UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	)	
	)	**No. 2:15-cr-155**
v.	)	**Hon. William H. Walls**
	)	
ROBERT MENENDEZ and SALOMON MELGEN,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS ALLEGING MISCONDUCT
(Mot. Nos. 3, 5, & 6; Dkt. Nos. 50, 52, & 53)

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INTRODUCTION

The charges in this case are the result of an exhaustive, focused, and disciplined investigation by career prosecutors and professional law enforcement agents over the course of more than two years. The corrupt relationship that the investigation uncovered is laid out in more than 200 paragraphs of detailed factual allegations in the indictment. It starts with the long-running stream of bribes that defendant Robert Menendez solicited and accepted from defendant Salomon Melgen, including luxurious international travel to the Dominican Republic and Paris, and hundreds of thousands of dollars of campaign contributions. The indictment then turns to the repeated and substantial use of defendant Menendez's power and influence to further the personal whims and financial interests of defendant Melgen. No ordinary constituent from New Jersey received the same treatment, and the *quid pro quo* outlined in the indictment is clear and unmistakable.

The motions filed by the defendants do nothing to dilute or undermine those hard facts, which are based on such evidence as contemporaneous emails, financial and travel records, and eyewitness accounts. Instead, the defendants resort to attacks on the *way* the Government gathered and presented this evidence to the grand jury; indeed, wishing mightily that the investigation itself had never taken place, they challenge even the way it got started. Despite the sensational and histrionic headings in their motions, the defendants' allegations of misconduct prove to be naked rhetoric that conflicts with the facts and the law. In their motions to dismiss, the defendants allege that the Government engaged in misconduct by performing such lawfully permitted and routine practices as asking leading questions in the grand jury, confronting witnesses with documents that contradict their testimony, and serving grand jury subpoenas after witness interviews. There was no misconduct in any of it, and the defendants' careless use of the evidence and caselaw to support

their attacks accomplishes little more than the continued erosion of their credibility, which began with defendant Menendez's remarkable and demonstrably false public statement that he had only traveled on defendant Melgen's plane on three occasions.

As the defendants note, this investigation began with serious and specific allegations involving child prostitution. Presented with that information, the Government, including experienced prosecutors from the Department of Justice's Child Exploitation and Obscenity Section, took the only responsible course possible—it conducted an investigation. While those allegations have not resulted in any criminal charges, there can be no question that the Government has an obligation to take such allegations regarding potential harm to minors very seriously, regardless of who the alleged perpetrators may be. That is precisely what the Government did here, and there was nothing improper about it, despite the defendants' palpable regret that the investigation ultimately led to the discovery of their corrupt relationship.

Although the Government presented the grand jury with dozens of witnesses—totaling more than 2,900 pages of transcripts—and hundreds of exhibits totaling more than 1,300 pages, the defendants allege that the Government engaged in misconduct by, among other things, not presenting enough witnesses to the grand jury. Reading the defendants' motions, one would think that the Government did nothing in this grand jury investigation other than call a single FBI agent to summarize the evidence, and then ask the grand jury to return an indictment. That is simply not the case. In fact, the Government called so many witnesses before the grand jury that on several occasions the defendants complained that the Government was calling too many witnesses. *See, e.g.*, Ex. 1 ("[W]e are asking that you forego calling more witnesses."); Oral Argument at 25:02-27, *In re Grand Jury (Robert Menendez)*, 608 F. App'x 99 (3d Cir. 2015) (No. 14-4678) (Counsel for Def. Menendez: "I was shocked, actually, as someone who has done this for two-and-a-half

decades . . . that they then said, and by the way, we want to re-ask them in the grand jury."), *available at* http://www2.ca3.uscourts.gov/oralargument/audio/14-4678InReGrandJury.mp3 (last visited Aug. 23, 2015). Although post-indictment the defendants suggest that the Government called just a single summary witness, *see* Dkt. No. 50-1 at 20-21, pre-indictment the defendants argued that the Government should have done precisely that, *see* Reply Br. of Appellant at 4 n.4, *In re Grand Jury (Robert Menendez)*, 608 F. App'x 99 (No. 14-4678), Dkt. No. 03111877348 ("If the witness answered the questions at the interview, those answers could be conveyed to the grand jury through a case agent."); *see also* Oral Argument at 25:24-35, *In re Grand Jury (Robert Menendez)*, 608 F. App'x 99 (No. 14-4678) (Counsel for Def. Menendez: "How many times do you know that cases are a probable cause without having people in the grand jury? Happens all the time.").

Notably, none of the defendants' pre-indictment statements are included in their post-indictment motions, despite their obvious relevance; nor is there any attempt to reconcile their inconsistency. The defendants' duplicity demonstrates that they are not advancing principled arguments. Rather, they are merely advancing results-oriented arguments captioned by sensational section headings in motions that read more like press releases than legal briefs.

Perhaps most troubling, the defendants accuse the Government of concealing evidence from the grand jury, while themselves concealing from the Court evidence material to their allegations. Specifically, the defendants allege that the Government elicited perjured testimony before the grand jury, and support their claim by relying on selective snippets of witness statements, omitting material evidence that contradicts their claims, and making creative use of ellipses in their quotations from the record. As described in detail below, however, the defendants fail to advise the Court of evidence that unambiguously contradicts their assertions—including

evidence contained in the very same documents that they quote to the Court. The testimony that the defendants claim to be perjury is, in fact, corroborated by unimpeachable witness statements and the defendants' own contemporaneous emails and memoranda, all of which contradict the defendants' post-indictment characterization of their pre-indictment conduct, and none of which are included in the defendants' analysis. Although the defendants omit these documents from their motions, they have been in the defendants' possession since at least April 9. At bottom, what the defendants characterize as perjury is merely evidence that conflicts with their public protestations of innocence.

The defendants' lack of candor demonstrates that they are so eager to allege misconduct that they are willing to misrepresent the facts and conceal material evidence in order to do so. The defendants' misconduct motions are not only meritless, they are predicated on false factual assertions. They should be denied.

I. THE DEFENDANTS' CORRUPTION CHARGES ARE NOT TAINTED BY UNPROVEN ALLEGATIONS THEY SOLICITED UNDERAGE PROSTITUTES. (Mot. No. 6, Dkt. No. 53.)

Presented with specific, corroborated allegations that defendants Menendez and Melgen had sex with underage prostitutes in the Dominican Republic, the Government responsibly and dutifully investigated those serious allegations. The indictment here, of course, charges only corruption and does not include any allegations of soliciting underage prostitution. The defendants argue, however, that the indictment should be dismissed because the entire investigation was tainted by false allegations of underage prostitution—allegations they assert were likely initiated by political enemies. Dkt. No. 53-1 at 3-5. Notably, this section of the defendants' brief includes no citations to any legal authority supporting their position that an indictment should be dismissed if the investigation was predicated on unproven allegations or allegations made by someone with questionable motives.

In fact, there is no legal basis for such a position, which would result in the dismissal of countless indictments brought around the country initiated by tips from a scorned lover, disgruntled employee, rival gang member, or cheated business partner. *See United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (observing that the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"). Indeed, "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence[,] . . . or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination." *United States v. Calandra*, 414 U.S. 338, 345 (1974); *see also id.* at 344-45 ("The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered."). The Supreme Court has held that the grand jury's investigative power is broad in scope, recognizing that an investigation "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." *Id.* at 344.

The defendants concede as much when they acknowledge that "[i]n the normal course, it would not matter how the prosecution chooses to initiate an investigation, whether from an eyewitness report, anonymous tip or referral from another agency." Dkt. No. 53-1 at 3. This case and these defendants, however, are not entitled to anything other than "the normal course." The defendants present their case as exceptional because the allegations of underage prostitution are "such easily disprovable allegations about something that would hardly be a federal crime even had it been true." *Id.* As an initial matter, it is most certainly a federal crime to leave the country for the purpose of engaging in a commercial sex act with a minor, and the defendants' suggestion to the contrary is unsettling. *See* 18 U.S.C. §§ 1952, 1591(a)(1), & 2421. Furthermore, the

defendants' dismissive treatment of these allegations is troubling. Allegations of human trafficking and underage prostitution must be taken seriously and cannot be dismissed merely because the alleged perpetrator is a United States Senator. Given the nature and seriousness of the allegations, in addition to the corroborating evidence, it would have been irresponsible not to investigate.

