conduct similar arms transactions in the  
20 past. Examples abound:

- 21 ■ During the September 29, 2006 conversation between Hawthorne and  
22 Jack, Jack indicated, in substance, that the people he was  
23 dealing with had conducted this type of transaction in the past  
[referring to the purchase of AK-47s]. Gov. Ex. OO, ATF Rpt. 1.
- 24 ■ During the May 3 meeting (after a discussion of weapons  
25 acquisition and potential tighter security in Thailand), Jack  
26 told the UC that they (referring to unspecified conspirators)  
27 were sensitive because they lost an \$800,000 shipment a couple of  
28 years ago. Gov. Ex. O, 5/3 Tr. at 15.
- During a May 9 call (after a discussion of some of the details of  
the planned arms transaction), Jack advised the UC that there was  
something the UC might be "interested to understand" - that they  
had made similar efforts before that had been curtailed as a  
result of the contact not being credible or not being able to

1 deliver. Per Jack, it had been "one hiccup after another." Gov.  
2 Ex. T, 5/9 ATF Linesheet.

3 ■ On May 10 [2:13 p.m.], Jack again explained that they had been  
4 trying to get "this initiative" off the ground for 35 years with  
5 multiple hiccups. Referring to the UC, Jack noted that this was  
6 the first time that they had what they considered a legitimate  
7 deep resource at their disposal with connections inside Thailand  
8 to facilitate the availability of the equipment they needed.  
9 Gov. Ex. AA, 5/10 ATF Linesheet.

10 ■ During the May 11 meeting, after outlining his thoughts regarding  
11 a coup, Lo Cha stated that he and Vang Pao appreciated knowing  
12 the UC and that they had been looking for things like this for  
13 "35 long years." Gov. Ex. U, 5/11 Tr. at 45-46. Lo Cha then  
14 explained that they had previously attempted to buy weapons seven  
15 or eight times but failed. He further stated that: they engaged  
16 people like the UC in Thailand, Laos, and China; delivered money  
17 at the assigned date and time; no equipment showed up; and all of  
18 their people sent to pick up the equipment were killed by the  
19 military. Id. at 46.

20 Finally, and perhaps most importantly, the conduct of the  
21 conspirators, as outlined supra § IV.D., clearly demonstrates that the  
22 conspirators, on their own, had formulated plans and taken actual  
23 steps toward procuring both weaponry and mercenaries for the purpose  
24 of attacking Lao soldiers, Lao governmental officials, and Lao  
25 buildings<sup>37</sup>.

26 \_\_\_\_\_  
27 <sup>37</sup>As part of their "incompetence" argument, the defense also  
28 makes much ado about the purported "inability [of the conspirators] to  
29 finance the alleged scheme," suggesting that, at most, conspirators  
30 gathered \$24,000. (Mot. at 13, 31.) This argument should be  
31 rejected.

32 The success of defendants' fund-raising efforts is irrelevant for  
33 the purposes of defendants' motion. Defendants' claim at issue (i.e.,  
34 that the undercover agent essentially manufactured the crime),  
35 requires an "objective" analysis of the Government's investigative  
36 conduct. Prior to defendants' arrest, the Government had every reason  
37 to believe that defendants were taking active steps to further the  
38 conspiracy, including fund-raising. That fact, coupled with all the  
39 other facts then known to law enforcement, certainly justified the  
40 investigative approach utilized.

41 In any event, it appears that defendants did make significant  
42 progress in raising funds or obtaining pledges for funds. As the  
43 defense notes, some unindicted individual(s) have stated that, as of  
44 June 3, they had collected \$24,000. (Mot. 13, n.52)(citing STVL

1 F. Defendants' Other Allegations of  
2 Supposed UC Misconduct Are Equally Groundless

3 1. Jack's Purported Desire for a  
4 Peaceful Resolution of the Genocide Issue

5 Per the defense, Jack insisted during his January 25, 2007  
6 meeting that "his sole desire was to help the Hmong villagers defend  
7 themselves against genocide [and] not to take any offensive action. .  
8 . ." (Mot. at 6)(emphasis added.) That contention is not accurate.

9 During the January 25 meeting, Jack suggested, at one point, that  
10 the group he represented "preferred" to not use force, etc. Gov. Ex.  
11 E, 1/25 Tr. at 46. During that very same meeting, however, Jack also:  
12 indicated that he was working with Vang Pao for the first time on  
13 military operations, id. at 14; inquired twice about hiring  
14 mercenaries or boots on the ground, id. at 26, 44; stated that he was  
15 not exactly sure what they (referring to his Hmong contacts) were  
16 going to do, and that, among other things, "they may want to harm X  
17 number of people immediately," Id. at 29; opined that "a decent SEAL  
18 team" could take Lao communications, infrastructure and the like; and  
19 stated that persons under Vang Pao's direction could have been talking  
20 "right now" about setting up some hit teams to take care of key

21 \_\_\_\_\_  
22 interview.) Wiretap intercepts suggest that certain conspirators sent  
23 money to unindicted individuals abroad in connection with plan  
24 preparations. See, e.g. Gov. Ex. EEE, 5/21/07 Call (#1320) (Nhia Kao  
25 Vang wired \$9,000 to Thailand and an unindicted co-conspirator had  
26 already wired \$3,000). Other known individuals pledged that they  
27 would give or collect substantial sums of money to support the effort.  
28 See, e.g., Gov. Ex. FFF, 5/22/07 (Call #1568)(President Lo Thao  
expected unindicted co-conspirator to give \$100,000, likely through a  
loan); Gov. Ex. II June 3 [20:39] call # 2810 at 41 (Lo Cha Thao  
indicated that on June 2, clan leaders "agreed to \$25,000" [to collect  
that amount from each state leader represented]). In addition, at the  
time search warrants were executed, agents discovered, in the  
aggregate, over \$200,000 in cash at various conspirators' and/or  
suspects' homes, all of which potentially was available to fund the  
conspirators' objectives.

1 communist problems. Id. at 52. Thus, it is wholly inaccurate for the  
2 defense to suggest that Jack solely sought to help Hmong villagers  
3 with self-defense.

4 2. The UC's Purported Efforts to Dash Hopes  
5 for Peace and Stoke Defendants' Outrage

6 The defense also suggests, at various points, that the UC tried  
7 to "dash" conspirators' hopes for a peaceful resolution of the  
8 genocide issue and also tried to "stoke" and "exploit" their outrage  
9 "to lure them toward his goal." (Mot. at 6-7, n.13 (citing January  
10 25, 2007 meeting and comment about the United Nations, and March 5,  
11 2007 meeting and comment about the German's Final solution); see also  
12 Mot. at 9-10, 31.) This likewise is inaccurate.

13 Take, for example, the conversation related to the United Nations  
14 ("U.N.") on January 25, 2007. During this call (the very same call  
15 where Jack inquired about mercenaries and opined about the use of a  
16 SEAL team to take control of key Laos assets), Jack indicated that a  
17 third party was going to drop off a packet on the Hmong situation at  
18 the U.N. and that the U.N. "was aware of all that stuff." Gov. Ex. E,  
19 1/25/07 Tr. at 19. The UC replied, "And they're not going to do  
20 anything either." Jack immediately agreed, noting that "their  
21 participation is pretty - pretty soft." Id. The UC, thus, did not  
22 "dash" Jack's hopes of a peaceful U.N. resolution; it is clear from  
23 the conversation that Jack himself held a dim view of the U.N.'s  
24 "soft" peacekeeping abilities.

25 The same can be said about the Jack and UC conversation related  
26 to "the German's final solution." See Gov. Ex. W, 3/5/07 Tr. at 24-  
27 25. In this March 2007 meeting, Jack was explaining to the UC that  
28 "they" [referencing unknown individuals in Laos] had captured reported  
genocide orders or documents which Jack characterized as pretty

1 significant "incriminating evidence" [against the Lao government].  
2 Id. at 27-28. (Previously, Jack had related to the UC that these were  
3 orders from the Lao government essentially to exterminate Hmong in  
4 Laos). See, e.g., Gov. Ex. E, 1/25 Tr. at 13-14. After Jack made  
5 this remark, the UC asked Jack if he had ever seen the [movie]  
6 German's Final Solution and suggested that "it's the same thing."  
7 Gov. Ex. W, 3/5/07 Tr. at 28. The UC described the movie, noting that  
8 it was a "scary" depiction of how the Germans efficiently planned to  
9 kill Jews. Id. Jack replied that he would have to check it out  
10 because his wife likes history. Thereafter, Jack noted that the  
11 [genocide] document should be here "this week" and both Jack and the  
12 UC moved onto discussion of another topic. Here again, it is plain,  
13 based on the context and Jack's reaction, that the UC was not somehow  
14 trying to "fan embers of outrage" for Jack or anyone else for that  
15 matter.

16 Moreover, it must be remembered that the UC was portraying the  
17 role of a weapons trafficker. "Undercover agents are actors. The  
18 success of their performance requires the delivery of lines  
19 appropriate to their characters." Luttrell, 889 F.2d at 811. Such is  
20 the case with the UC's remarks. Contrary to the defense suggestions,  
21 the UC's comments were not some calculated or manipulative ploy to  
22 play upon defendants' emotions.<sup>38</sup>

23 ///

24 ///

25

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26 <sup>38</sup>In fact, a review of the entire record should make it clear  
27 that the conspirators, particularly Jack and Lo Cha Thao, were the  
28 ones who repeatedly made impassioned statements to the UC about the  
situation in Laos, not vice versa. The UC listened to the  
conspirators' statements; the UC did not, however, fan the  
conspirators' emotions.

1 3. The UC's Purported Assurances  
2 Regarding Support for a Coup

3 Per the defense, the UC "encouraged them to believe" or gave  
4 "assurances" to conspirators that the United States government would  
5 "certainly" support an effort to overthrow the Lao government, citing  
6 to Jack's March 5 (Hangar 17 Restaurant) meeting with the UC. (Mot.  
7 at 7, 31.) This claim misses the mark as well.

8 A review of the conversation, in context, demonstrates that the  
9 UC was not providing Jack any "assurances" of U.S. support, much less  
10 assurances that Jack (or anyone else) objectively could have relied  
11 upon. During the conversation at issue, the discussion surrounded  
12 what would happen if there were a takeover of the Lao government.  
13 Jack noted that if they were going to "take over -- take Laos back  
14 over" he believed they needed administrative staff to run the show.  
15 Gov. Ex. W, 3/5 Tr. at 48. Jack opined that he did not see an issue  
16 with their ability to handle military and political issues, noting  
17 that Vang Pao was recognized and the military was supportive. Id.  
18 Jack next stated that he had already asked "him" [apparently  
19 referencing an unidentified conspirator] what the "big fish" such as  
20 the Chinese, Vietnamese, U.S. and Russians were going to do." Id. at  
21 49. At this point, the UC opined, "Well, the U.S. has no choice but  
22 to support a democratic government. They will support it." Id. When  
23 Jack inquired, "You think so," the UC answered, "No doubt in my mind."  
24 The UC added, "once they've already taken it over" and "want to have  
25 democratic elections," the U.S. will support that. Jack then asked  
26 the UC if he could access people at the right time so that "this thing  
27 is synchronized." The UC said he was "willing to bet that the CIA is  
28 aware what's going on there." Id. at 49. The UC again opined that,  
"They [the CIA] don't want to get into another Vietnam, but if Vang

1 Pao goes in there and takes over the fricking country ... and then ...  
2 gets things squared away and then wants to have democratic elections,  
3 that's going to be like that. I have no doubt in my mind." Id. at  
4 50. Jack expressed concern that the CIA might feel politically  
5 embarrassed about having left "75 to 100,000" people behind [referring  
6 to the Hmong]. The UC, in reply, suggested, "there is a different CIA  
7 today" and, "I think that - I think they'll step in there and go ...  
8 this is what we can do, and this is why we can do it, ... and ... we  
9 want to back your - your political endeavor of democracy." Id. at 50-  
10 51.