As would be done in the normal course, the Government took responsible steps to investigate these serious criminal allegations, which were not so "easily disprovable," as the defendants suggest. Some eyewitnesses described a party attended by defendant Melgen in Casa de Campo—where defendant Melgen has a home and where defendant Menendez often visited—involving prostitutes. *See* Ex. 2 at 2; Ex. 3 at 1-2.. Furthermore, defendant Melgen has flown numerous young women from the United States and from other countries on his private jet to the Dominican Republic. Many of these young women receive substantial financial support from defendant Melgen. For example, defendant Melgen flew two young women—whom he met while they were performing at a South Florida "Gentlemen's" Club, *see* Ex. 4 at 1-2—on his private jet to his villa in Casa de Campo the day after paying one young woman $1,000 and the other young woman $2,000. *See* Ex. 5. Indeed, one of defendant Melgen's pilots described "young girls" who "look[ed] like escorts" traveling at various times on defendant Melgen's private jet. Ex. 6 at 9:7-16. Some young women who received substantial sums of money from defendant Melgen were in the same place as defendant Menendez at the same time. Moreover, when the allegations were first reported, defendant Menendez defended himself with public statements that are easily disprovable. Specifically, he repeated several times that he had only flown on defendant Melgen's private jet on three occasions. That representation is demonstrably false. Confronted with corroborating evidence of such serious crimes, it would have been an inexcusable abdication of

responsibility not to investigate these allegations. *Cf. Calandra*, 414 U.S. at 343 (observing that the scope of the grand jury's "inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime" (internal quotation marks omitted)).

In this section of the defendants' motion, the defendants assert that the Government was "so intent on finding something, anything, with which to charge Senator Menendez, the investigators sought anyone they could – no matter that person's own wrongdoing – to solicit dirt on Senator Menendez." Dkt. No. 53-1 at 5. The defendants' citation in support of that accusation, however, is a post-indictment news article reporting an uncorroborated incident that allegedly occurred years before this investigation started and involved law enforcement officials other than the ones who led this investigation. *See id.* at 5-6 n.7 (citing post-indictment stories about a former government employee convicted of corruption who claims he was offered a deal by unidentified law enforcement officials if he provided incriminating evidence on defendant Menendez). The defendants' reliance on an uncorroborated claim factually and temporally unrelated to this investigation demonstrates the infirmity of the inference they seek to draw. It cannot be ignored that it is in fact the defendants who are relying on someone's uncorroborated claim, "no matter that person's own wrongdoing," in order to "solicit dirt" on law enforcement officials.

The defendants' motion merely amounts to a complaint that the Government investigated them at all. *See id.* at 3-6. The defendants have not identified a single fact or legal authority that entitles them to exceptional treatment. Therefore, this case should be treated "in the normal course," and the defendants' claim here should be rejected.

II. EVIDENCE CONCERNING DEFENDANT MELGEN'S LAVISH GIFTS TO DEFENDANT MENENDEZ, AND TESTIMONY BY THE FEMALE BENEFICIARIES OF THE DEFENDANTS' CORRUPT RELATIONSHIP, IS RELEVANT TO THIS BRIBERY CASE. (Mot. No. 3, Dkt. No. 50; Mot. No. 6, Dkt. No. 53.)

During its investigation, the Government interviewed witnesses who had personal knowledge about the things of value defendant Melgen provided to defendant Menendez. The Government also interviewed witnesses who had personal knowledge about the official acts defendant Menendez took to benefit defendant Melgen. Some of these witnesses were the defendants' girlfriends, who enjoyed the fruits—both the things of value and the official acts—of the defendants' bribery scheme. All of the Government's questions to these witnesses in the grand jury related directly to the defendants' bribery scheme.

The defendants assert that the indictment should be dismissed because the Government asked witnesses in the grand jury about the nature of the things of value that defendant Melgen provided to defendant Menendez. They further complain that the Government elicited testimony establishing that defendant Melgen's girlfriends received visas with defendant Menendez's assistance, and that defendant Menendez's girlfriends enjoyed with him private jets and Caribbean villas that defendant Melgen provided. Specifically, the defendants complain that "the prosecution flooded the grand jury proceedings with inflammatory questions regarding sexual relationships, affairs, and lavish gifts which are unrelated to the charges contemplated by the Government." Dkt. No. 53-1 at 10. The questions to which the defendants object relate directly to the conduct charged in the indictment, and are integral to the corrupt nature of the relationship between the defendants. Moreover, the girlfriends who testified in the grand jury are eyewitnesses to and beneficiaries of the corrupt relationship between the defendants.

As a preliminary matter, because of the serious nature of the underage prostitution allegations and the evidence corroborating them, the Government had a duty to investigate those

allegations. The Supreme Court has observed that "[t]he function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991); *see also id.* ("As a necessary consequence of its investigatory function, the grand jury paints with a broad brush."). Importantly, the Supreme Court has emphasized that "[a] grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)). The defendants, however, object to the exchange with defendant Melgen's pilot who testified that "young girls" who "look[ed] like escorts" traveled on defendant Melgen's private jet, and elaborated that "[e]very time they would be different girls." Dkt. No. 53-1 at 13 (citing Butt Tr. (03/07/13) at 8:24-9:22). The Government cannot ignore this testimony merely because it appears inflammatory. If the defendants' standard were employed consistently, then violations of our federal statutes criminalizing child exploitation would never be prosecuted.

Most of the questions to which the defendants object, however, have nothing to do with an investigation into underage prostitution. The defendants object, for example, to the fact that the Government presented to the grand jury three of defendant Melgen's girlfriends and three of defendant Menendez's girlfriends, averring that these six witnesses have nothing to do with "the real issues" in this case. *Id.* at 10-11; *see also* Dkt. No. 50-1 at 33 ("The prosecution called every woman it could find who could provide irrelevant and prejudicial testimony concerning their alleged relationships with Dr. Melgen."). These girlfriends, however, are direct witnesses to the corrupt relationship between the defendants, and their testimony is reflected in many of the indictment's paragraphs. It should not be contested that when there are allegations of criminal

activity, law enforcement must interview the individuals who witnessed the conduct under investigation. This basic investigative tool is not limited merely because a witness was the defendant's girlfriend or mistress.

Moreover, the Government did not interview or subpoena all of defendant Melgen's or defendant Menendez's girlfriends. Rather, the Government only subpoenaed defendant Melgen's girlfriends who were the beneficiaries of defendant Menendez's official actions, and only defendant Menendez's girlfriends who enjoyed with him the things of value provided by defendant Melgen. It cannot be ignored that part of the corrupt exchange involved defendant Menendez using the power of his Senate office to help defendant Melgen bring his foreign girlfriends into the United States, while defendant Melgen used his wealth to help defendant Menendez take his American girlfriends on exotic overseas vacations. The nature of these relationships is highly relevant to the defendants' motives, and to the value of each gift and official act. This goes directly to the heart of "the real issues" in this case.

The defendants argue that evidence of defendant Melgen's extramarital affairs is irrelevant to the charges. *See* Dkt. No. 53-1 at 26 ("[S]uch testimony is completely irrelevant to the charges, as it implies wrongdoing by suggesting infidelity."). Otherwise relevant evidence, however, does not become irrelevant merely because it involves an extramarital affair, and it would be disingenuous for the Government to sanitize the evidence in its presentation to the grand jury.

The defendants characterize as further misconduct the Government "implying some illicit relationship between Senator Menendez and [a Menendez staffer] (completely unrelated to an improper bribery scheme with Dr. Melgen)." *Id.* at 13. The staffer and defendant Menendez stayed together at defendant Melgen's villa in Casa de Campo, twice, and they traveled together on defendant Melgen's private jet—on flights that defendant Menendez did not pay for or report,

and continued to conceal after the allegations surfaced. Therefore, she falls into that category of witness who enjoyed with defendant Menendez the things of value provided by defendant Melgen. Her testimony, therefore, is not only relevant to the defendants' bribery scheme, it is evidence of its existence.

In perhaps their most frivolous argument in this section, the defendants accuse the Government of misconduct by eliciting testimony that is so obviously integral to the corruption charges that it is the predicate for multiple counts in the indictment. Specifically, the defendants urge the indictment's dismissal because the Government elicited "immaterial and prejudicial testimony from numerous pilots about supposedly luxurious private planes . . . and from numerous guests who visited the Melgens in Casa de Campo about how supposedly luxurious their home was." Dkt. No. 50-1 at 33-34. The indictment expressly charges that defendant Melgen bribed defendant Menendez with, among other things, flights on his private planes and access to his home in Casa de Campo. *See, e.g.*, Dkt. No. 1 (Indictment), ¶ 12. The defendants would obviously prefer if no one—from the grand jury, to the trial jury, to the Court—focused on the nature of the bribes that were given, but the grand jury was certainly entitled to this evidence. Indeed, it should hardly be contested that evidence about the quality of bribes is relevant in a bribery case. *See, e.g.*, *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir. 1983) (approving instruction in gratuities case that "focus[ed] on the value that the defendants subjectively attached to the items received," due to the "broad meaning" of "anything of value"). Thus, this argument should be rejected.

III. THE DEFENDANTS PROVIDE NO EVIDENCE THAT THE GRAND JURY THAT INDICTED THEM WAS BIASED, AND THEY HAVE NO CONSTITUTIONAL RIGHT TO AN "EXTENSIVELY SCREENED" GRAND JURY. (Mot. No. 5, Dkt. No. 52.)

The defendants argue that the indictment should be dismissed because the Government did not sufficiently screen the grand jury for bias. Specifically, the defendants contend that "extensive

grand juror screening was necessary," identical to the procedures used to empanel a petit jury, "given Senator Menendez's stature." Dkt. No. 52-1 at 5. The defendants further assert that "specific questions should have been asked to elicit the conscious *and unconscious* prejudices of the grand jurors," *id.* at 14 (emphasis added), without identifying the specific questions that should have been used to elicit those prejudices. The defendants advance the remarkable legal position that "[i]f the government did not conduct a proper *voir dire* in screening the grand jury that indicted Defendants, the Constitution *mandates* that this Court dismiss the Indictment." *Id.* (emphasis added). The defendants fail to identify a single case that supports this purported constitutional mandate. Indeed, there is none. *See R. Enterprises*, 498 U.S. at 298 ("This Court has emphasized on numerous occasions that many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings."). In fact, many courts have rejected the constitutional mandate the defendants advance here. *See, e.g.*, *Schwartz v. U.S. Dep't of Justice*, 494 F. Supp. 1268, 1271, 1274-75 (E.D. Pa 1980) (denying motion to stay grand jury proceedings made by prominent member of the community who argued pervasive publicity and extensive leaks of allegations created "inherent and incurable prejudice" in the grand jury); *In re Grand Jury Investigation of Frank P. Balistrieri*, 503 F. Supp. 1112, 1113-14 (E.D. Wis. 1980) (denying plaintiff's request that because of substantial publicity, the court should *voir dire* the grand jury); *U.S. ex rel. Dessus v. Pennsylvania*, 316 F. Supp. 411, 419 (E.D. Pa 1970) (denying plaintiff's request to screen grand jurors because "[n]either federal nor state law permit an investigation of prospective members of a grand jury to determine possible bias since neither federal nor state law permit a challenge for cause on such grounds").

It is well-settled that facially valid indictments are entitled to a presumption of regularity. *See Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974); *Costello v. United States*, 350 U.S.

359, 363 (1956). In fact, the only specific grounds on which the Supreme Court has recognized a grand jury panel to be biased to the point necessitating dismissal of the indictment have been in cases of structural race or sex discrimination. *See Vazquez v. Hillery*, 474 U.S. 254 (1986) (race discrimination); *Ballard v. United States*, 329 U.S. 187 (1946) (sex discrimination). By contrast, the defendants rely on public opinion polls reflecting decreasing political support for defendant Menendez. Dkt. No. 52-1 at 8-9. As an initial matter, the defendants reliance on polls conducted post-indictment, as well as on post-indictment media coverage, is clearly inapposite for determining bias in the grand jury. *See id.* at 9 n.13 (citing news article from April 16, 2015, reporting poll conducted April 9-14, two weeks after the indictment); *id.* at 12 (representing that the "initial court date was covered by over 100 reporters and photographers"). Furthermore, pre-indictment polls evaluating defendant Menendez's popularity among a sampling of just over 1,000 New Jersey voters—and which found positive approval ratings—hardly rise to the level of overcoming the presumption of regularity. *See, e.g.*, *id.* at 9 n.12 (citing "Clinton Blooms Over Christie In Garden State, Quinnipiac University Poll Finds; Booker Tops Little-Known Challenger By 10 Points," Quinnipiac Univ. Polling Inst. (Aug. 6, 2014), http://www.quinnipiac.edu/images/polling/nj/nj08062014_nt63gr.pdf (polling 1,148 New Jersey voters and finding defendant Menendez had a positive approval rating of 45 to 34 percent)). If anything, the consistently positive approval ratings suggest the grand jury was biased in favor of defendant Menendez. Moreover, pre-indictment media attention reporting the existence of a grand jury investigation could not have created "a likelihood of grand jury bias," since the media reports merely confirmed the existence of an investigation that the grand jurors knew about as a result of their direct participation in it.

The defendants' legal position is not only invalid, it is impractical. As the defendants note, "there is a likelihood that a subset of the people called to jury service would begin with strong feelings *for* or against the Senator." *Id.* at 1 (emphasis added). Therefore, a consistent application of the defendants' analysis means that a grand juror was just as likely to reject an indictment because of bias favorable to defendant Menendez, and a consistent application of the defendants' constitutional mandate would require excluding from the grand jury individuals biased in favor of defendant Menendez, consciously or unconsciously. There should be no doubt that whatever screening the Government employed to empanel a grand jury free of conscious or unconscious prejudices, the defendants would have challenged that screening as insufficient and improper, particularly if it resulted in the dismissal of grand jurors biased in favor of defendant Menendez. The defendants, therefore, are not advancing a principled or well-developed position.

The impracticality of the defendants' proposed constitutional mandate is perhaps best illustrated by the defendants' inconsistent proposals. On one page of their motion, the defendants propose "an extensive screening questionnaire and follow-up *voir dire*," *id.* at 13 (internal quotation marks omitted), while on the very next page the defendants assert that "a show of hands before proceedings began" could have been sufficient, *id.* at 14 n.24. Notably, the defendants fail to identify the question that would have elicited the showing of a hand, or how a question eliciting the showing of a hand would have sufficiently elicited the unconscious prejudices of the grand jurors.

The defendants invite this Court to be the first to apply the comprehensive *voir dire* procedures used to empanel a petit jury to the empanelment of a grand jury. Almost all of the cases the defendants rely on in support of their constitutional mandate, however, discuss the procedures used to empanel a fair and impartial petit jury; and one focuses on fundamental

unfairness in the grand jury process due to racial discrimination in grand jury selection. *See id.* at 13-14; *but see id.* at 5 (citing a case discussing the dismissal of a grand juror where the grand juror "might have been one of the aggrieved parties against whom the alleged conspiracy was directed"). The Government agrees that extensive screening and *voir dire* should be used to empanel a fair and impartial petit jury in this case. The defendants' analysis, however, does not support the assertion that the grand jury was biased or that the indictment should be dismissed. Thus, their invitation should be declined.

IV. THE GOVERNMENT ELICITED TRUTHFUL TESTIMONY FROM AGENT SHEEHY THAT IS CORROBORATED BY UNIMPEACHABLE WITNESS STATEMENTS AND CONTEMPORANEOUS RECORDS. (Mot. No. 3, Dkt. No. 50.)

The evidence establishes that defendant Menendez advocated on behalf of defendant Melgen in his $8.9 million Medicare billing dispute to officials at the U.S. Department of Health and Human Services (HHS). That evidence comes in the form of witness statements by the HHS officials who met with defendant Menendez, as well as the defendants' and their staffers' emails and memoranda. The defendants nevertheless accuse the Government of eliciting false testimony from Special Agent Gregory Sheehy—testimony that defendant Menendez's meetings with HHS officials were an effort to benefit defendant Melgen. Specifically, among the more than 2,900 pages of grand jury testimony, the defendants have identified eight instances of what they allege to be perjured testimony. Their allegations, however, are dependent upon the concealment of material evidence that contradicts their accusations and corroborates Agent Sheehy's testimony. Not only does the evidence the defendants omit from their motion demonstrate the veracity of Agent Sheehy's testimony, their concealment of it undermines the credibility of their irresponsible accusations. In short, Agent Sheehy did not give false or misleading testimony.

Of the eight instances the defendants identify, six provide the same substantive, truthful information, one is a typographical error from the court reporter—a typo that made the testimony less incriminating—and one involves testimony that the defendants concede to be true. The eight allegedly perjurious statements are as follows:

- "Did [CMS Acting Administrator] Marilyn Tavenner confirm that during this meeting, Dr. Melgen [sic] was advocating on behalf of Dr. Melgen and his Medicare dispute?" "Yes." *See* Dkt. No. 50-1 at 9 (quoting Sheehy Tr. (05/07/14) at 58).

- "And did Jonathan Blum confirm during the interview that the purpose of this call [with Blum in June 2009] that Senator Menendez initiated, that his office initiated, was to advocate on behalf of Dr. Melgen?" "Yes." *See id.* at 9 n.4 (quoting Sheehy Tr. (05/07/14) at 57-58).

- "Senator Menendez made the arguments on behalf of Dr. Melgen, similar arguments that had previously been made to Jonathan Blum and Marilyn Tavenner." *Id.* at 15 (quoting Sheehy Tr. (05/07/14) at 65).

- "Was it also clear that the meeting [with HHS Secretary Kathleen Sebelius] was about Dr. Melgen?" "Perfectly clear. . . . It was all about Dr. Melgen, the meeting." *Id.* at 15 (quoting Sheehy Tr. (05/07/14) at 66).

- "[D]id your investigation reveal that Senator Menendez met with HHS Secretary Sebelius and Senator Reid about Dr. Melgen's Medicare billing dispute?" "Yes." *Id.* at 16 (quoting Sheehy Tr. (04/01/15) at 23).

- "And did your investigation reveal that during that meeting Senator Menendez advocated on behalf of Dr. Melgen's position in his Medicare billing dispute focusing on Dr. Melgen's specific case and asserting that Dr. Melgen was being treated unfairly?" "Yes." *Id.* at 16 (quoting Sheehy Tr. (04/01/15) at 23).