11 What we have here is an illegal arms trafficker (the UC), engaged  
12 in a hypothetical conversation with an arms broker (defendant Jack),  
13 musing about "what ifs," and stating his obviously subjective opinion  
14 that the United States would support a new democratic government in  
15 Laos. The UC did not state that he was "in the know" regarding U.S.  
16 policy in this area and the UC did not state that he had spoken with  
17 any government officials regarding these issues. The UC, an arms  
18 trafficker, offered his "off-the-cuff" prediction regarding what would  
19 happen in the event of a coup. These statements, read in context,  
20 cannot be viewed as "assurances" or any type of aggressive  
21 encouragement. Moreover, it is hard to imagine how any defendant  
22 could objectively rely upon such statements given that, to defendants'  
23 knowledge, they were made by an illegal arms dealer with no actual or  
24 apparent authority to speak on behalf of the government.

25 In any event, these statements, even if construed as some form of  
26 encouragement, fall well within the ambit of constitutionally  
27 acceptable government conduct. As noted before, the Ninth Circuit has  
28 held repeatedly that encouraging defendants, advising defendants, or

1 even sometimes threatening defendants to complete potential criminal  
2 conduct, are all constitutionally permissible, so long as the  
3 Government has not manufactured a crime from start to finish.

4 4. Defendants' Purported Contact with Government Officials

5 The defense also complains (in their factual recitation) that:  
6 Jack informed the UC that he had been in touch with various government  
7 officials (namely, senior congressional officials, two-star generals);  
8 that Jack and Lo Cha Thao reported to the UC about Lo Cha Thao's  
9 purported meetings with the CIA and the CIA's purported support for  
10 their efforts; and that the UC "never expressed any doubt or surprise  
11 that the government was backing their efforts." (Mot. at 8.) These  
12 arguments also lack merit.

13 First, as the Government has stated before, the CIA did not  
14 "back" or "support" the conspiracy at issue; this entire suggestion is  
15 an absolute fabrication by defendant Lo Cha Thao. On or about March  
16 28, 2007, Lo Cha Thao told Jack that he had met with the Deputy  
17 Director of the CIA on the weekend of March 24-25, 2007. Gov. Ex. GG,  
18 3/28 Tr. at 2. Thereafter, Lo Cha Thao apparently related various  
19 statements regarding purported CIA support to Jack, who, in turn  
20 related the same to the UC. Government counsel<sup>39</sup> met with attorneys in  
21 the Office of Chief Counsel of the CIA and was informed orally that  
22 the purported meeting never happened and that defendant Lo Cha Thao's  
23 assertion that there had been such a meeting was a complete lie. In  
24 fact, Lo Cha Thao, through his attorney Marc Reichel, has affirmed the  
25 same. See, e.g., Gov. Ex. III; May 11, 2008 New York Times Magazine  
26 ("The reported meeting with the C.I.A. 'didn't happen,' said Lo Cha  
27

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28 <sup>39</sup>Senior Trial Attorney Robert Wallace, Counterespionage Section,  
National Security Division, Department of Justice, spoke with the CIA.

1 Thao's lawyer, Mark Reichel." ).

2 Second, it is important to emphasize that the UC did not make any  
3 of the statements regarding purported CIA backing or support for the  
4 conspiracy. These statements were made by Lo Cha Thao and then  
5 repeated by Jack.

6 Third, contrary to the defense suggestion, the UC did not somehow  
7 engage in misconduct because he failed to express "doubt" or  
8 "surprise" in connection with defendant Lo Cha Thao's lies or Jack's  
9 repetition of the same. Under the due process clause, the government  
10 may permissibly encourage defendants to engage in criminal conduct, so  
11 long as the government has not manufactured a crime. That being the  
12 case, the government assuredly has no due process obligation to  
13 somehow advise defendant Jack (or any other defendant), mid-  
14 conspiracy<sup>40</sup>, that the defendant is potentially laboring under some  
15 sort of non-cognizable mistake of law, i.e., an erroneous belief that  
16 the criminal conduct was somehow authorized by the CIA.<sup>41</sup> See, e.g.,  
17 United States v. Burrows, 36 F.3d 875, 881-2 (9th Cir. 1994) ("The  
18 validity of [a public authority] defense depends upon whether the  
19 government agent in fact had the authority to empower the defendant to  
20 perform the acts in question. If the agent had no such power, then  
21 the defendant may not rest on the 'public authority' [defense]. . .  
22 ."); United States v. Anderson, 872 F.2d 1508, 1515 (11th Cir.)

23  
24 <sup>40</sup>Jack first mentioned the idea of purported CIA meetings and  
25 support on March 28, 2007, months after the conspiracy had commenced  
26 and well after there had been substantial negotiations and meetings in  
27 connection therewith. To the extent that Jack asserts any sort of  
28 "CIA defense," this defense would be wholly inapplicable to his  
earlier criminal conduct.

<sup>41</sup>The Court also should note that during the January 25 meeting,  
the UC specifically warned Jack that the contemplated sale of arms was  
illegal. See Gov. Ex. E, 1/25 Tr. at 37-38.

1 ("Because the CIA had no real authority to violate the statutes of the  
2 United States, appellants' theory that they were acting on apparent  
3 authority of an alleged CIA agent is not a viable defense"), cert.  
4 denied, 493 U.S. 1004 (1989); United States v. Holmquist, 36 F.3d 154,  
5 61 (1st Cir. 1994)("mistaken but good-faith belief that one's conduct  
6 is authorized by the government ... is not a defense at all."), cert.  
7 denied, 514 U.S. 1084 (1995); United States v. Berg, 658 F. Supp. 253  
8 (E.D.N.Y. 1987)(rejecting derivative apparent authority defense;  
9 "co-defendants may not make any such claim of reliance upon . . .  
10 defendant Schwartz's alleged apparent authority [from the intelligence  
11 community] and claimed statements made by him to [co-defendants]  
12 authorizing them to violate any law of the United States.").

13 5. Alcohol Consumption by the UC and Defendants

14 Defendants note, at various times, that alcohol "flowed freely"  
15 at various UC meetings, seemingly attempting to suggest that it was  
16 improper for the UC to drink or offer drinks to defendants Jack and Lo  
17 Cha. (Mot. at 6.) Defendants offer no evidence, nor is there any  
18 indication whatsoever in the record, that either the UC or the  
19 defendants' social drinking had any demonstrable impact on their  
20 conduct or competence. People drink all the time at "business  
21 meetings" and there is nothing untoward about a putative arms dealer  
22 having drinks with his customers while they all discussed the business  
23 at hand. See Simpson, 813 F.2d at 1466 ("To win a suspect's  
24 confidence, an [an undercover agent] must make overtures of friendship  
25 and trust and must enjoy a great deal of freedom in deciding how best  
26 to establish a rapport with the suspect.")

27 ///

28 ///

1 G. The Government Has Not Suppressed Information  
2 Related to Vang Pao's Purported Opposition

3 Defendants suggest that "[t]he government's pre-indictment  
4 investigation revealed ... staunch opposition" to the alleged coup  
5 plot and further suggest that the Government has "suppress[ed] this  
6 information." (Mot. at 13.) These claims are patently incorrect.

7 The Government has not suppressed any sort of exculpatory  
8 evidence related to this issue in any way, shape or fashion. The  
9 Government conducted Court-approved wiretaps between approximately  
10 late March 2007, and early June 2007. Intercepts in the English  
11 language were monitored, and contemporaneously minimized or recorded,  
12 as appropriate. The Government did not contemporaneously monitor or  
13 minimize conversations in Hmong and/or Lao because of the  
14 unavailability of sufficient linguists with those language skills to  
15 conduct such monitoring.<sup>42</sup> As such, all Hmong/Lao calls were recorded  
16 and then transmitted to a linguist who minimized the calls.  
17 Pertinent, non-minimized Hmong/Lao calls were transmitted back to law  
18 enforcement with a very short (approximately one line) English

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19  
20 <sup>42</sup>Two caveats should be noted: First, prior to arrests, the  
21 Hmong/Lao linguist assisting with wiretap minimization traveled to  
22 Sacramento. Per ATF SSA Graham Barlowe, on or about June 3, the  
23 linguist advised SSA Barlowe and AUSAs Twiss and Endrizzi, in  
24 substance, that the linguist had listened to certain intercepts, that  
25 some of the intercepts appeared to indicate that there was a conflict  
26 in the group, that Vang Pao was apparently unhappy, that certain  
27 people were threatening to resign, and that there appeared to be some  
28 sort of power struggle. Per SSA Barlowe, AUSA Twiss asked the  
linguist to explain the basis for the conflict. The linguist  
indicated, in substance, that he was unable to explain based on the  
limited information known to him.

Second, this Hmong/Lao linguist also reviewed some completed  
wiretap intercepts (and UC meeting recordings) during the  
investigation for officer safety reasons, *i.e.*, to make sure that  
there were no indications that the conspirators intended to do harm to  
the undercover agent.

1 summary. These pertinent Hmong/Lao calls were then transmitted to  
2 other linguists who translated and transcribed the calls in full. The  
3 full English translations were then transmitted to law enforcement,  
4 who, in turn, gave them to prosecutors.

5 After the June 14, 2007, indictment, the Government began  
6 production of discovery. In due course, the Government produced  
7 copies of the Hmong/Lao intercepts (the actual recorded calls) to the  
8 defense, even before the government had full translations/transcripts  
9 of the content. (Indeed, the defense acknowledges that it received  
10 many of these calls in advance of the bail review hearings). (See  
11 Mot. at 25, n.107.)

12 The earliest date that any fully translated Hmong/Lao transcripts  
13 were transmitted to law enforcement was on or about November 15,  
14 2007.<sup>43</sup> Indeed, government records indicate that the full translations  
15 of the Hmong/Lao calls identified by the defense (Mot. at 14, nn.53-  
16 64), were received by the FBI on or about November 15, 2007 (call nos.  
17 332, 2684, 2693), May 8, 2008 (calls nos. 927, 944, 1232, 2810) and  
18 August 6, 2008 (call no. 2666). The government produced copies of the  
19 translated and transcribed Hmong/Lao calls to the defense thereafter,  
20 on or about December 5, 2007, May 22, 2008, June 18, 2008, and  
21 September 30, 2008, respectively.

22 Two points should be obvious: First, the Government did not have  
23 knowledge of the content of any of these calls until, at the earliest,  
24 November 2007. Plainly, neither prosecutors nor agents were aware of  
25 the content of the calls at the time of the June 14, 2007 indictment

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26  
27 <sup>43</sup>The earliest date that law enforcement received any of the  
28 short (one line) summaries of the calls was on or about July 4, 2007  
(call nos. 332, 927, 944, 1232, 2738, 2810). The next date that law  
enforcement received short summaries was on or about November 29, 2007  
(call no. 2666).

1 or the July 12, 2007 bail hearings.

2 Second, the government did not suppress anything from the defense  
3 or engage in any sort of misconduct with respect to its discovery  
4 obligations. The Government produced the raw intercepts, thus,  
5 fulfilling its Rule 16 obligations (with respect to recorded  
6 conversations of defendants). As a matter of courtesy, the government  
7 also produced draft translations of these and other Hmong/Lao calls.

8 In short, defendants' claim that the Government improperly  
9 suppressed wiretap evidence is completely devoid of merit.

10 Setting this "suppression" issue aside, some comment is needed  
11 regarding the sweeping defense claim that "Hmong elders" including  
12 Vang Pao, "opposed" the plan.<sup>44</sup>

13 First, the defense has not presented any evidence to suggest that  
14 any individuals other than Vang Pao purportedly opposed any aspect of  
15 the plan.

16 Second, the defense fails to point out that there is significant  
17 evidence that suggests that Vang Pao was a knowing and willing  
18 participant in the conspiracy and, in fact, ultimately approved the  
19 plan. Among other things:

- 20 ■ Vang Pao participated in the February 7 (Amarin Restaurant)  
21 meeting. During videotaped conversations and while viewing a  
22 cache of weapons, Vang Pao pointed to various weapons and, in  
23 English, stated that he wanted this one, that one, etc.  
Moreover, after viewing the weapons, he stated, among other  
things, that the UC had "very good material," and that he was  
"sold on the whole thing." Gov. Ex. D, 2/7 Tr. at 43.
- 24 ■ As recounted earlier, Jack, Lo Cha Thao and Lo Thao made co-  
25 conspirator statements to the UC suggesting that Vang Pao was  
aware and supportive of the plan.
- 26 ■ There are numerous wire intercepts where other defendants made

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27  
28 <sup>44</sup>This is offered in response to defendants' claim so that the  
Court can appreciate the complete context. The Court need not resolve  
this claim for the purpose of this motion.