- "Meaning specifically that Marilyn Tavenner confirmed that she told Senator Menendez that there was nothing they could do, they were not going to change their policy, they weren't going to change their decision with respect to Dr. Melgen and his Medicare dispute?" "Correct. And they *wouldn't* allow the appeal process to go forward." *See id.* at 13 (quoting Sheehy Tr. (05/07/14) at 59) (emphasis added).

- "[Senator Harkin's] office did not advocate on behalf of Dr. Melgen." *Id.* at 19 n.13 (quoting Sheehy Tr. (05/07/14) at 49).

Agent Sheehy's testimony is truthful and corroborated by witness statements and numerous grand jury exhibits, which the defendants omit from their analysis. The first six statements all

relate to defendant Menendez's meetings with HHS officials, the penultimate statement was a typographical error, and the final statement is indisputably true.

A. Defendant Menendez Advocated on Behalf of Defendant Melgen to HHS Officials.

In support of their argument that the first six statements are false, the defendants aver that "the agent's testimony contradicts the government's own records of witness interviews." *Id.* at 2. Specifically, the defendants rely on selective snippets of statements memorialized in FBI-302 reports to argue that Agent Sheehy's testimony is inconsistent with information in those reports and, therefore, false. *See id.* at 7-19. The most relevant information to the defendants' claims, however, is the information they omit from their motion.

The defendants omit from their analysis numerous grand jury exhibits and information from the 302s of Secretary Kathleen Sebelius, Acting Administrator Marilyn Tavenner, CMS Director Jonathan Blum, and Senator Harry Reid that contradict their characterization of defendant Menendez's conduct, and corroborate Agent Sheehy's testimony. For instance, Secretary Sebelius's 302 memorializes her statement that "Menendez was advocating on behalf of Melgen and used his (Melgen's) situation as an example. Sebelius did not recall Menendez using any other examples other than Melgen's example." Ex. 7 at 4. Although that statement is found in the Sebelius 302, it is found nowhere in the defendants' motion.[1] Significantly, the defendants also

[1] Moreover, in March 2015, Politico published an article after interviewing Secretary Sebelius about her meeting with defendant Menendez in August 2012. Importantly, the article notes that "[a]ccording to Sebelius, the topic of the meeting was a multimillion dollar billing dispute between the Centers for Medicare and Medicaid Services and a company run by Melgen, a Florida ophthalmologist." Manu Raju, *Robert Menenedez case: Kathleen Sebelius also questioned by feds*, *Politico* (Mar 9, 2015), http://www.politico.com/story/2015/03/robert-menendez-kathleen-sebelius-criminal-probe-115919.html (last visited Aug. 23, 2015).

The article also reports Secretary Sebelius as saying that "she had been told the purpose of the meeting was to discuss 'billing issues with Dr. Melgen,' raising red flags . . . ." *Id.* The timing of Secretary Sebelius' interview—two years after she was interviewed by the FBI—strengthens

omit from their analysis the following language from Acting Administrator Tavenner's 302: "Tavenner first learned about Melgen when Senator Robert Menendez wanted to discuss the issue." Ex. 8 at 2. The defendants not only conceal these material statements from the Court, they brazenly contend that "there was no basis for [the Government's] claim to the grand jury that Tavenner said Senator Menendez was 'advocating on behalf of Dr. Melgen' at that meeting." Dkt. No. 50-1 at 12. Tellingly, although the defendants chose to selectively quote from the 302s, they elected not to provide them to the Court as exhibits to their motions, even though the Government disclosed them to the defendants more than three months before they filed their motions. The Government, however, is providing these 302s to the Court, under seal, in their entirety.

The defendants omit equally relevant information from the Jonathan Blum 302. For instance, the Blum 302 memorializes that "Blum knew that the call [with defendant Menendez] would relate to a doctor in Florida, but Blum was not sure whether he (Blum) knew Melgen's name at that point." Ex. 9 at 2; *see also id.* ("Blum knew that there was an approximately $9 million overpayment involving this doctor and the drug Lucentis."). Inexplicably, the defendants also omit from their motion the fact that, in a call with Blum, defendant Menendez referred to "a doctor in Florida" and argued that "the doctor was being treated unfairly." *Id.* at 3; *cf.* Dkt. No. 50-1 at 16 ("[T]here were no prior arguments on behalf of Dr. Melgen to Blum or Tavener."). The defendants attach much significance to a portion of the Blum 302 that notes defendant Menendez "talk[ed] about policy in general." *See* Dkt. No. 50-1 at 7 (alteration in the defendants' motion). The only time this phrase appears in the Blum 302, however, is in the following quote: "Menendez talked about the policy in general, but it focused on one doctor. It was clear to Blum that Menendez

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the corroboration of Agent Sheehy's grand jury testimony, since her statements to Politico were consistent with the testimony that the defendants allege to be perjured. That is, defendant Menendez's meeting with Secretary Sebelius was indeed about defendant Melgen.

was talking about Melgen, even if no one used Melgen's name." Ex. 9 at 3-4; *see also id.* at 4 ("Blum thought the telephone call with Menendez was strange because it did not involve broad policy questions or a hospital in Menendez' district."). It is stunning that in a motion accusing the Government of perjury, the defendants conceal from the Court material language that substantively alters the meaning of the very language they are using to establish the alleged falsity of the testimony.

Blum participated in the August 2012 meeting between defendant Menendez, Senator Harry Reid, and Secretary Sebelius. Regarding this meeting, the Blum 302 notes that "[t]he same issue (regarding billing for a whole vial, even if it was split between patients) came up in this meeting as [it] came up in Blum's telephone call with Menendez." *Id.* at 5. Importantly, the Blum 302 also notes that "Reid said that he (Reid) became aware of this issue through a close doctor friend in Florida," *id.* at 5, and "[i]t was clear to Blum that Reid and Menendez were talking about Melgen at this meeting," *id.* at 5-6.

In addition, the defendants acknowledge but dismiss the fact that the Tavenner 302 memorializes that she "thought that it was unusual that Menendez was advocating for someone who was not his (Menendez') constituent." Ex. 8 at 4. The defendants minimize the obvious inconsistency this statement presents to their perjury accusations by averring that the agent's notes from this interview "reflect that Tavenner was still just speaking generally, and not with respect to Senator Menendez in particular." Dkt. No. 50-1 at 12. The defendants' creative interpretation of this unambiguous statement strains credulity. In an interview about her meeting with defendant Menendez, it would be a meaningless, non-responsive statement for Acting Administrator Tavenner to opine that, in general, it was unusual for Senators to be advocating on behalf of someone who was not their constituent, particularly when defendant Melgen is not defendant

Menendez's constituent. *Cf.* Ex. 9 at 2 ("Blum tried to figure out why a New Jersey Senator was calling about a Florida doctor.").

The defendants also omit from their analysis the 302 of Senator Harry Reid, who participated in the August 2012 meeting with defendant Menendez and Secretary Sebelius. Significantly, the Reid 302 notes that "Reid learned about Melgen's dispute with CMS through Menendez when Menendez asked Reid to arrange for a meeting with Health and Human Services Secretary Kathleen Sebelius. Menendez brought the request for a meeting to Reid on behalf of Melgen." Ex. 10 at 3. It further memorializes that "Reid believes Melgen's name probably came up during the course of the meeting because Melgen's individual situation was clearly the purpose of the meeting and they would have otherwise been speaking in a vacuum." *Id.*; *see also id.* at 4 ("Reid considered his role in setting up the meeting with Sebelius to be offering assistance to Menendez in order that Menendez might be able to offer assistance to Melgen."). This information obviously conflicts with the defendants' characterization of their conduct, but it strongly corroborates Agent Sheehy's testimony before the grand jury. Remarkably, the defendants omit it from their motion.

This omission is particularly striking in light of the ellipsis the defendants inject into one of their alleged instances of perjury: "Perfectly clear. . . . It was all about Dr. Melgen, the meeting." Dkt. No. 50-1 at 15 (quoting Sheehy Tr. (05/07/14) at 66). The full quotation of Agent Sheehy's testimony reads as follows:

> Perfectly clear. *Senator Reid made it clear that he had set this meeting on behalf of Senator Menendez so that Senator Menendez would have the opportunity to advocate on behalf of Dr. Melgen. He had said something to the effect of we would be speaking in a vacuum if people didn't know it had to do with Dr. Melgen.* It was all about Dr. Melgen, the meeting.

Ex. 11 at 66:13-19 (emphasis added). Bizarrely, the defendants substitute the core of the testimony with an ellipsis, and then characterize everything around the ellipsis as perjury. As the Court can now see, the omitted testimony is drawn directly from Senator Reid's interview, and undermines the defendants' argument. This ellipsis is particularly notable because the defendants do not challenge the veracity of the information that it substitutes.