1 co-conspirator statements indicating that Vang Pao was a knowing  
2 participant.<sup>45</sup>

3 ■ Documents seized at Vang Pao's residence also evidence his  
4 participation. Among other things, agents found a copy of the  
5 April, 2007 "POPCORN" operations plan authored by David Vang.  
6 This plan indicated that "ACTION ONE" was to "BRING DOWN THE  
7 POWER OF THE LAO COMMUNIST PARTY LEADERS AND TAKE OVER THE  
8 GOVERNMENT."

9 ■ There are also numerous wiretap intercepts on June 2 and June 3,  
10 2007, which suggest that, even though Vang Pao expressed  
11 criticism/opposition (of an uncertain nature) about the plan on  
12 June 2, he ultimately gave his approval to the same.<sup>46</sup>

13 ///

14 ///

15 \_\_\_\_\_

16 <sup>45</sup>See Gov. Ex. GGG, 5/17/07 call 882 (Chong Yang Thao advised Lo  
17 Cha Thao that he would ask Vang Pao to direct David Vang to complete  
18 the draft plan); Gov. Ex HHH, 5/20/07 call 1232 (David Vang informed  
19 Lo Cha Thao that Vang Pao directed him to create the strategic  
20 military plan for the Americans).

21 <sup>46</sup>See Gov. Ex. HH, June 2 [17:46 pm] call # 2670 at 14 (Lo Cha  
22 Thao advised a third party that after Vang Pao had scolded him, others  
23 complained to Vang Pao, then "the old man [Vang Pao] said for Lo Cha  
24 Thao and the Americans to go."); Id., June 2 [20:48] call # 2686 at 3  
25 (In a call with Lo Cha Thao, Lo Thao related that, according to Zang  
26 Blong, "the General [Vang Pao] told Tou Pao that, 'You have to go  
27 because everyone agrees that I [Vang Pao] was wrong. You all agreed,  
28 so go. I [Vang Pao] will agree with you all. I will take what you  
all say. Tell the young man [Lo Cha Thao] to take them and just  
go."); Id., June 2 [18:11] call # 2672 at 8 (Lo Cha Thao told a third  
party that after scolding and complaining between Vang Pao and others,  
Vang Pao said "Go ahead and pursue it, but first of all, president Lo  
[Thao would] have to write [a] resignation letter. Secondly, [Vang  
Pao] will let his son Cha [Vang] [] go along with [Lo Cha Thao] when  
[he] talk[s] to the Americans in order for it to be true."); Gov. Ex.  
II, June 3 [20:39] call # 2810 at 19 (Lo Cha Thao told a third party  
that after an argument, [Vang Pao] noticed that he [could not] win the  
argument with anyone. The majority of the people approved and [was]  
satisfied about the mission, so he [Vang Pao] went along. \* \* \* [Vang  
Pao] went along and said that it's okay. Go ahead and proceed with it  
and he will see what he can do.")

1 H. Summation

2 In short, defendants have failed to prove, as is their burden,  
3 that the UC engaged in outrageous government conduct. ATF, quite  
4 properly, attached itself to planned or ongoing firearms conspiracies  
5 to determine their full nature and scope and to bring all involved  
6 conspirators to justice. Even though the UC offered to provide  
7 conspirators with weapons and mercenaries, defendants, not the UC,  
8 were the driving force behind developing both the plans to acquire  
9 weapons and to overthrow the Lao government, and made significant  
10 progress in effectuating those plans. Moreover, during the course of  
11 the investigation, the UC did not utilize any sort of constitutionally  
12 impermissible tactics to induce defendants to commit their crimes. As  
13 such, the government's investigative conduct was wholly consistent  
14 with due process standards.

15 V.

16 THERE WAS NO AGENT MISCONDUCT IN CONNECTION WITH THE  
17 WIRETAP, SEARCH AND COMPLAINT AFFIDAVITS

18 A. Dismissal of The Indictment Based on Purported False and  
19 Misleading Agent Affidavits Is Not Authorized as Prejudice  
20 Has Not Been Demonstrated and Because Any Potential Prejudice  
21 Can Be Neutralized by Appropriate Exclusion of Evidence At Trial

22 Defendants allege, at length, that agents submitted false and  
23 misleading affidavits during the investigation (Mot. at 19-23), but,  
24 curiously, do not cite a single case in support of their claim that  
25 dismissal is legally authorized for such purported misconduct.<sup>47</sup> The  
26 reason is simple: Supreme Court and circuit court law indicate it is  
27 not.

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28 <sup>47</sup>Indeed, defendants mention such purported falsities in their  
introduction and conclusion, but do not advance any contentions in  
their "argument" as to why dismissal is authorized or warranted for  
such falsities.

1 The Supreme Court has unequivocally held that, "absent  
2 demonstrable prejudice, or substantial threat thereof, dismissal of  
3 [an] indictment is plainly inappropriate, even though the violation  
4 may have been deliberate." United States v. Morrison, 449 U.S. 361,  
5 365 (1981). The Supreme Court has never "suggested that searches and  
6 seizures contrary to the Fourth Amendment warrant dismissal of the  
7 indictment." Id. at 366. Similarly, "the remedy [for a Fifth  
8 Amendment violation] does not extend to barring the prosecution  
9 altogether." Id. at 366, n.3. To the contrary, the Supreme Court  
10 recognizes that, "[t]he remedy in the criminal proceeding is limited  
11 to denying the prosecution the fruits of its transgression." Id. at  
12 366.

13 Following Morrison, the Ninth Circuit has repeatedly held that an  
14 indictment cannot be dismissed for purported governmental misconduct  
15 absent demonstrable prejudice to the defendant. United States v.  
16 Rogers, 751 F.2d 1074, 1077, 1079 (9th Cir 1985); see United States v.  
17 Jacobs, 855 F.2d 652, 655 (9th Cir. 1988)(purported prosecutorial  
18 misconduct); United States v. Sears, Roebuck & Co., 719 F.2d 1386,  
19 1391-1392 (9th Cir. 1983) (same), cert. denied, 465 U.S. 1079 (1984);  
20 United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978) (purported  
21 agent misconduct).

22 Similarly, the Ninth Circuit and other circuits have consistently  
23 held that dismissal is unwarranted where a lesser remedy, such as  
24 suppression, is available to neutralize any potential prejudice to  
25 defendants. See Rogers, 751 F.2d at 1079 (suppression of evidence,  
26 and not dismissal of the indictment, is the appropriate remedy when  
27 evidence is discovered in violation of the fourth, fifth and sixth  
28 amendments; "We ... conclude that dismissal of the indictment against

1 [defendant] Rogers is not an appropriate remedy. We are satisfied  
2 that any prejudice to Rogers from the [former attorney] Miller  
3 disclosures to [agent] Taylor, if these disclosures were improper, can  
4 be neutralized by the exclusion of improperly obtained evidence at  
5 trial"); United States v. Haynes, 216 F.3d 789, 796-7 (9th Cir.  
6 2000)("We thus hold that the court properly refused to dismiss the  
7 indictment; suppression of tainted evidence at trial was an  
8 appropriate remedy sufficient to cure any prejudice to Haynes and  
9 Denton resulting from the intrusion on their attorney-client  
10 relationship."), cert. denied, 531 U.S. 1078 (2001).

11 Moreover, courts, including the Ninth Circuit, have also  
12 indicated that purported false statements in affidavits and/or during  
13 judicial hearings fall short of satisfying the extremely high standard  
14 necessary to warrant dismissal of an indictment. See Edmonds, 103  
15 F.3d at 825 (even though defendant alleged that "DEA agents applied  
16 for the search warrant on the basis of signed affidavits stating that  
17 ... information was reliable when they actually suspected that the  
18 information was false," these "allegations [do not] point to  
19 flagrantly offensive government conduct required to satisfy the  
20 'extremely high standard' [for dismissal]"); United States v. Broward,  
21 594 F.2d 345, 351 (2d Cir.)(dismissal improper even though agents  
22 inserted false material into affidavits for arrest or search warrants  
23 and gave false testimony at suppression hearing), cert. denied, 442  
24 U.S. 941 (1979).

25 Here, defendants have failed to allege, much less prove, that  
26 they have suffered any sort of demonstrable prejudice as a result of  
27 the purported affidavit omissions and falsities. Moreover, any  
28 conceivable prejudice that defendants might have suffered in

1 connection with these affidavits can be fully neutralized via the  
2 potential remedy of suppression (as deemed appropriate, after any such  
3 issue is fully litigated).<sup>48</sup> Finally, the allegations, even if assumed  
4 to be true, do not constitute flagrantly offensive government conduct  
5 warranting dismissal. Accordingly, for any and all of these reasons,  
6 purported agent falsities/omissions in the affidavits cannot form the  
7 basis for dismissal of the indictment.

8 B. The Court Need Not Presently Determine  
9 Whether the Affidavits Contain Intentional or  
10 Reckless Material False Statements or Omissions

11 At this juncture, this Court need not determine whether the  
12 agents/affiants made intentional or reckless falsities/omissions in  
13 the affidavits. As noted before, dismissal is not legally appropriate  
14 even if one assumes, *arguendo*, that the affidavits contained falsities  
15 or omissions.

16 Moreover, the defense has indicated that they intend to "renew  
17 this motion," that is, to apparently file a motion to suppress the  
18 search warrants raising the same contentions articulated in its  
19 current motion and other unspecified contentions which arise as a  
20 result of remaining discovery. (Mot. at 3, n.1.) As the Court knows,  
21 a motion to suppress requires a fact-intensive analysis of each  
22 specific affidavit at issue to determine whether there are any  
23 purported falsities/omissions, whether any such falsities were  
24 intentional or reckless, and whether inclusion/exclusion of any proven

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25 <sup>48</sup>The government does not concede that any type of evidence  
26 should be suppressed and intends to oppose any such motions should  
27 they be filed. For purposes of this motion, however, the government  
28 submits that the remedy of dismissal is not available as a matter of  
law because a lesser sanction is plainly available that would address  
any potential prejudice to defendants.

1 falsities/omission had any demonstrable effect on probable cause. See  
2 United States v. Bennett, 219 F.3d 1117, 1124 (9th Cir. 2000). In  
3 light of this, judicial economy would be better served if the Court  
4 analyzed all of these related factual questions together after the  
5 defense has specifically identified which warrants are at issue, all  
6 the purported falsities/omissions at issue, and the basis for all of  
7 their claims. There is no need to litigate, and then potentially  
8 relitigate, these issues in a piecemeal fashion.

9 C. The Agents Did Not Make Any Intentional  
10 or Reckless Material False Statements or Omissions

11 That said, the government wants to make it perfectly clear that,  
12 in its judgment, its agents did not make any sort of intentional or  
13 reckless false statements or omissions in the affidavits, much less  
14 material false statements or omissions that would ultimately warrant  
15 suppression or any sort of remedial action.

16 "A defendant is entitled to a Franks hearing only if he makes a  
17 two-fold showing: intentional or reckless inclusion or omission, and  
18 materiality." Bennett, 219 F.3d at 1124. A defendant satisfies this  
19 two-fold obligation by making a substantial preliminary showing that  
20 both (1) the affidavit contained intentional or reckless false  
21 statements or misleading omissions, and (2) the affidavit purged of  
22 its alleged falsities would not be sufficient to support a finding of  
23 probable cause. Id.; United States v. Reeves, 210 F.3d 1041, 44 (9th  
24 Cir.), cert. denied, 531 U.S. 1000 (2000).