It is also telling that the defendants ignore the numerous exhibits establishing that defendant Menendez's meetings with HHS officials were indeed about defendant Melgen. For instance, less than two weeks after defendant Menendez's meeting with Acting Administrator Tavenner, and only three days after the meeting with Secretary Sebelius had been requested, defendant Menendez's Chief of Staff sent a message from his gmail account to defendant Menendez's att.blackberry.net account asking if defendant Menendez had informed defendant Melgen that they were organizing a meeting with Secretary Sebelius. Defendant Menendez responded, "Haven't told Dr Melgen yet. Prefer to know when we r meeting her so that I don't raise expectation just in case it falls apart." *See* Ex. 12 at 2. This email was presented to the grand jury, and yet there is no mention of it, nor any mention of the other 305 exhibits presented to the grand jury, in the defendants' analysis, despite their obvious relevance to the defendants' allegations of perjury.

Thus, Agent Sheehy's testimony regarding defendant Menendez's meetings with HHS officials was truthful.

B. The Defendants' Predicate an Allegation of Perjury on a Typographical Error.

The defendants accuse the Government of eliciting perjury when Agent Sheehy testified that Acting Administrator Tavenner said to defendant Menendez that CMS "*wouldn't* allow the appeal process to go forward." *See* Dkt. No. 50-1 at 13 (quoting Sheehy Tr. (05/07/14) at 59) (emphasis added). The defendants contend that Acting Administrator Tavenner never said that

CMS "wouldn't" allow the appeal process to go forward, postulating that "[t]his was simply testimony made up for the grand jury suggesting, without any basis, that Tavenner found Senator Menendez's purported advocacy for Dr. Melgen so outrageous that she halted Dr. Melgen's appeal." *Id.* at 15; *see also id.* at 15 n.10 ("Mr. Koski knew the witness' testimony about Tavenner halting the appeal process was not true, but no effort was made to correct that testimony as he was required to do.").

The alleged perjury is in fact a typographical error. Agent Sheehy did not testify that Acting Administrator Tavenner told defendant Menendez that CMS "*wouldn't* allow the appeal process to go forward." Rather, he testified that CMS "would *then* allow the appeal process to go forward." Ex. 13 (Corrected Transcript) at 59:19-20. After reading the defendants' motion, the Government contacted the court reporter, who is in possession of the audio recording for that testimony. The court reporter listened to the audio tape and confirmed Agent Sheehy's actual testimony.[2] Agent Sheehy's actual testimony is consistent with the evidence, and confirms that defendant Menendez's meeting with Acting Administrator was indeed about defendant Melgen, whose $8.9 million Medicare billing dispute was in the appeals process at the time of the meeting.

It is perhaps not surprising that out of more than 2,900 pages of grand jury testimony, the defendants have identified a typographical error. It is surprising, however, that the defendants would predicate a perjury charge on it.

C. The Defendants Concede that Agent Sheehy's Testimony about the Defendants' Meeting with Senator Harkin is Truthful.

In a footnote, the defendants allege that it was "incomplete and potentially misleading" for Agent Sheehy to testify that Senator Tom Harkin had a staff member reach out to CMS to get more

[2] Although the tape is in the possession of the court reporter, it can be made available for the Court.

information, but "his office did not advocate on behalf of Dr. Melgen." Dkt. No. 50-1 at 19-20 n.13. Notably, the defendants do not contend that this testimony is false; in fact, they concede that it is truthful. Instead, they argue that "Agent Sheehy's testimony may have misled the jury into believing that Senator Harkin had refused a request from Dr. Melgen to assist him." *Id.* at 20 n.13. The nature of the defendants' objection is not entirely clear or well developed. The complete testimony on this topic, however, is informative. Specifically, after meeting with defendant Melgen at defendant Menendez's request, Senator Harkin was left with the impression that defendant Melgen was "screwing Medicare." Ex. 11 at 48:24-49:4. After only 30 minutes with the defendants, "it was clear to [Senator Harkin] that what Dr. Melgen was doing was seeking multiple reimbursements for a single expense and he felt that Dr. Melgen was, in fact, cheating Medicare and he -- it went no further after that single meeting as far as his office did not advocate on behalf of Dr. Melgen." *Id.* at 49:6-11; *see also* Ex. 14 (Harkin 302) at 2. The defendants do not challenge the truthfulness of the full quote, which further demonstrates the falsity of the defendants' accusations and confirms the veracity of Agent Sheehy's testimony.

V. SUMMARY TESTIMONY AND HEARSAY ARE PERMITTED IN THE GRAND JURY. (Mot. No. 3, Dkt. No. 50.)

During its investigation, the Government presented 36 witnesses and over 300 exhibits to the grand jury. The defendants nevertheless contend that the indictment should be dismissed because the Government also used summary testimony and elicited hearsay. Specifically, the defendants assert that "[t]he prosecution's use of a single case agent witness . . . is improper." Dkt. No. 50-1 at 21. Summary testimony and hearsay, however, are lawfully permitted and encouraged practices before the grand jury. As noted above, the defendants' argument is also premised on the inaccurate factual assertion that Agent Sheehy was the only witness. Instead, he was one of three dozen.

More than half a century ago, the Supreme Court rejected the argument advanced by the defendants here. Specifically, in *Costello*, the Supreme Court held that the rule against hearsay does not apply to grand jury proceedings. 350 U.S. at 363-64. The reason for this is that applying the Rules of Evidence to grand jury proceedings interferes with the grand jury's constitutional mandate while doing nothing to strengthen it. *See R. Enterprises*, 498 U.S. at 298 ("Strict observance of trial rules in the context of a grand jury's preliminary investigation 'would result in interminable delay but add nothing to the assurance of a fair trial.'") (quoting *Costello*, 350 U.S. at 364). Indeed, a grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials . . . ." *Calandra*, 414 U.S. at 343; *see also R. Enterprises*, 498 U.S. at 298 ("The same rules that, in an adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an *ex parte* investigation into whether or not there is probable cause to prosecute a particular defendant.").

Even the Benchbook for U.S. District Court Judges, which the defendants include as an exhibit to a different motion, *see* Dkt. No. 52-2, reflects this axiomatic principle. Specifically, the section on grand jury selection includes the following model instruction:

> Hearsay testimony, if deemed by you to be persuasive, may in itself provide a basis for returning an indictment. You must be satisfied only that there is evidence against the accused showing probable cause, even if such evidence is composed of hearsay testimony that might or might not be admissible in evidence at a trial.

BENCHBOOK FOR U.S. DISTRICT COURT JUDGES at 227 ¶ 22, Federal Judicial Center (5th ed. 2007). The defendants concede that "[a]s a matter of law, hearsay and the summary testimony of a case agent are permitted." Dkt. No. 50-1 at 1; *see also id.* at 3 ("While it is true that the prosecution can introduce hearsay to the grand jury . . . ."). Like their "tainted investigation" argument above,

the defendants urge this Court to again stray from "the normal course." The only argument they provide in support of their exceptionalism, however, is premised on a false factual assertion.

The defendants aver that "[t]he prosecution's use of a single case agent witness" was improper. *Id.* at 21; *see also id.* (describing judicial criticism of the "single-witness policy" and asserting, "[t]hat is certainly what happened here"). As described above, however, the Government presented three dozen witnesses to the grand jury. The defendants acknowledged, and made much of, the Government's numerous grand jury witnesses in their motion to transfer venue. *See* Dkt. No. 18-1 at 6-8. Where that acknowledgement is most relevant to their allegations here, however, there is no mention of it.

The defendants' reliance on judicial criticism of a "single-witness policy" is also misleading. The defendants assert that "*[i]n similar circumstances*, the Second Circuit explained," Dkt. No. 50-1 at 21 (emphasis added), followed by a quote from *United States v. Brito*, 907 F.2d 392 (2d Cir. 1990), criticizing the U.S. Attorney's Office's formal *policy* of calling only a single summary witness to the grand jury when seeking an indictment. *Id.* at 395. In *Brito*, the single-witness policy involved a lone witness providing all of the testimony to the grand jury. *Id.* By introducing *Brito*'s quote with the clause, "[i]n similar circumstances," the defendants deceitfully suggest that the circumstances criticized in *Brito* are similar to the circumstances here. In fact, there is nothing similar about these cases. First, *Brito* criticized a formal office policy requiring only a single summary witness when seeking indictments as a matter of course in all investigations. Here, not only is there no such single-witness policy, there was no such single witness. Moreover, whereas in *Brito* the prosecutor called just one witness before the grand jury, here the Government called more than 35.

The defendants include another citation to *Brito* in this section of their brief with the following parenthetical: "(complaining 'the prosecutor, herself was the 'true' witness because the agent's testimony was presented through leading questions.')." Dkt. No. 50-1 at 22-23 (quoting *Brito*, 907 F.2d at 394). The defendants' parenthetical inaccurately suggests that the court was doing the "complaining." In fact, in the language quoted by the defendants, the court was merely explaining the position of the defendant in that case, attributing to him the complaint about the prosecutor being the true witness. Further, in *Brito*, the court did not dismiss the indictment, *see Brito*, 907 F.2d at 395-96, making the case particularly unhelpful to the defendants given that dismissal of the indictment is precisely the relief they seek here, where the Government put before the grand jury dozens more witnesses than the prosecutor called in *Brito*. *See United States v. Weiss*, 752 F.2d 777, 786 (2d Cir. 1985) (perceiving "no error in the prosecution's use of leading questions before the grand jury") (citations omitted).