25 "An affiant cannot be expected to include in an affidavit every  
26 piece of information gathered in the course of an investigation."  
27 Lombardi v. City of El Cajon, 117 F.3d 1117, 1124 (9th Cir. 1997); see  
28 United States v. Burnes, 816 F.2d 1354, 1358 (9th Cir. 1987)("[t]he  
mere fact that the affiant did not list every conceivable conclusion

1 does not taint the validity of the affidavit."). For that reason,  
2 "[i]dentifying intentional [or reckless] omissions and misstatements  
3 is not enough ... to warrant a Franks hearing." United States v.  
4 Meling, 47 F.3d 1546, 1554 (9th Cir.), cert. denied, 516 U.S. 843  
5 (1995) "[A defendant] also has to show that these deceptions are  
6 material." Id. "[I]f, when material that is the subject of the  
7 alleged falsity or reckless disregard is set to one side, there  
8 remains sufficient content in the warrant affidavit to support a  
9 finding of probable cause, no hearing is required." Id. (internal  
10 quotations omitted). Stated another way, once the purported  
11 falsities/omissions are set aside, "if what is left is sufficient to  
12 sustain probable cause, the inaccuracies are irrelevant." Franks v.  
13 Delaware, 438 U.S. 154, 172, n.8. (1978).<sup>49</sup>

14 1. Reference to Hawthorne as a Defense Contractor

15 The defense first suggests that it was false and misleading for  
16 the agents/affiants to suggest that Hawthorne was a "defense  
17 contractor." (Mot. at 19.) This argument should be rejected.

18 At the time the UC made his affidavits, he reasonably believed  
19 that Hawthorne, in fact, was a "defense contractor." The UC spoke  
20 with Hawthorne by phone in or about January 2007, prior to the date of  
21 the UC's first contact with Jack. Among other things, the UC:  
22 indicated that he intended to give Jack a call; advised Hawthorne that  
23 he intended to use a "cover story" that he was a defense contractor  
24

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25  
26 <sup>49</sup>If, at the Franks hearing, "the allegation of perjury or  
27 reckless disregard is established by the defendant by a preponderance  
28 of the evidence, and, with the affidavit's false material set to one  
side, the affidavit's remaining content is insufficient to establish  
probable cause, the search warrant must be voided and the fruits of  
the search excluded to the same extent as if probable cause was  
lacking on the face of the affidavit." Franks, 438 U.S. at 156.

1 who had been overseas in Iraq; and asked Hawthorne how Hawthorne could  
2 plausibly know the UC (so that the UC could inform Jack if Jack  
3 inquired). At this point, Hawthorne advised the UC that Hawthorne, in  
4 fact, had developed an invention which Hawthorne had actually  
5 demonstrated to the Department of Defense. Hawthorne explained that  
6 his invention was a device that used RF (radio frequency energy) to  
7 initiate explosions of IEDs (improvised explosive devices) from a  
8 distance. Hawthorne further indicated that he was testing the device,  
9 that the device had military applications, and that the DOD was  
10 looking at the device for use in the Middle East.

11 Later, during the March 2 meeting with Jack, Jack also made  
12 comments to the UC suggesting that Hawthorne was associated with  
13 "defense contracting." Gov. Ex. JJ, 3/2 Tr. at 89. Jack explained  
14 that Namon Hawthorne had developed some technology to mitigate  
15 contaminated water. Id. Jack said that he introduced Hawthorne to  
16 one of the regional managers of URS (which Jack described as a  
17 multibillion dollar "primary defense contractor," "a preferential  
18 contractor," that does "everything from environmental remediation to  
19 you name it") and that "their response was definitely one of  
20 interest." Id. at 88-89.

21 Jack also informed the UC that Jack "actually got [Hawthorne]  
22 plugged into McClellan Air Force Base." Id. at 81. Jack explained  
23 that the base had a radioactive contamination site known as CS-10.  
24 Id. Jack later indicated that he participated in a two-hour  
25 conference call or pitch at McClellan between three physicists,  
26 Hawthorne and a guy from URS, during which there was a discussion of  
27 Hawthorne's "equipment" and its potential use in connection with CS-  
28 10. Id. at 94-95. Per Jack, they [the physicists] apparently said

1 that this was amazing stuff. Id. at 95.

2 The UC characterized Hawthorne as a "defense contractor" because,  
3 based on this information, the UC believed that Hawthorne was someone  
4 who did business with the Department of Defense.

5 The UC literally was correct. By definition, a "contractor" is  
6 one who contracts to perform work or provide supplies. Merriam-  
7 Webster's Collegiate Dictionary (10th ed. 2001). Based on Namon  
8 Hawthorne's and Jack's remarks, the UC had a good faith basis to  
9 believe that Namon Hawthorne was developing and providing supplies to  
10 the military.

11 Granted, the UC could have engaged in further inquiry regarding  
12 Hawthorne's background to verify the exact nature of his specific  
13 business ties to the military. Hawthorne's actual professional  
14 status, however, was an ancillary and irrelevant investigative issue.  
15 What was important about Hawthorne's report to law enforcement was  
16 Hawthorne's recollection of a call in which Jack asked where he might  
17 buy 500 machine guns. What was important is that Jack made a similar  
18 statement in a recorded call with Hawthorne thereafter. See, e.g.,  
19 United States v. Miller, 753 F.2d 1475, 1478 (9th Cir. 1985) ("It  
20 might have been prudent for the federal agents to check on [an  
21 informant's] background and criminal record, but their failure to do  
22 so is not reckless disregard.") On this record, thus, defendants have  
23 failed to demonstrate that the UC's statement was deliberately or  
24 recklessly false or misleading.

25 In any event, for similar reasons, Hawthorne's status as a  
26 defense contractor was immaterial to the affidavits. For purposes of  
27 probable cause, the germane issue was what Hawthorne heard, not  
28 Hawthorne's professional status. A probable cause finding would not

1 have been altered in the least if the affidavits indicated that  
2 Hawthorne was an inventor or businessman rather than a defense  
3 contractor.

4 2. Weapons for Purported Protection

5 The Court should likewise reject defendants' argument that the  
6 agents improperly omitted "that Jack wanted guns not for any offensive  
7 purpose, but for besieged Hmong villagers 'to protect themselves'" or  
8 that the "the people Jack was connected to preferred not to use force  
9 and did not care about taking over the government." (Mot. at 19.)

10 Focusing on the first purported omission, it is true that Jack  
11 initially told Hawthorne in November 2006, that the machine guns were  
12 sought for "protect[ion]." Gov. Ex. 00, ATF Report 1. If one assumes  
13 there was an omission of this statement from the affidavits,<sup>50</sup> however,  
14 the exclusion was neither misleading nor material. The Jack statement  
15 implied that Jack and the Hmong he represented were seeking to obtain  
16 machine guns in the United States, and transfer those weapons to Hmong  
17 in Laos for use against Lao government forces, as necessary, for Hmong  
18 "self-protection." Whether sought for an offensive purpose or  
19 defensive purpose, however, it is illegal to obtain and transfer  
20 machine guns to a foreign country to potentially use against others,  
21 period. The motive for obtaining the weapons is irrelevant for the  
22 purpose of criminal liability. In addition, in subsequent  
23 conversations in February through May 2007, Jack and other  
24

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25 <sup>50</sup>It appears that the substance of these facts were included in  
26 the Complaint Affidavit. That affidavit notes that after Jack  
27 inquired regarding special operations soldiers, he explained that the  
28 Lao government was engaging in a genocide against the Hmong and that  
the Hmong community was very sensitive about protecting their people.  
Jack then stated that Vang Pao was the one trying to get weapons to  
the Hmong in Laos. Def. Ex 1, Complaint Aff. ¶ 17.

1 conspirators made it quite clear that they wanted to acquire both arms  
2 and mercenaries for use against Lao forces, Lao government officials,  
3 and Lao government buildings. Given the totality of the record, it is  
4 plain that any omission of Jack's November 2006 statement (regarding  
5 use of weapons for protection) was neither misleading nor material.

6 As for the second purported omission, during the January 25,  
7 2007 meeting, Jack made it clear that he did not know what the group  
8 intended to do, Gov. Ex. E, 1/25/07 Tr. at 29, suggesting, on the one  
9 hand, that "they preferred not to use force," Id. at 46, and  
10 suggesting on the other hand, that he might want to hire mercenaries,  
11 Id. at 26, 44, that they might want "to harm X number of people  
12 immediately, Id. at 29, and ultimately suggesting that "a decent SEAL  
13 team" could potentially target and take key assets in Laos. Id. at  
14 51. In addition, conspirators made it unequivocally clear in later  
15 conversations that they wanted to acquire both arms and mercenaries  
16 for a planned military action against the Lao government. Given the  
17 totality of the record, any omission of Jack's January 2007 statement  
18 (that he "preferred not to use force, etc.") was neither misleading  
19 nor material.

20 3. Defendants' Statements at the  
21 February 7 Amarin Restaurant Meeting

22 The defense suggests that the UC fabricated three portions of the  
23 affidavits relating to conversations regarding Jack and Vang Pao at  
24 the February 7 Amarin Restaurant meeting. (Mot. at 20-22.) This  
25 claim likewise lacks merit.

26 a. Factual Background Regarding  
27 the Amarin Restaurant Meeting

28 A discussion of this issue requires a fair amount of background  
and context. First, approximately 15 or so individuals attended the

1 Amarin Restaurant meeting. See Gov. Ex. D, 2/7 Tr. at 4 (Jack  
2 statement). Per the UC, during the portion of the meeting inside the  
3 restaurant, most of the participants were seated at one long table  
4 (while a small number were at a separate table), all eating lunch.  
5 The UC was on one side of the long table. From the UC's perspective,  
6 Hue Vang was seated to the UC's left side and Jack was seated on his  
7 right side (there were multiple other individuals on this side of the  
8 table as well). Viewed from the perspective of the UC, on the  
9 opposite side of the table, roughly across from Hue Vang, was Lo Cha  
10 Thao. Viewed from the perspective of the UC, to the right of Lo Cha  
11 Thao was either a gap or perhaps another individual; to the right  
12 thereafter sat Mae Song Vang; and to her right sat Vang Pao. Roughly  
13 speaking, Vang Pao sat at a diagonal and to the right of the UC (from  
14 his perspective).

15 Second, to the best of the UC's recollection, Vang Pao, in fact,  
16 appeared to speak English with a "strong" Asian accent. (Indeed,  
17 there are a number of occasions during the meeting in both the  
18 restaurant and later in the undercover RV when Vang Pao most  
19 definitely makes statements in English that were captured by the  
20 recording devices.) See Gov. Ex. LL, 2/7 RT 26, 28, 43.<sup>51</sup>

21 Third, according to the UC, during the meeting inside the  
22 restaurant, the UC utilized a watch recorder worn on his left wrist<sup>52</sup>.

23 \_\_\_\_\_  
24 <sup>51</sup>Moreover, third-party witnesses have noted that Vang Pao has  
25 English speaking abilities. For example, Michael Spak indicated  
26 during an FBI interview that, in February, 2004, he spoke with Vang  
27 Pao in English, with occasional interpretation assistance from a third  
party, for three to four hours, regarding a variety of topics related  
to the situation in Laos. Gov. Ex. MM; 8/16/07 FBI Interview Report.

28 <sup>52</sup>This was the first investigation in which the UC had ever used  
this specific device; this was the second time the UC had used the  
device during this investigation.

1 As the Court no doubt is aware, all recording devices, this one  
2 included, have their technical limitations. Capturing a sound or a  
3 voice depends on a variety of factors including, among other things:  
4 the exact proximity of the recording device microphone to the voice to  
5 be recorded (including the presence of objects between the voice and  
6 the recording device); the volume and quality of the voice to be  
7 recorded; and the volume, quality and quantity of competing background  
8 noise. The Court is invited to listen to the audio recording of the  
9 restaurant meeting. See Gov. Ex. LL. Such an examination will make  
10 it readily apparent that: certain conversations, in fact, were  
11 captured and are clearly audible; other conversations were captured  
12 seemingly only in part; and some conversations, while faintly  
13 perceptible, are not of a sufficient volume or quality to be  
14 understood.

15 Fourth, during a portion of the meeting at the lunch table, the  
16 UC recalled that he was able to keep his left hand and the recording  
17 device on the table, as part of an effort to capture voices as best as  
18 possible. Fairly early during the lunch (precise time unknown), the  
19 UC moved his left arm (and the watch recorder) to his lap and left his  
20 arm in the vicinity of his lap for the duration of the lunch at the  
21 table. Sometimes the UC, leaning forward in his seat, had his arm and  
22 the recording device literally underneath the table. Other times, he  
23 simply had his wrist and the device in or around his lap.<sup>53</sup>

24 \_\_\_\_\_  
25 <sup>53</sup>The UC realized that Hue Vang, seated to the UC's left,  
26 appeared to be looking at the UC, his arm, and his watch in a  
27 suspicious manner. At the time, the UC knew that Hue Vang had a law  
28 enforcement background and was concerned that Hue Vang might figure  
out that the UC, in fact, was wearing a recording device. As a  
result, in order to protect the integrity of the investigation  
(including use of the recording device), and to protect his own  
safety, the UC took his arm off the table and kept it in or around his

1           b.    The Affidavits

2           The UC (working directly with AUSA Twiss) drafted a description  
3 of the February 7 (Amarin Restaurant) meeting, including the  
4 statements at issue, in approximately mid-March 2007, while preparing  
5 the affidavit in support of the first Wiretap Application.<sup>54</sup> The UC  
6 did not attempt in his affidavit to recite verbatim the statements he  
7 made or heard. The UC did try, as best he could, to summarize the  
8 substance of the communications he recalled in their appropriate  
9 context. The UC memorialized the statements at issue, in final form,  
10 shortly prior to March 28, 2007 (the date the first wiretap affidavit  
11 was sworn out).<sup>55</sup> The UC notes that he made all the statements set  
12 forth in the affidavit at a point in time closer to the February  
13 meeting when his recollection was better than it is today.

14           Of significance, the UC recalls today (or previously recalled)  
15 statements in connection with the February 7 meeting, at least some of  
16 which (through no fault of the UC) were not captured by the watch  
17 recorder. The UC, in good faith, included these recollections in the  
18 affidavits (including the affidavit provisions at issue). The  
19 government will outline the UC's recollections regarding these issues  
20 one-by-one.

21           The first statement at issue per the defense (Mot. at 21), was as

22 \_\_\_\_\_  
23 lap.

24           <sup>54</sup>This same language was then incorporated into other subsequent  
25 affidavits, including the Complaint Affidavit.

26           <sup>55</sup>The statements at issue were memorialized approximately five to  
27 seven weeks after the February 7 meeting. The UC did not memorialize  
28 these statements in any writing prior thereto. The UC prepared a  
report on or about February 12, 2007 related to the Amarin Restaurant  
meeting. For this report, however, he listened to the audio of the  
meeting and summarized the audible parts of the audio only.

1 follows:

2 During lunch, Jack and Vang Pao advised me that the plan was to  
3 provide arms to insurgents who were in place in Laos, and to  
4 initiate hostile military action in the very near future against  
5 military forces of the government of Laos. I was advised that  
6 the insurgents would attack Lao government soldiers and positions  
7 and attempt to gain control of certain areas of the border  
8 between Laos and Thailand. I was also advised that the two dozen  
9 special operations mercenary troops, which I was being asked to  
10 provide, would play a large role in the insurgent military  
11 operation. I told Jack and General Vang Pao that any special  
12 operations troops that I would be able to provide would be very  
13 conspicuous, and that it would be necessary for them to "melt"  
14 back into the jungle in Laos immediately after completion of the  
15 "strike" mission against the Lao government troops. I told them  
16 that the mercenary troops could not be used to secure and  
17 maintain positions along the border. Jack stated that they  
18 understood.

11 Def. Ex. 1, Complaint Aff. ¶ 22.

12 The UC's recollection today of the events set forth in Complaint  
13 Affidavit ¶ 22 remains substantially the same with one important  
14 clarification. The UC recalls that he had a conversation with both  
15 Jack and Vang Pao at the lunch table and that Jack, in substance, made  
16 the statements noted in the affidavit. The UC does not believe that  
17 Vang Pao affirmatively made the statements noted in the affidavit.  
18 The UC recalls that, while he was speaking, or while Jack was  
19 speaking, Vang Pao oftentimes appeared to be tracking their  
20 conversation and at times appeared to be nodding affirmatively. (The  
21 UC cannot pinpoint the precise moments in time when he observed Vang  
22 Pao tracking or nodding, but recalls him doing so). The UC also  
23 recalls that Vang Pao made a statement, in English, about freedom  
24 fighters taking Vientiane, while looking over at Jack and the UC.<sup>56</sup> In  
25 drafting the affidavit, the UC indicated, in a summary fashion, that  
26 Jack and Vang Pao "advised" him in order to describe the statements of  
27

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28 <sup>56</sup>The UC also indicated that he presently cannot recall use of  
the word "melt."

1 Jack and the noted conduct of Vang Pao.<sup>57</sup>

2 It should be noted that various portions of the captured,  
3 recorded conversations directly correlate with the UC's affidavit  
4 statement, Complaint Affidavit ¶ 22, or corroborate the same. For  
5 example, the recording device captured a UC statement to Jack (in the  
6 restaurant before lunch began) that two dozen mercenaries or special  
7 operations troops were available. Gov. Ex. D, 2/7 Tr. at 6-7.  
8 Regarding potential operation locations, Jack noted that he wanted to  
9 secure the Thai border crossings and avenues so "they" would have  
10 choices and not be totally committed to one path. Id. at 17-18. As  
11 for mercenary plans, the UC advised Jack that the "operators" [the  
12 mercenaries] were white and they would not "want to be seen by the  
13 Thais." Id. at 18. The UC explained that the mercenaries were "low-  
14 profile guys" who would prefer to be "doing their thing." The UC  
15 specifically added, "not that they couldn't secure something and then  
16 have it taken over by ... the Hmong." Id. Jack indicated he  
17 understood, noting that the mercenaries would be "present but not  
18 visible." Id.<sup>58</sup> Finally, regarding timing, the UC indicated that he  
19 could have weapons within 14 days and troops in about three weeks.  
20 Id. at 20-21. Jack replied that, "A month would be a good planning  
21 time for everything put together." Id. at 21. In short, the

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22  
23 <sup>57</sup>The UC recognizes, with the benefit of hindsight, that it would  
24 have been better to specifically describe his observed conduct related  
25 to Jack and his observed conduct related to Vang Pao separately in the  
26 affidavit.

27 <sup>58</sup>At another point, the UC suggested that Jack "cut these 24 guys  
28 [mercenaries] loose, cut a wide swath." Id. at 17. Jack indicated,  
"Yes. I hear you," noting that would be "level two" (understood by the  
UC to mean the second part of the operations).

Later, Jack and the UC discussed the fact that the UC's men (the  
mercenaries) were sensitive "to being left" [in Laos]. Id. at 22.

1 recording device captured significant portions of conversations which  
2 either tracked, or corroborated, the UC's ¶ 22 affidavit statements.

3 The second statement at issue according to the defense, (Mot. at  
4 20-21), is:

5 During the meeting at the restaurant on February 7, 2007, I told  
6 Jack and General Vang Pao that I needed to have them show me on  
7 maps exactly where they needed me to insert both the troops and  
8 munitions. We discussed that if both the troops and munitions  
9 were to be air-dropped into Laos (i.e., parachute insertion) as  
they wanted, I would need to identify the usable drop zones.  
They stated that they understood and could provide me with maps  
showing the points of insertion, as well as the emplacement of  
insurgent troops and Lao government troops.

10 Def. Ex. 1, Complaint Aff. ¶ 24.

11 The UC's recollection today of the events set forth in Complaint  
12 Affidavit ¶ 24 remains substantially the same as they relate to his  
13 dealings with defendant Jack; however, the UC does not presently  
14 remember whether Vang Pao was a party to or participant in these noted  
15 discussions. Specifically, the UC presently recalls, in substance,  
16 that he told Jack that the UC needed maps and that he needed to know  
17 lats and longs (latitudes and longitudes) for "drop points" (exact  
18 locations by latitude and longitude where weapons and troops were to  
19 be delivered). The UC also recalls, in substance, that he told Jack  
20 that he needed good "drop zones" for the weapons (appropriate safe  
21 locations, clear of obstructions, where weapons could be dropped by  
22 air to the ground). Finally, the UC recalls that Jack made  
23 statement(s), in substance, affirming that he understood and would be  
24 able to provide the requested information. The UC presently believes  
25 that he spoke with Jack about these topics either inside the  
26 restaurant or inside the RV; he cannot presently recall which. The UC  
27 has no present recollection of Vang Pao being present at the time the  
28 UC and Jack discussed these topics.

1 It should be noted again that various portions of the captured  
2 recorded conversations directly correlate with the UC's affidavit  
3 statement, Complaint Affidavit ¶ 24, or corroborate the same. The  
4 recording device captured the UC's conversation with Jack (in the  
5 restaurant) in which the UC stated that two dozen mercenaries were  
6 available and that air transport was taken care of. Gov. Ex. D, 2/7  
7 Tr. at 7. Regarding air drops and maps, the UC indicated that he  
8 would prefer to go to Thailand and enter [Laos] on foot, but that if  
9 they had to "[air] jump guys in, we can." Id. In response, Jack  
10 noted that, "We've got maps and coordinates" - "All the information  
11 you needed in order to price things, coordinate things. . . ." Id.  
12 Later (inside the RV), Jack asked how they would close the planning -  
13 "the op[erational] side of this thing as far as grid coordinates."  
14 Id. at 48. The UC indicated that he needed a lat and a long as far as  
15 dropping anything-including personnel. Id. Afterwards, Hue Vang came  
16 in, at the request of Jack, and gave an overview of certain Lao  
17 military strong points and freedom fighter locales. Id. at 49-50.  
18 The UC asked if they had agreed on a "drop point" for weapons and  
19 troops. Id. at 50. Hue Vang replied that drop points were very  
20 possible. Id. Hue Vang likewise, per inquiry from the UC, indicated  
21 that they had identified ideal crossing points on the border. Id. at  
22 51. Afterwards, the UC said he would start doing a little research on  
23 the lat and longs of these areas, to which Hue Vang indicated, "Okay."  
24 In short, the recording device captured significant portions of  
25 conversations which either track, or corroborate, the UC's ¶ 24  
26 affidavit statement.

27 The third statement at issue (Mot. at 21), is as follows:

28 I told Jack and General Vang Pao that I needed to get an  
operational briefing from someone doing the operations planning

1 for their insurgent operation, as well as copies of the  
2 operations plan. I explained that I needed to develop my own  
3 operations plan and operations order for the transfer and  
4 delivery of the munitions and the air drop of both personnel and  
munitions; moreover, I needed to ensure that my operations plan  
and operations order were consistent with theirs. Jack and Lo  
Cha Thao agreed to make those available to me.

5 Def. Ex. 1, Complaint Aff. ¶ 25.

6 The UC's recollection today of the events set forth in Complaint  
7 Affidavit ¶ 25 remains substantially the same as they relate to his  
8 dealings with defendant Jack. The UC remembers that Vang Pao and Lo  
9 Cha Thao were present at the lunch table during this conversation with  
10 Jack, but does not remember whether these two actually participated in  
11 this particular conversation. Specifically, the UC remembers that,  
12 while seated for lunch, he and Jack both discussed, in substance, the  
13 need for operations plans. The UC recalls telling Jack, in substance,  
14 that he had concerns related to the guys going in (the proposed  
15 mercenaries going to Laos) and that he and Jack needed to make sure  
16 that the operations plans for the UC's guys were consistent or squared  
17 with the operations plans for Jack and his group. The UC further  
18 recalls that Jack, in substance, acknowledged that he would do that.  
19 The UC remembers that Vang Pao was present at the time of this  
20 discussion. The UC cannot presently remember whether Vang Pao was  
21 tracking this discussion at this point in time (or using any sort of  
22 body language suggesting agreement or otherwise with the discussion).  
23 The UC recalls that Lo Cha Thao was present at the lunch table at this  
24 time. The UC cannot presently remember whether Lo Cha Thao was  
25 tracking this discussion at this point (or using any sort of body  
26 language suggesting agreement or otherwise with the discussion).<sup>59</sup>

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27  
28 <sup>59</sup>The UC separately remembers that (while in the restaurant,  
likely before sitting down) Jack, seemingly in the presence of Lo Cha  
Thao, told the UC that they needed to exchange operation plans and

1 It should be noted, yet again, that various portions of the  
2 captured recorded conversations corroborate the UC's ¶ 25 affidavit  
3 statement and his recollections related thereto. As noted previously,  
4 there were many captured statements by the UC and Jack related to the  
5 acquisition of both weaponry and personnel, air drop delivery of the  
6 same, and the need to coordinate delivery of the same.