The Government interviewed more than 200 witnesses in this investigation. There is no doubt that the Government used an FBI witness to provide summary testimony to the grand jury, as permitted by law, in order to avoid the "interminable delay" described in *R. Enterprises* and *Costello*. That practice, however, is not only lawfully permissible, it is so routine that the defendants encouraged its use pre-indictment. Indeed, although now the defendants argue to this Court that the Government engaged in outrageous conduct by using summary testimony, pre-indictment the defendants argued to the Third Circuit and another court in this district that the Government should have used even more summary testimony. *Compare* Dkt. No. 50-1 at 1 (complaining to this Court that "[r]ather than call those witnesses to the grand jury, however, the prosecution had them interviewed by the FBI and then had a case agent testify as to what he, or his colleagues, said they learned from those individuals"), *with* Reply Br. of Appellant at 4 n.4, *In*

re Grand Jury (Robert Menendez), 608 F. App'x 99 (No. 14-4678) ("If the witness answered the questions at the interview, those answers could be conveyed to the grand jury through a case agent."); Ex. 15 at 3 (asserting that because defendant Menendez staffer Kerri "Talbot answered *every* question" in an interview, "a grand jury appearance should not have been needed" (emphasis in original)); *and* Ex. 15 at 8 (asserting that because Menendez staffer Kerri Talbot "appeared for an interview . . . , no grand jury appearance by Ms. Talbot should have occurred"). In fact, while the defendants represent to this Court that "it does not appear there was any good reason not to call live witnesses," Dkt. No. 50-1 at 23, just six months earlier the defendants complained to the Third Circuit that "the Department indicated it would require Talbot (as well as other witnesses) to reappear before the grand jury to answer *all* questions regardless of whether they answered questions in the interview," Br. for Appellant at 20, *In re Grand Jury (Robert Menendez)*, 608 F. App'x 99 (No. 14-4678), Dkt. No. 03111857103 (emphasis in original).

Moreover, the facts most material to the defendants' argument are the ones they omit from their motion. The defendants argue that the use of summary testimony to present evidence of defendant Menendez's meetings with Secretary Sebelius and Acting Administrator Tavenner was particularly improper, complaining that "the only meaningful testimony the grand jury heard about these communications was hearsay that came in through a case agent." Dkt. No. 50-1 at 20. The defendants omit, however, the meaningful emails and memoranda the Government presented to the grand jury, described above and below, which memorialize the purpose of and preparation for defendant Menendez's meetings with Secretary Sebelius and Acting Administrator Tavenner. These contemporaneous emails and memoranda, many of which are authored by defendant Menendez or his staffers, reflect the defendants' contemporaneous intent, and they were powerful

evidence for the grand jury that defendant Menendez's meetings with HHS officials were about defendant Melgen.

For example, on April 6, 2012—two months before defendant Menendez's meeting with Acting Administrator Tavenner—defendant Menendez staffer Michael Barnard sent an email to defendant Menendez's Chief of Staff titled, "Melgan" [sic]. In his email, Mr. Barnard said the following: "Can you circle back with Dr. Melgan's [sic] attorney to find out specifically what they're asking for? I just heard from [the Senior Health Counsel for another Senator], who needs to know because CMS is asking. I know they've changed from their original ask, so we need to know what they're seeking now." Ex. 16. On June 5, 2012, defendant Menendez and his staff met with defendant Melgen's lawyer to prepare for defendant Menendez's meeting with Tavenner, which occurred two days later. Ex. 17. When defendant Menendez could not resolve the matter in defendant Melgen's favor with Acting Administrator Tavenner, he elevated his advocacy to Secretary Sebelius. Before meeting with her, however, he again spoke with defendant Melgen's lawyer in order to prepare for his meeting. In fact, defendant Menendez spoke with defendant Melgen's lawyer the day before his meeting with Secretary Sebelius. Ex. 18. The defendants, however, omit these meaningful emails, and every other exhibit presented to the grand jury, from their analysis.

In sum, the Government's use of hearsay and summary testimony was lawfully permitted and encouraged, and certainly does not amount to misconduct. Moreover, the considerable number of witnesses and exhibits presented to the grand jury enervates the factual premise of the defendants' argument. The defendants' arguments here should be rejected.

VI. THE DEFENDANTS MISCHARACTERIZE LAWFUL AND ORDINARY INVESTIGATIVE STEPS AS INTIMIDATION, COERCION, AND ABUSE. (Mot. No. 6, Dkt. No. 53.)

The defendants further argue that the indictment should be dismissed because the Government intimidated, coerced, and abused witnesses during its investigation. Dkt. No. 53-1 at 6-9, 14-16. As demonstrated below, however, the defendants' examples suggest that they define intimidation as serving a grand jury subpoena, coercion as conducting witness interviews at 9:00 a.m., and abuse as asking follow-up questions. The defendants' objections to investigative steps taken in the normal course of a grand jury inquiry are unavailing, and their continued mischaracterization of the facts further undermines the credibility of their arguments.

The defendants allege that the Government engaged in misconduct warranting the indictment's dismissal based on its treatment of two witnesses from the Dominican Republic (defendant Melgen's girlfriend and her sister) who were visiting the United States on a tourist visa—a visa that was initially denied and then granted only after defendant Menendez intervened. *See* Dkt. No. 1 (Indictment), ¶¶ 80-107. The defendants argue that the indictment should be dismissed because "FBI agents told both sisters they would be required to testify before a grand jury, and if they did not, they could lose their visas or be incarcerated." Dkt. No. 53-1 at 8. As a preliminary matter, it is unclear how informing someone about the consequences of failing to comply with a grand jury subpoena could constitute misconduct. Second, the defendants' representation is false. The sisters were properly served with a grand jury subpoena, and were never told they would be incarcerated. In addition, the defendants omit from their motion the material fact that the sisters retained an American attorney, whom they consulted before testifying in the grand jury and who accompanied them to the grand jury. *Compare* Ex. 19 (R. Polanco Tr.) at 4:2-16 (acknowledging she is represented by an attorney and providing the attorney's name) *and* Ex. 20 (R. Polanco 302) at 1 (memorializing R. Polanco interview at Polanco's attorney's

office), *with* Dkt. No. 53-1 at 8 ("Unaware of their legal rights, the Polanco sisters cooperated with the interrogations.").

The defendants also urge the indictment's dismissal because the "FBI agents visited Senator Menendez's former spouse, Jane Jacobsen, while she was still in her pajamas." Dkt. No. 53-1 at 8. Ms. Jacobsen was indeed still in her pajamas when FBI agents visited her home, but they visited her home at 9:00 a.m. on a weekday. Ex. 21 at 27:3-5 (recounting "when the two men showed up at my house at 8:00 in the morning or 9:00 and I was in my pajamas"). Rule 41 of the Federal Rules of Criminal Procedure defines "daytime" as beginning at 6:00 a.m., authorizing federal agents to execute a search warrant when many people are still in their beds—a far more invasive investigative step than knocking on someone's door and conducting a voluntary interview. Fed. R. Crim. P. 41(a)(2)(B). Here, the FBI waited until 9:00 a.m. on a Wednesday to knock on her door. The fact that defendant Menendez's ex-wife was still in her pajamas at 9:00 a.m. on a weekday is of no moment, and knocking on her door at that reasonable time of day hardly qualifies as "outrageous government conduct" warranting dismissal of the indictment.

The defendants also complain that the FBI agents who interviewed Ms. Jacobsen disrespected the spousal communications privilege. *See* Dkt. No. 53-1 at 8 ("When Ms. Jacobsen asked if the spousal privilege applied to her answers, she was told by the interviewing agent that because she and the Senator were divorced, it 'wasn't clear' if the privilege applied and it was then suggested that in any event, the privilege only protected 'pillow talk.'"). The defendants' representation is demonstrably false. The first paragraph of Ms. Jacobsen's 302, which was drafted the same day that the interview was conducted, says the following:

> Jacobsen was advised that the interviewing agents were not trying to elicit information regarding private conversations she (Jacobsen) had with her ex-husband, Robert Menendez, during the time of their marriage. Jacobsen was told that the interviewing agents wanted Jacobsen to provide information based only on

> what she (Jacobsen) personally experienced, but that she should not provide the interviewing agents with the contents of any private conversations between herself and Menendez during the time of their marriage.

Ex. 22 at 1.

The defendants have been in the possession of the Jacobsen 302 since April 9, *see* Ex. 33, and yet they do not acknowledge it in their motion or include it in their analysis, despite their reliance on 302s in other motions. Moreover, the defendants were particularly interested in reviewing the Jacobsen 302, writing to the Government on May 21, 2014, "we ask that you preserve any FD-302 relating to the agents' interview of Ms. Jacobsen so that Senator Menendez may ensure the agents did not improperly solicit privileged communications." Ex. 23 at 1. It appears, therefore, that the defendants reviewed it, but did not include it, despite its obvious materiality to their allegation and their well-demonstrated proclivity for relying on 302s when they think it is to their advantage.

The defendants further object that "FBI agents also visited Senator Menendez's *seventy-year old* sister, Ms. Caridad Gonzalez, and employed similar aggressive tactics to speak with her." Dkt. No. 53-1 at 8 (emphasis in original). The FBI visited defendant Menendez's sister because she received from defendant Melgen an eight-night stay on Brickell Key, making her a fact witness in this investigation. The "aggressive tactics" the defendants describe, however, were merely serving Ms. Gonzalez with a grand jury subpoena after she participated in an interview, *see* Dkt. No. 53-1 at 8-9, a practice the defendants encourage in other parts of their misconduct motions but discourage here. *Compare* Dkt. No. 53-1 at 9 ("Although Ms. Gonzalez answered the agents' questions, she was still subpoenaed to testify."), *with* Dkt. No. 50-1 at 1 ("Ordinarily and ideally, evidence comes to the grand jury through witnesses with first-hand knowledge.").

The defendants also assert that the indictment should be dismissed because, during its investigation into the underage prostitution allegations, the FBI unilaterally conducted "custodial interrogations of at least three individuals in the Dominican Republic," in violation of Dominican law. Dkt. No. 53-1 at 6. In support of their accusation, the defendants have submitted affidavits from three Dominican nationals that make bizarre and incredible claims, many of which do not even make sense, and none of which relate to this case. *See, e.g.*, Dkt. No. 53-4 (Soraya Velma Sanchez Colon Affidavit) at 8-10 (alleging the FBI asked "if I used marijuana" and "if I was a lesbian," offered a bribe, and "threatened to take away my U.S. Visa if I did not tell them what they wanted to hear"). Moreover, the defendants' allegations are undermined by the very affidavits on which they rely. Specifically, each affidavit describes the participation of the Dominican national police in the investigative steps attributed exclusively to the FBI. *See* Dkt. No. 53-3 (Rosa de Jesus Acosta and Miriam Rivera Affidavit) at 5 (describing interception by and involvement of "the national police" and FBI interviews conducted at the Dominican national police station); Dkt. No. 53-4 at 7 (Soraya Velma Sanchez Colon Affidavit) ("Dominican National Police General Dupree's personal assistant Mendez was present during the interview."). The defendants' allegation that the FBI violated Dominican law is contravened by the affidavits expressly declaring the involvement of Dominican law enforcement. None of these three individuals will be witnesses in this trial, none of their allegations are credible, and none of what they have to say, in their affidavits or elsewhere, has anything to do with the charges, the elements of the crimes, or the evidence.

In perhaps the least credible allegation in this section, the defendants accuse the Government of misconduct by trying "to force [Menendez staffer Patricia] Enright to change her answers, by injecting [their] own conclusory, irrelevant and prejudicial beliefs into the line of

continued questioning as opposed to accepting her answer and moving on." Dkt. No. 53-1 at 14. Specifically, the defendants object to three questions the Government asked Ms. Enright. First, the Government asked Ms. Enright in the grand jury, "What is that based on?" in response to her statement that "[m]y impression is that [defendant Menendez] has the utmost ethics and integrity and trustworthiness." *Id.* (quoting Enright Tr. (07/02/14) at 13:19-15:6). Second, after receiving a non-responsive answer, the Government followed up by asking Ms. Enright about defendant Menendez's "ethics and integrity with respect to accepting gifts," which prompted the response, "I don't know any – I have no factual facts to even speculate or answer that question. I don't know anything about –." *Id.* at 14-15 (quoting Enright Tr. (07/02/14) at 13:19-15:6). And third, in response to the previous answer, the Government clarified, "So you don't have an opinion one way or the other . . . ?" *Id.* at 15 (quoting Enright Tr. (07/02/14) at 13:19-15:6). These are natural follow-up questions relevant to a staffer's basis for forming an opinion regarding defendant Menendez's proclivity for accepting gifts. Merely accepting Ms. Enright's answer and moving on fails to provide the grand jury with any context or foundation by which to evaluate her testimony.

Moreover, there are no "conclusory, irrelevant, and prejudicial beliefs" that the Government injected into this line of inquiry. More fundamentally, the duty of the grand jury is not merely to "accept a witness' answer and move on." The grand jury would abandon its truth-seeking mandate if all it did was accept a witness' uninterrupted, rehearsed, non-responsive narrative, and then "move on" without asking any follow-up questions.

In the normal course, indictments are not dismissed merely because the Government asks follow-up questions in the grand jury, serves grand jury subpoenas after a witness participates in an interview, or conducts a voluntary interview at 9:00 a.m. on a weekday. These routine investigative steps are hardly the sort of practices that can be characterized as misconduct. If the

defendants' proposed investigative limitations were applied consistently, the federal government would lose its ability to enforce our nation's laws. Here, the Government took responsible and careful steps to investigate allegations of serious criminal conduct. The defendants' arguments and examples here demonstrate that, again, they are merely complaining that they were investigated at all. Their arguments should be rejected.

VII. THE GOVERNMENT ACCURATELY SUMMARIZED THE LAW REGARDING DEFENDANT MELGEN'S IMPROPER BILLING PRACTICES. (Mot. No. 3, Dkt. No. 50.)

The defendants accuse the Government of providing erroneous legal instructions to the grand jury. Specifically, the defendants contend that the Government misled the grand jury on an issue unrelated to the elements of the charged offenses in this case—"Dr. Melgen's practice of repackaging or multi-dosing Lucentis and his dispute with CMS." Dkt. No. 50-1 at 26. In doing so, they aver that CMS, the CDC, and the FDA all permit defendant Melgen to multi-dose and multi-bill Lucentis, and that the Government falsely suggested otherwise. *See id.* at 26-30. As an initial matter, it is rather odd that in one section the defendants contend that clearly immaterial evidence, like the draft administrative regulations regarding multi-dosing, is relevant to this corruption case, *see id.*, while arguing in a separate section that testimony concerning the things of value defendant Melgen gave to defendant Menendez is not, *see id.* at 33-34. The defendants are not charged with violating a draft administrative regulation; they are charged with using things of value to influence official acts.

The defendants' proposed legal theory justifying defendant Melgen's overbilling of Medicare by $8.9 million has been rejected by every authority to which it has been presented, most recently by the U.S. District Court for the Southern District of Florida. *See Vitreo Retinal Consultants of the Palm Beaches, P.A. v. U.S. Department of Health and Human Services et al*,

No. 13-22782, 2015 WL 1608458, at *1-2 (S.D. Fl. Apr. 10, 2015) (summarizing each instance defendant Melgen has lost on the merits in his $8.9 million Medicare billing dispute). The Government faithfully and accurately summarized the law on this issue as it relates to defendant Melgen.

In advancing their argument, the defendants object that the Government should have presented "decisions from U.S. Courts," Dkt. No. 50-1 at 26, "or presented the actual CDC or FDA guidance," *id.* at 32, to explain the law to the grand jury. The most recent U.S. court to address this issue is the one that rejected the same argument that defendant Melgen advances here. Specifically, in denying defendant Melgen's request for relief in his $8.9 million Medicare billing dispute, the United States District Court for the Southern District of Florida explicitly relied on FDA and CDC guidance to reject defendant Melgen's legal theory. *See Vitreo Retinal Consultants*, 2015 WL 1608458, at *4-6. There, the court observed that the FDA-approved packet insert for Lucentis explains that "[e]ach vial should only be used for the treatment of a single eye." *Id.* at *4. The court also noted that the CDC's guidelines unequivocally "caution[] against administering medications from single-dose vials to multiple patients." *Id.* at *6; *see also* Ex. 7 (Sebelius 302) at 5 ("The matter at issue with Menendez was whether a doctor could charge Medicare more than one time for one vial of medication. The Centers for Disease Control (CDC) put out a memorandum regarding the potential for contamination from multiple applications from the same vial.").

Although the defendants argue that the Government should have relied on U.S. courts to summarize this issue for the grand jury, the defendants omit this U.S. court opinion from their analysis, despite the fact that it was issued just three months before they filed their motion, one of the defendants is a party to the case, and defendant Melgen is represented by the same attorneys

in both cases. Instead, the defendants cite as authority draft guidance issued by the FDA regarding "mixing, diluting, or repackaging biological products outside the scope of an approved biologics license application." Dkt. No. 50-1 at 28. Notably, however, this inapposite draft guidance was issued in 2015—after the charged conspiracy ended and even after the testimony to which the defendants object was presented to the grand jury. *See id.* Defendant Melgen asks this Court to adopt—in a criminal case charging bribery and corruption—a legal theory regarding billing practices that every other legal authority has rejected. This is not the proper venue to re-litigate those claims.