7 c. Analysis

8 The UC did not intentionally or recklessly make any false  
9 statements regarding the Amarin Restaurant meeting. The UC has sworn  
10 under oath that he had certain conversations related to Jack and Vang  
11 Pao. Many portions of these conversations appear to have been  
12 captured, at least in part, on the recording device; some of these  
13 conversations were not. This is hardly surprising given that the UC  
14 was conversing with suspects at a crowded table in a public restaurant  
15 and the UC was using a watch recording device which, much of the time,  
16 had to be placed below the level of the table. The fact that the  
17 statements at issue were not completely captured by the recording  
18 device does not, as the defense suggests, *ipso facto* prove that the UC  
19 simply made them up. Indeed, the various conversations captured by  
20 the recording device lend powerful credence to what the UC stated in  
21 his affidavit and recalls today. The transcript of this meeting is  
22 replete with statements by Jack and others related to acquisition of  
23 weapons, acquisition of mercenaries, air drop delivery of the same to  
24 Laos at coordinated locales, use of maps to identify drop locales, and  
25 stealth use of the mercenaries -- all of which either track what the  
26 UC stated in the affidavit or corroborate the same. In short, on this

27 \_\_\_\_\_  
28 contemporaneously gestured with his hand, pointing to himself and the  
UC. The UC indicated that Vang Pao was not present for this  
discussion.

1 record, there is no reason to believe that the UC's sworn statements  
2 in the affidavit were anything other than truthful.

3 Of some concern, of course, is the UC's statement in Complaint  
4 Affidavit ¶ 22 that "Jack and General Vang Pao advised [him] that the  
5 plan was to provide arms to insurgents who were in place in Laos, and  
6 to initiate hostile military action . . . against military forces of  
7 the government of Laos." Def. Ex. 1, Complaint Aff. ¶ 22 (emphasis  
8 added). With the benefit of hindsight, it would have been better if  
9 the UC precisely explained his observations, i.e., that Jack made  
10 these statements and that Vang Pao somehow indicated his concurrence.  
11 That said, the agent's description of his observations was, at most,  
12 an innocent error. The agent firmly believed (and believes) that Jack  
13 made the noted statements, that Vang Pao, through his conduct,  
14 expressed agreement, and used a conclusory phrase ("advised") to  
15 describe the totality of his observations. The agent should have  
16 articulated his specific observations to avoid any potential  
17 confusion; his imperfect drafting, however, was an honest mistake, not  
18 an intentional or reckless falsity.

19 It is likewise true that the UC presently cannot remember Vang  
20 Pao's presence during the conversation reflected in Complaint  
21 Affidavit ¶ 24 and cannot remember Vang Pao's participation during the  
22 conversation reflected in ¶ 25. The UC's inability to remember these  
23 specific details, however, does not prove that the Agent lied when he  
24 swore out his affidavits. Recollections fade; we all hope they will  
25 not, but sometimes they do. The agent's affidavit is his sworn  
26 "recorded recollection" of these events and, speculation aside, the  
27 defense has presented no evidence which demonstrates that the agent's  
28 recorded recollections are false, much less deliberately so.

1 Moreover, and of significance, defendants have woefully failed to  
2 establish that the statements at issue are legally material. Even if  
3 one assumes, arguendo, that the UC's statements in Complaint Affidavit  
4 ¶¶ 22, 24 and 25 are erroneous, these purported errors would not  
5 impact the probable cause analysis one iota in either the Complaint,  
6 the Search Warrants or the Wiretap Applications. Setting the disputed  
7 portions of the affidavits aside, there would have still been ample  
8 probable cause that every single conspirator had committed a crime,  
9 including Vang Pao.

10 Focusing on Vang Pao, for example, other provisions in the  
11 Complaint Affidavit plainly indicate that there was probable cause to  
12 believe that he was a knowing participant in the charged conspiracies:

- 13 ■ Jack indicated he was working directly with Vang Pao and that  
14 this was the first time he had worked with him on anything  
military-oriented. Def. Ex. 1, Complaint Aff. ¶ 15.
- 15 ■ Jack indicated that Vang Pao was the one trying to get weapons to  
16 the Hmong people in Laos. Id. ¶ 17.
- 17 ■ Jack indicated he was going to bring the highest leadership  
including Vang Pao to the [February 7] meeting. Id. ¶¶ 19-20.
- 18 ■ Vang Pao came to the February Amarin Restaurant meeting, looked  
19 at the weapons display and commented that he "was sold on the  
whole thing." Id. ¶¶ 21, 27, 29.
- 20 ■ JACK said that he had been involved in several conversations with  
21 Vang Pao and his group, and that "Vang Pao and others wanted to  
get their objective immediately." Id. ¶ 36.
- 22 ■ Lo Cha Thao said that Vang Pao had ordered funding to be in place  
23 for a purchase of "equipment" from the UC. Id. ¶ 47.
- 24 ■ Jack asked Lo Cha Thao how soon Vang Pao would want to round up  
any of the equipment they had been talking about, and Lo Cha Thao  
25 indicated a meeting was scheduled the next day. Id. ¶ 48.
- 26 ■ Lo Cha Thao indicated that Vang Pao would give the order pending  
the outcome of an intelligence mission in Laos to determine if an  
27 unnamed person, with the proper equipment, could handle "the  
coup." Id. ¶ 53.
- 28 ■ Jack stated that a contemplated meeting might be the last before  
Lo Cha Thao, Vang Pao and others placed a formal order. Id. ¶

1 61.

2 ■ Lo Cha Thao indicated, in response to a UC question, that Vang  
3 Pao was "all right" [with the coup plans previously discussed]  
4 and further indicated, "We're the masterminds on this so the  
5 Generals don't get [sic] into trouble." Id. ¶ 115.

6 The same, of course, is true as for all the other conspirators.  
7 If the statements at issue were removed from the affidavits, the  
8 probable cause calculus would remain unaltered. For this reason (and  
9 even this reason alone), defendants' claim fails. In sum, this Court  
10 should reject defendants' claim that the UC somehow made material  
11 false statements in connection with his description of the Amarin  
12 Restaurant meeting.

13 4. The Conspirators' Beliefs as to Supposed  
14 U.S. Government Support for Their Efforts

15 The defense next suggests that the agents/affiants "said nothing  
16 about the so-called conspirators' apparent belief that elements of the  
17 U.S. Government, including the CIA, Two-Star Generals, and senior  
18 Congressional leaders, knew of and supported their efforts -- or of  
19 the undercover agent's own actions to encourage that belief." (Mot.  
20 at 22.) These claims likewise should be rejected.

21 First, the affidavits did reference purported information  
22 regarding conspirator contacts with government leaders. For example,  
23 Complaint Affidavit ¶ 53 reads, in pertinent part, on April 12, 2007,  
24 Lo Cha Thao told Jack that Thao "had participated in a conference call  
25 with an unnamed United States congressman about what Thao described as  
26 'on the table politics.'" Def. Ex. 1, Complaint Aff. ¶ 53. The  
27 affidavit subsequently notes, "Thao ... said that his group had been  
28 consulting with a United States congressman and had received advice  
concerning 'under table strategies' from military personnel like Jack  
and an unnamed 'CIA guy.'" Id.; see, e.g., 6/1/07 Search Warrant

1 Affidavit (Case No. 2:07-sw-150 GGH) ¶¶ 59-60, 4/30/07 Wiretap  
2 Affidavit (Case No. 2:07-sw-082 FCD) ¶ 105.<sup>60</sup> There was no omission  
3 here (much less a misleading or material omission).

4 Second, the applicable Complaint and Search Warrant Affidavits  
5 reference Lo Cha Thao's [false] claim of purported CIA support. For  
6 example, in Complaint Affidavit ¶ 79 the UC reports that, on May 4,  
7 2007:

8 Jack also told me that, according to Lo Cha Thao, the Agency  
9 (which I understood to be the CIA) was standing by and ready to  
10 roll. I understood his statement to mean that the CIA was  
preparing to assist the Hmong insurgency once the takeover of  
Laos had begun.

11 Def. Ex. 1, Complaint Aff. ¶ 79; see, e.g., 6/1/07 Search Warrant  
12 Affidavit (Case No. 2:07-sw-150 GGH) ¶ 91 (same).

13 Third, it is true that the UC, in his role as an arms dealer, had  
14 a March 5, 2007 conversation with Jack ruminating about whether the  
15 United States would support a new democratic government, and that the  
16 UC ultimately opined that the United States (including CIA) would  
17 support a democratic government. Gov. Ex. W, 3/5 Tr. at 48-51. It  
18 was not misleading, however, to exclude this information from the  
19 affidavits. As noted before, the Complaint Affidavit already  
20 contained information about Lo Cha Thao's May 4, 2007 statement to  
21 Jack suggesting that the "Agency" was "standing by and ready to roll"

---

22  
23 <sup>60</sup> Contrary to the defense suggestion (Mot. at 22), Jack did not  
24 indicate that any of these government officials actually knew about or  
25 supported the plans. See Gov. Ex. D, 2/7/07 Tr. at 13 (Jack noted  
26 "I've got senior congressional officials that will eventually be  
27 brought into the general concept of this . . . ."); Gov. Ex. W, 3/5  
28 Tr. at 34 (Jack stated that Feinstein's office and congressional reps  
in Minnesota and Wisconsin were going to or had been meeting with  
"them" and that Jack advised "them" to let these [legislators] "know  
what you're doing" and "tell them the support you need"). Omission of  
the fact that Jack or anyone else purportedly had been in touch with  
legislative leaders (with nothing known about substantive  
communications, if any), is neither misleading nor material.

1 (specifically interpreted by the UC to mean that the CIA was prepared  
2 to assist with the takeover). This reference, by itself, put the  
3 judicial officer on notice that at least one conspirator apparently  
4 had suggested, and another had heard, that the CIA was ready to  
5 support the venture. In light of this, the fact that the UC/arms  
6 dealer told Jack that he "thought" the United States (or CIA) would  
7 support a new democratic government could not mislead a judicial  
8 officer with respect to the issue of purported official support.  
9 Moreover, omission of this conversation would not be material. Even  
10 if the information had been included, probable cause was still plainly  
11 present in the affidavit.

12 Fourth, contrary to the defendants' suggestions, the UC did not  
13 encourage the defendants to believe that the CIA, in fact, was  
14 supporting their efforts. It was Lo Cha Thao who (falsely) indicated  
15 that he had been in touch with the CIA and that the CIA purportedly  
16 was supportive. Lo Cha Thao told Jack of this purported support, who,  
17 in turn, told the UC. The UC (then playing the role of an arms  
18 dealer) neither affirmed (not denied) the assertion of purported CIA  
19 support made by La Cha Thao. There was no omission here (much less a  
20 misleading or material one).

21 5. Supposed Efforts to Goad the  
22 Conspirators to Do More and Use More Weaponry

23 The defense alleges that the affiants/agents omitted information  
24 about the UC's goading of the conspirators to "do more" or "use more  
25 weaponry." (Mot. at 22.) As described earlier, the UC did not  
26 impermissibly "goad" the conspirators or anything of the sort. As  
27 such, the agents/affiants did not intentionally or recklessly omit  
28 this information, much less omit information which would be material  
to a probable cause determination.

1           6.    Conspirators' Alleged  
2                Ineptitude for Realistic Planning

3           The defense avers that the affiants/agents omitted information  
4 about the conspirators' "obvious ineptitude when it came to doing any  
5 realistic planning." (Mot. at 22.) Again, this defense contention is  
6 unsupported by the record. As such, there were no omissions, much  
7 less misleading or material ones.

8           7.    Vang Pao's History

9           The defense argues that the UC "must have known" the "history" of  
10 "how General Vang Pao and other Hmong came to be in this country," and  
11 that this was not "explained" in the affidavit. (Mot. at 22.) This  
12 claim should likewise be rejected.

13           In fact, some of this information related to Vang Pao's Lao  
14 military background was included in the Wiretap Affidavit. See, e.g.,  
15 3/28/07 Wiretap Affidavit (2:07-sw-082 FCD) ¶ 22.

16           In any event, defendant's remaining prior acts, which date to the  
17 time of the Vietnam war and immediately thereafter, are wholly  
18 irrelevant to the conspirators' criminal conduct between 2006 and 2007  
19 described in the affidavits at issue and ultimately charged in the  
20 Indictment. There was no misleading omission and certainly no  
21 material omission.

22           8.    Alleged Opposition to the Coup

23           Per the defense, the agents "went out of their way to create the  
24 impression that all of the defendants supported the alleged plan,  
25 despite the extensive wiretap evidence demonstrating deep and  
26 entrenched opposition." (Mot. at 23.) Not so. As explained before,  
27 government agents/prosecutors did not have translated versions of any  
28 of the supposedly exculpatory calls cited by the defense until  
November 2007, well after execution of the March 28, 2007-June 1, 2007

1 Wiretap, Search Warrant and Complaint affidavits. As such, government  
2 agents did not intentionally or recklessly make any sort of misleading  
3 statements or omissions.

4 9. Neo Hom References

5 The defense complains that the agents/affiants misleadingly  
6 referred to the conspiracy as a "Neo Hom" conspiracy "in the  
7 affidavits," referring, for example to the UC's statement in the  
8 Complaint Affidavit that, on February 7, 2007, the UC met with Jack,  
9 Vang Pao and "approximately twelve suspected Neo Hom leaders  
10 concerning the sale of weapons to Neo Hom." (Mot. at 23, n.96.) This  
11 contention lacks merit.

12 It was made clear in the Wiretap Affidavits that Vang Pao  
13 established "Neo Hom, a/k/a United Lao National Liberation Front."  
14 3/28/07 Wiretap Aff. (2:07-sw-082 FCD) ¶ 22; 4/30/07 Wiretap Aff.  
15 (2:07-sw-082 FCD) ¶ 27. Thereafter, the affidavits state:

16 Please note that in this affidavit the "Neo Hom" identifier is  
17 used to describe those persons who follow General Vang Pao and  
18 support the overthrow of the Laotian government by Hmong  
19 insurgents. At no time during this investigation has a target  
20 subject or any other Hmong person identified him/herself to me as  
21 a Neo Hom member. However, some individuals, such as General  
22 Vang Pao, have stated publicly that they are Neo Hom. Unless a  
23 source is identified, it is only presumed, and not confirmed,  
24 that the person is a Neo Hom member.

25 Id.

26 Similar language apparently was omitted (by error) from the  
27 Search Warrant and Complaint Affidavits. The Complaint Affidavit  
28 (which was considered contemporaneously with the Search Warrant  
29 Affidavits), did advise the judicial officer that "at no time has the  
30 term 'Neo Hom' been used by any of the suspects in my presence to  
31 identify their affiliation." E.g., Def. Ex. 1, Complaint Aff. ¶ 21.

32 Given the above, it should be clear that the agents did not  
33 intentionally or recklessly mislead judicial officers regarding the

1 Neo Hom terminology. The agent made it perfectly clear in the Wiretap  
2 Affidavits that he was using the term "Neo Hom" as a defined term "to  
3 describe those persons who follow Vang Pao and support the overthrow  
4 of the Laotian government by Hmong insurgents." The agent used that  
5 same defined term throughout the Wiretap Affidavits. Agents also used  
6 the same definition in the Complaint and Search Warrant Affidavits  
7 (but forgot to include the definition previously utilized in the  
8 Wiretap Affidavits).

9 Indeed, if one utilizes the defined term in connection with the  
10 conversation cited by the defense, the conversation clearly indicates  
11 that the UC had a meeting with approximately twelve suspected Neo Hom  
12 leaders (that is, leaders of those supportive of the overthrow of the  
13 Laotian government), concerning the sale of weapons to Neo Hom (that  
14 is, supporters of the overthrow). This is not misleading in the  
15 least.

16 Finally, it is hard to fathom how use of this term (even if  
17 erroneously undefined in the Complaint and Search Warrant Affidavits)  
18 would have had any material impact on the probable cause  
19 determinations made therein.

20 10. Press Reports About the Aftermath  
21 of Vang Pao's November 2003 Speech

22 Defendants next contend that the agents misleadingly described  
23 press reports about the aftermath of Vang Pao's November 2003 speech  
24 in their affidavits. According to the defense, it was somehow  
25 improper for agents/affiants to quote that article and suggest that  
26 Vang Pao "now favors violence, despite the evidence that they  
27 themselves intercepted showing just the opposite." (Mot. at 23.)  
28 This argument lacks any serious merit.

First, the Government accurately quoted the statements made in

1 the article. See Def. Ex. 64, "Hmong Friends," New Republic Magazine  
2 (Feb. 5, 2007) at 6.

3 Second, as noted before, the government did not possess full  
4 translations of the intercepts at the time it prepared these Wiretap,  
5 Search and Complaint Affidavits.

6 Third, there was plenty of evidence known to agents at the time  
7 of the affidavits to suggest that Vang Pao was a knowing participant  
8 in the conspiracy<sup>61</sup>.

9 11. Alcohol Consumption by the UC

10 Finally, defendants claim that the UC "misrepresented his own  
11 repeated consumption of alcohol," because he referenced drinking  
12 during the March 5, 2007 meeting but did not reference drinking on  
13 other occasions in his affidavits. (Mot. at 24.) Here again, it is  
14 quite difficult to imagine how this purported omission misled judicial  
15 officers or would be material to any of the probable cause  
16 determinations made by judicial officers.

17 D. Summation

18 To recap, purported agent false statements in affidavits are not  
19 an appropriate basis for dismissal of the indictment because: there is  
20 no demonstrable prejudice to defendants; any conceivable prejudice can  
21 be neutralized by lesser remedies such as suppression of evidence; and  
22 the allegations, even if assumed true, do not constitute "flagrantly  
23 offensive government conduct" warranting dismissal. In addition,  
24 agents did not intentionally/recklessly submit any sort of material  
25 false or misleading information in their affidavits.

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26  
27 <sup>61</sup>Moreover, as noted before, the wiretap evidence does not  
28 uniformly suggest that Vang Pao was opposed to violence; a number of  
intercepts, we now know, suggest that Vang Pao ultimately agreed to  
the plan.

VI.

THERE WAS NO PROSECUTORIAL MISCONDUCT IN CONNECTION WITH THE  
BAIL PROCEEDINGS OR DISCOVERY PROCEEDINGS

Defendants next suggest that former AUSA Twiss engaged in purported misconduct by "repeating many of the same misstatements" of the agents. (Mot. at 24.) These claims are also wholly devoid of merit.

A. The Purported Prosecutorial Misconduct Cannot Form the Basis for Dismissal Because Defendants Have Failed to Demonstrate Substantial Prejudice

To start, defendants have failed to allege that they suffered any type of demonstrable harm or prejudice as a result of this purported prosecutorial misconduct. "[A] district court may properly dismiss an indictment only if ... prosecutorial misconduct (1) was flagrant, and (2) caused substantial prejudice to the defendant." Jacobs, 855 F.2d at 655 (emphasis added). In the absence of such prejudice, lesser sanctions are considered adequate to remedy any potential acts of prosecutorial misconduct. See United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993).

Here, defendants have failed to allege how any of the purported misstatements by prosecutors prejudiced them either during the bail proceedings or the discovery proceedings. As such, the purported misconduct at issue cannot legally serve as a basis for dismissal. See Rogers, 751 F.2d at 1075 (noting, but not reviewing, district court ruling that "pre-indictment delay and misconduct regarding arrest and bail ... could not be the basis for dismissal because they had not resulted in prejudice to [defendant].")

B. AUSA Twiss Did Not Engage in Any Type of Misconduct

In addition, each and every claim of prosecutorial misconduct (Mot. at 24-27), is wholly meritless.

1           1.    Complainant Namon Hawthorne

2           Defendants suggest that there was some sort of prosecutorial  
3 misconduct because AUSA Twiss repeated "the false allegation that this  
4 case began when Jack approached a 'defense contractor.'" (Mot. at  
5 24.) This claim should be rejected.

6           As noted before, the UC/affiant believed in good faith that  
7 Hawthorne was affiliated with the defense community and characterized  
8 him as a "defense contractor." The AUSA, obviously acting in reliance  
9 on the known investigation to date, made a similar representation to  
10 the Magistrate Court during bail proceedings. There has been no  
11 showing whatsoever that the AUSA made a deliberate or reckless  
12 misstatement.

13           The defense also suggests that AUSA Twiss "wrongly" suggested  
14 that Jack "outline[d] exactly the plan to buy the arms and logistics.  
15 . . ." (Mot. at 25.) AUSA Twiss did not misstate these facts.

16           In fact, in November 2006, Jack outlined to Hawthorne his plan to  
17 buy arms and some of the logistics related thereto. Jack explained  
18 that: (1) he needed 500 AK rifles A.S.A.P; (2) he was willing to pay  
19 \$400.00 to \$1,200.00 per gun depending on method of delivery  
20 (inside/outside U.S.); and (3) he wanted to know if the firearms could  
21 be delivered outside the U.S. and, if so, as close to the Laotian  
22 border as possible. Gov Ex. 00, ATF Rpt. 1. There has been no  
23 showing of a falsity, much less a deliberate or reckless one.

24           The defense also suggests that AUSA Twiss inappropriately  
25 suggested that Namon Hawthorne was a defense contractor who had  
26 government contracts or business in Iraq and other places. (Mot. at  
27 25.) This argument likewise should be rejected.

28           Per AUSA Twiss, an ATF agent (either the UC or ATF SSA Graham

1 Barlowe) informed him that the informant [Nathan Hawthorne] had  
2 developed technology to detect and explode land mines and IEDs in  
3 Iraq. AUSA Twiss obviously made his bail hearing remarks in reliance  
4 on the UC's affidavit statements (that Namon Hawthorne was a defense  
5 contractor), as well as the separate ATF agent's statement noted  
6 above<sup>62</sup>. Here again, AUSA Twiss did not make a deliberate or reckless  
7 misstatement.

8 2. Characterization of Harrison Jack

9 The defense "cries foul" because the "prosecutors described Jack  
10 as a savvy and experienced military professional" when "the government  
11 knew" that Jack "may have been knowledgeable about supernatural  
12 healing and divination, but was useless when it came to any real-world  
13 organization or planning." (Mot. at 25.) This argument, simply put,  
14 is ridiculous. Jack's resume, among other things, reflected that he  
15 is a graduate of the United States Military Academy at West Point, was  
16 a lieutenant colonel in the United States Army, a Ranger, an Airborne  
17 Infantry officer and that he completed at least one combat tour in  
18 Southeast Asia. See Def. Ex. 1; Complaint Aff. ¶ 11. Moreover,  
19 Jack's known conduct in the case obviously suggested that Jack was a  
20 well-versed military professional and that he was deeply involved in  
21 the planning and execution of the charged conspiracies. AUSA Twiss,  
22 quite properly, told the Magistrate Court that Jack was a "defense  
23 professional," not "someone who just fell off the turnip truck." Def.  
24 Ex. 39, 7/12/07 R.T. 44.

25 3. Defendants' Ability to Finance the Plan

26 Contrary to defendants' suggestion (Mot. at 25), AUSA Twiss did  
27 not make "misleading statements about the defendants' ability to  
28

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<sup>62</sup>SSA Barlowe indicated that he, in fact, spoke with AUSA Twiss.

1 finance the plan." The defense has not explained the full record on  
2 this issue to the Court.

3 As the defense suggests, AUSA Twiss told the Magistrate Court  
4 during bail review proceedings that defendants had enough money on  
5 hand as of June 4 to either purchase an aggregate total of 250 AK-47s  
6 and smoke grenades, or alternatively, a load of 125 AK-47s, smoke  
7 grenades and a Stinger missile. Def. Ex. 39, 7/12/07 R.T. 64. Of  
8 significance, immediately before making that statement, AUSA Twiss  
9 also advised the Magistrate Judge that:

10 [O]n June 4<sup>th</sup>, we [the government] seized approximately \$212,000  
11 in United States currency in the houses of those defendants  
12 sitting in the box over there. Now [\$]212,000, that's not [\$]9.8  
13 million, but that's twice the first installment of arms.

14 Def. Ex. 39, 7/12/07 R.T. 64.

15 In fact, the Government had seized approximately \$212,000 from  
16 either defendants or suspects in this case.<sup>63</sup> In light of this, the  
17 AUSA's comments were wholly appropriate because, at the time of the  
18 July 2007 hearing, AUSA Twiss had a good faith basis to believe that  
19 the conspirators had available cash that potentially could have been  
20 used to finance the purchase of weapons.<sup>64</sup> Once again, AUSA Twiss did

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21 <sup>63</sup>Agents had recovered approximately \$211,244 from charged  
22 conspirators or then known suspects in the conspiracy: Vang Pao-  
23 \$13,000 (Discovery No. Tarn Egl 34726); Chue Lo-\$11,000 (Tarn Egl  
24 34765); Unindicted Suspect-\$146,044 (Tarn Egl 1868); Unindicted  
25 Suspect-\$13,700 (Tarn Egl 1478); Hue Vang-\$4,500 (Tarn Egl 992); Lo  
26 Cha Thao-\$12,000 (Tarn Egl 95 & 97); Nhia Kao Vang-\$11,000 (Tarn Egl  
27 609).

28 <sup>64</sup>Ultimately, in the exercise of its discretion, the government  
chose not to forfeit any of these seized funds. That, however, is  
irrelevant to the issue at hand. The question is what AUSA Twiss knew  
at the time of the bail hearing and whether he somehow made an  
intentional or reckless misstatement in light of his knowledge. AUSA  
Twiss plainly did not make an intentional misstatement.

1 not make a deliberate or reckless false statement.

2 4. Vang Pao's Endorsement of the Plan

3 The defense reiterates its claim that prosecutors  
4 mischaracterized evidence related to the "critical June 2 meeting" and  
5 that the government incorrectly suggested that Vang Pao "endorsed the  
6 'coup plan,'" when "the government held extensive evidence" to the  
7 contrary. (Mot. at 26; see also id. 18.) Again, this claim is  
8 patently meritless. At the time of the July 12 bail hearing, the  
9 prosecutors did not have complete translations of the Lao/Hmong calls  
10 at issue, including the calls related to the June 2 Meeting. There  
11 has been no showing that prosecutors suppressed anything and no  
12 showing that AUSA Twiss made any sort of deliberate false statement.<sup>65</sup>

13 5. The Spak Interview

14 The defense also suggests that the government's October 31, 2008  
15 Opposition to Defendants' Motion to Compel Discovery misrepresented  
16 facts related to the interview of witness Michael Spak. This claim  
17 likewise misses the mark.

18 Spak was interviewed on August 16, 2007, by and in the presence  
19 of multiple agents, prosecutors and defense attorneys. See Gov. Ex.  
20 MM, 8/16/07 FBI Rpt. Spak stated, among other things:

21 ■ Spak met with Vang Pao, Ger Vang and Ross Milosevic in the  
22 Washington, D.C. area in February 2004 for three or four hours.  
23 Id. at 1-2. Vang Pao communicated in English with occasional  
interpretation assistance by Ger Vang. Id. at 2.

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24 <sup>65</sup>AUSA Twiss made his proffer to the Magistrate Court based on  
25 the evidence then known to him, principally the known English portions  
26 of the communications between the UC and conspirators, and the known  
27 English portions of the wiretap intercepts. Indeed, during bail  
28 proceedings, AUSA Twiss told the Court that the Government did not  
know of any orders by Vang Pao for conspirators to "stand down," but  
that he believed just the opposite, citing in part to then available  
transcripts of June 3, 2007 English conversations between Jack and Lo  
Cha Thao. See Def. Ex. 39, 7/12/07 R.T. 52-59

1 ■ Vang Pao initially characterized the situation in Laos as  
2 unfavorable and stated his objective was to stop the killing of  
3 "his people" by working with the existing government of Laos  
4 (citing examples of ideas). Id. In response, Spak told Vang Pao  
5 that political pressure alone had no chance of working and  
6 recommended a two-pronged political and military approach, the  
7 latter to include direct and indirect sabotage and small-scale  
8 military engagements. Id. Spak indicated that weapons could be  
9 acquired by purchasing them from corrupt Lao military personnel  
10 or "using a gun to get a gun," that is, attacking Lao soldiers to  
11 obtain their weapons. Spak said that Vang Pao understood these  
12 tactics and acknowledged so with his body language by nodding.  
13 Spak further recommended that Vang Pao acquire explosives in  
14 Thailand or through Spak's company [Virtual Defense and  
15 Development International, Inc. ("VDI")]. Id. Spak, at Vang  
16 Pao's request, gave Vang Pao prepared talking points and cost  
17 estimates for military operations. Id. Of significance, Spak  
18 also offered to discuss the military approach with his contacts  
19 in the CIA.<sup>66</sup> Id. Per Spak, Vang Pao agreed. Id.

11 ■ Ger Vang wanted to proceed with military operations, but Vang Pao  
12 did not and repeated his preference that a political solution be  
13 given a chance. Vang Pao believed that a political solution  
14 could work and a military solution could work as well. Id.

14 ■ Vang Pao also discussed the status of the Hmong resistance groups  
15 in Laos. Vang Pao indicated he was in contact with the  
16 commanders of the groups. Id. at 3. Ger Vang produced a map  
17 showing the general locations of the resistance groups as well as  
18 the locations of Lao government troops. Id. Vang Pao explained  
19 that the resistance was not doing well. Vang Pao explained that  
20 the resistance had used its weapons to attack small Lao military  
21 patrols. He noted, however, that the resistance had sought  
22 refuge in the mountains after increased pressure from the Lao  
23 military and that it had older model weapons and limited  
24 ammunition. Id. at 3.

20 ■ After the February 2004 meeting, Spak approached one of his CIA  
21 contacts about military support for the Hmong resistance. Id.  
22 Spak said that his CIA contact forwarded the matter to a CIA  
23 officer in the Southeast Asia unit and that his CIA contact  
24 reported that the response was "good luck." Id. Spak indicated  
25 that he asked for clarification from his CIA contact and received  
26 none. Id. Spak also indicated that he did not forward the CIA  
27 response to Vang Pao or any of his people. Id.

24 In the Government's Opposition, AUSA Twiss advised the Magistrate  
25 Court, in pertinent part:

27 \_\_\_\_\_  
28 <sup>66</sup>Spak told Vang Pao that VDI would not assist with any military  
operation without approval from the United States government. Id. at  
3.

1 In this case, defendant Vang Pao met personally with the  
2 [then] United States Ambassador to Laos, and was told in a  
3 face-to-face meeting that the United States was at peace with  
4 Laos and that military or covert actions against the Government  
5 of Laos was contrary to United States foreign policy. Defendant  
6 Vang Pao also met personally with the [then] Deputy Assistant  
7 Secretary of State for East Asian and Pacific Affairs, and was  
8 told in a face-to-face meeting that the United States was at  
9 peace with Laos and that military or covert actions against the  
10 Government of Laos was contrary to United States foreign policy.

11 Vang Pao and several associates met face-to-face for  
12 virtually an entire day with a retired operations officer for the  
13 CIA, during which Vang Pao and his associates outlined for hours  
14 their operational concept for military operations in Laos against  
15 the Lao government and Lao soldiers. The retired CIA officer  
16 told Vang Pao that he could not assist them without formal  
17 approval of the United States government. The retired CIA  
18 officer asked Vang Pao if Vang Pao wanted him to present Vang  
19 Pao's plan to the CIA, to which Vang Pao responded that he did.

20 The retired CIA officer presented the plan to a CIA  
21 operations officer, who subsequently advised the retired officer  
22 that the CIA would not assist or approve of the plan. Vang Pao  
23 and his associates never were told by the retired officer that  
24 the CIA had approved the plan. The defendants therefore knew  
25 that their plan had not been approved or authorized by the CIA.

26 The defendants specifically were told "No" by government  
27 officials, including the Ambassador to Laos and the Deputy  
28 Assistant Secretary of State for East Asia and the Pacific, and  
by implication by the CIA because they knew that their plan was  
presented to the CIA and they never were told that it was  
approved or authorized. The defendants cannot now be heard to  
say that they did not know that the United States was at peace  
with Laos at the time of their actions in the period between 2004  
and the present.

Def. Ex. 79, 10/31/08 Opposition at 26-27 (emphasis added).

At bar, the defense seemingly takes issue with the suggestion by  
AUSA Twiss that Vang Pao mentioned military operations against the Lao  
government during the February 2004 meeting with Mr. Spak and others.  
(Mot. at 26.) To support this contention, defendants submit a  
December 2008 declaration from Mr. Spak stating, that "Vang Pao  
outlined his political plan and never mentioned military operations  
against the Lao government or Lao soldiers." Id. (quoting Def. Ex.  
80, Spak Declaration).

1 AUSA Twiss did not deliberately or recklessly misstate the Spak  
2 interview in the Government's Discovery Opposition. Per the August  
3 2007 FBI interview report: Vang Pao recognized that a military  
4 solution could work; acknowledged (through his body language) that he  
5 understood Spak's recommendation that Vang Pao should use a military  
6 track in Laos (of direct and indirect sabotage and small-scale  
7 military engagements); and authorized Spak to contact the CIA for the  
8 purpose of discussing a military approach.<sup>67</sup> AUSA Twiss certainly had  
9 a good faith basis to suggest in the October 2008 Opposition that Vang  
10 Pao had discussed military operations in Laos in February 2004.<sup>68</sup>

11 Moreover, defendants have failed to demonstrate how any purported  
12 misstatements by AUSA Twiss were at all material to the discovery  
13 motion. The government made its remarks regarding the Spak interview  
14 in a portion of its Opposition to Defendants' Motion to Compel  
15

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16 <sup>67</sup>The defense seems to suggest that it was inaccurate to suggest  
17 that the CIA would not assist or approve of the plan. (Mot. at 26.)  
18 The government disagrees. The reasonable interpretation of the  
19 response from the CIA contact, i.e., "good luck," is that the CIA  
would not assist or approve military operations in Laos.

20 The defense argues that it was inaccurate for AUSA Twiss to  
21 suggest that Vang Pao was aware of the CIA's view. (Mot. at 26.)  
22 Given that Spak did not communicate back with Vang Pao about Spak's  
23 idea of a potential CIA approved "military track," the fair inference  
24 is that Vang Pao knew it was not approved by the CIA.

25 <sup>68</sup>The defense and Mr. Spak suggest that their recollection of  
26 what Mr. Spak said during his August 2007 interview is different than  
27 the recollections of the government agents and attorneys who were  
28 present. Most pointedly, Mr. Spak suggests in his December 2008  
declaration that Vang Pao never mentioned military operations against  
the Lao government during the 2004 meeting in question (Mot. at 26 and  
n. 112), while law enforcement agents recall otherwise. The Court  
need not resolve the issue of what Spak said during his August 2007  
interview. The narrow question presented in this motion is whether  
AUSA Twiss, when he submitted the October 2008 Opposition, made an  
intentional or reckless misstatement regarding the Spak interview  
based on the information then known to him. He did not.

1 Discovery related to the topic of whether the United States was at  
2 peace or at war during the time period of the indictment and whether  
3 the defendants were entitled to discovery related thereto. Def. Ex.  
4 79, 10/31/08 Opposition at 19-27. It should be clear from the quoted  
5 portion of the brief, supra, that the government proffered the Spak  
6 statements to demonstrate to the Magistrate Court that Vang Pao had  
7 been put on notice that the United States was at peace with Laos. The  
8 details of whether Vang Pao actually made affirmative statements  
9 regarding support of military operations, etc., were and are not at  
10 issue in connection with the discovery motion.

11 Finally, the defense filed a reply brief in connection with the  
12 discovery motion as well as the declaration of Mr. Spak to present its  
13 perspective on this issue. See Def. Ex. 80, Spak. Decl. As of the  
14 filing of this brief, the discovery motion remains under submission.

15 In short, AUSA Twiss did not make a deliberate or reckless  
16 material false statement in connection with the Spak interview.

17 C. Summation

18 To recap, AUSA Twiss did not make any sort of material false  
19 statements to judicial officers in connection with pretrial  
20 proceedings. In addition, the purported falsities have not caused any  
21 demonstrable prejudice to defendants. Dismissal on these grounds is  
22 plainly unwarranted.

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VII.

CONCLUSION

In summary, defendants have failed to demonstrate that law enforcement agents or prosecutors in this case engaged in any sort of misconduct, much less conduct that would violate due process standards. Law enforcement agents and prosecutors in this case have done exactly what their sworn duties require: they have vigorously, fairly and professionally investigated extremely serious criminal conspiracies and are prosecuting the culpable conspirators with equal vigor, fairness and professionalism. The defense motion to dismiss is devoid of merit and should be denied.

Dated: April 6, 2009

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