The defendants also object that instead of eliciting testimony on this issue from its case agent, the "[t]he government could have called witnesses from HHS." *Id.* at 32. In effect, that is precisely what the Government did. Specifically, the Government interviewed the head of HHS—Secretary Kathleen Sebelius—whose 302 includes the following: "this rule was a 'slam dunk'; why should Medicare pay for the same vial of medication more than once and why would Medicare want to risk patient safety by having doctors share the vials between patients." Ex. 7 at 6. The grand jury testimony to which the defendants object is premised on Secretary Sebelius' statements. Despite this unequivocal position expressed by the Secretary of HHS, of which CMS is a component, the defendants aver that "CMS expressly permits and encourages the practice of multi-dosing for certain drugs, and its stated policy is to pay providers for this practice." Dkt. No. 50-1 at 28. The defendants, however, omit this 302 from their analysis, even though they rely on it just a few pages earlier in the very same motion. *See id.* at 17-18.

The indictment alleges that because of his failure on the merits, defendant Melgen bribed defendant Menendez to use the power of his Senate office to manufacture a favorable result in defendant Melgen's $8.9 million Medicare billing dispute. For instance, on July 16, 2012—shortly

after defendant Menendez's meeting and follow-up phone call with Acting Administrator Tavenner—defendant Melgen's lobbyist said the following in an email to Mr. Barnard, defendant Menendez's Legislative Assistant in charge of health care matters, and defendant Menendez's chief of staff: "[L]et me know if you hear back from Tavenner's office -- at some point I have to make a decision whether to recommend to the doctor to go to court rather than wait any longer. I did not want to take any action until I knew that *other avenues* were shut down." Ex. 24 (emphasis added). Defendants Melgen and Menendez attempted to circumvent a decision on the merits by creating "other avenues" to get defendant Melgen's $8.9 million.

In dismissing defendant Melgen's motion for reconsideration in his Medicare litigation, the district court described defendant Melgen's arguments—the same arguments he advances here—as "illogical" and "nonsensical." *Vitreo Retinal Consultants*, 2015 WL 1608458, at *5. The same could be said about the defendants' arguments here. This claim should be rejected.

VIII. THE GOVERNMENT PROPERLY ELICITED INCRIMINATING EVIDENCE, WHICH IS DISTINCT FROM IMPROPERLY COMMENTING ON THE EVIDENCE. (Mot. No. 3, Dkt. No. 50; Mot. No. 6, Dkt. No. 53.)

In two separate motions, the defendants accuse the Government of improperly commenting on the evidence by making closing arguments. *See* Dkt. Nos. 50-1 & 53-1. For instance, the defendants complain that the Government elicited testimony and presented exhibits establishing that, on the merits, defendant Melgen has lost his $8.9 million Medicare billing dispute at every level, and elicited testimony that despite losing on the merits at every stage of his litigation, he has been able to rely on defendant Menendez as his one champion. Similarly, the defendants urge the indictment's dismissal because the Government juxtaposed evidence of defendant Menendez's advocacy on behalf of defendant Melgen with evidence about the numerous things of value that defendant Menendez received from him. The question to which the defendants object, however,

merely confirmed that as defendant Menendez championed defendant Melgen's position in his $8.9 million Medicare billing dispute, defendant Menendez "got to fly on Dr. Melgen's private jet, stay at his villa in the Dominican Republic, use his AmEx points for the hotel in Paris, [and] got $40,000 to his legal defense fund." Dkt. No. 50-1 at 32 (quoting Sheehy Tr. (05/07/14) at 25). This is not an example of commenting on the evidence; this is an example of exhibiting the evidence.

The distinction is best illustrated by the cases on which the defendants rely. Specifically, the defendants identify three cases that resulted in the dismissal of the indictment, averring that the facts of those cases are similar to the Government's conduct here. None of those cases, however, support the defendants' request for relief. In fact, the defendants' mischaracterization of those cases illustrates the infirmity of their argument.

First, the defendants allege that "[t]his sort of prosecutorial behavior is similar to [*United States v.*] *Samango*[, 607 F.2d 877 (9th Cir. 1979)], a case in which the Ninth Circuit affirmed the dismissal of an indictment because the grand jury heard 'much testimony by the prosecutor in the form of questions which . . . definitely conveyed the prosecutor's belief that [the accused] was guilty.'" *Id.* at 33 (quoting *Samango*, 607 F.2d at 883). The defendants contend, without providing examples, that "Mr. Koski similarly conveyed his personal belief in Defendants' guilt in this case." *Id.*

The defendants significantly mischaracterize *Samango* in an unconvincing effort to find some legal authority that satisfies their eagerness to accuse the Government of misconduct. In *Samango*, the objectionable conduct leading to the indictment's dismissal included the following: (1) "[a]t the outset of [the accused's] testimony, the prosecutor gave the grand jury a lengthy and heated account of the Government's dissatisfaction with [the accused's] performance under a

nonprosecution agreement," 607 F.2d at 878-79; (2) while the accused was in the grand jury, the prosecutor "stated that if he refused to testify he would be charged as a defendant," *id.* at 879; (3) the prosecutor asked the accused a "gratuitous question" about a co-conspirator "being capable of killing people," *id.* at 883; (4) when "a juror asked to see a transcript of [the accused's] statements to [a DEA Agent, t]he prosecutor refused," *id.* at 879 n.3; (5) "the prosecutor knew but did not warn the grand jury of [an important defendant-cooperator's] doubtful credibility," *id.* at 881; (6) on December 12, the prosecutor told the grand jury "off the record that he had a December 20th deadline," *id.* at 879; and (7) when the prosecutor presented the case to a new grand jury, "the lengthy transcripts were merely deposited with the grand jury," and "there [were] indications in the record of their proceedings that some of the jurors were not familiar with the contents of those transcripts," *id.* at 881. When one actually reads *Samango*, it is impossible to conclude, as the defendants do, that "this sort of prosecutorial behavior is similar to *Samango*," when the defendants do not even allege the sort of prosecutorial behavior at issue in *Samango*.

Moreover, the specific language from *Samango* on which the defendants rely—"much testimony by the prosecutor in the form of questions which . . . definitely conveyed the prosecutor's belief that [the accused] was guilty," Dkt. No. 50-1 at 33 (quoting *Samango*, 607 F.2d at 883)—when considered in context and without an ellipsis, further exposes their effort to manipulate the opinion. Specifically, in its quoted passage, the court was referring not to the prosecutor's presentation of testimony in general, but rather to the prosecutor's decision to read to the grand jury an irrelevant transcript of the accused's testimony, in which the accused "had refused to answer questions, asserting his Fifth Amendment right against self-incrimination." *Id.* at 883. The full quote reads as follows: "The transcript was an impressive repertory of insults and insinuations. It contained much testimony by the prosecutor in the form of questions *which were usually denied*

and definitely conveyed the prosecutor's belief that [the accused] was guilty and evasive." *Id.* (emphasis added). The fact that the questions "were usually denied"—a fact that the defendants substitute with an ellipsis—further emphasizes the disparity between that case and this case. That the prosecutor read to the grand jury the transcript of a defendant's denials and Fifth Amendment assertions suggests that he was not interested in presenting evidence to the grand jury; it suggests the prosecutor was interested in prejudicing the grand jury into indicting the defendant based on his denials of criminal activity, juxtaposed against the assertion of his Fifth Amendment right against self-incrimination. A faithful description of *Samango* does not support the assertion that the Government here "similarly conveyed" its personal belief in the defendants' guilt.

Second, the defendants contend that "[t]his case is also similar to [*United States v.*] *Breslin*, [916 F. Supp. 438 (E.D. Pa. 1996)], where the court dismissed the indictment after finding 'the prosecutor improperly characterized the evidence and inserted his opinions regarding the strength and weight of the evidence.'" Dkt. No. 50-1 at 33 (quoting *Breslin*, 916 F. Supp. at 443). As with *Samango*, however, *Breslin* is nothing like this case.

In *Breslin*, the objectionable conduct leading to the indictment's dismissal included the following: (1) "the prosecutor attempted to bond with the grand jurors by providing them with donuts," 916 F. Supp. at 442; (2) "the prosecutor pressured the jury by stating the statute of limitations was about to run on some of the charges," *id.*; (3) "the prosecutor often made characterizations of the evidence and inserted his own opinions," *id.*; (4) "the prosecutor referred to a *Frontline* television documentary involving one of the defendants" and suggested it might be played for the grand jury "for fun," *id.*; and (5) "[p]erhaps the most disturbing thing occurred when the prosecutor stated that the grand jury did not have to agree with everything in the indictment; only the 'critical' parts," *id.* at 445. Moreover, the prosecutor's objectionable commentary in

Breslin included his assertion that "I think you'll be able to come to a determination of probable cause before we read very much," *id.* at 443, as well as his opinion that a defendant's statement "was just an outright lie," *id.* at 444. Like their mischaracterization of *Samango*, the defendants' mischaracterization of *Breslin* undermines the credibility of their claim. The conduct in those cases is so far removed from anything that is even alleged here that, if they teach us anything at all, it is that the defendants' allegations of misconduct are unfounded and their request for relief is meritless.

And third, the defendants' reliance on *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983), is equally unhelpful. There, the prosecutor "characterized [the accused] as a real hoodlum who should be indicted as a matter of equity," and made "numerous speculative references to other crimes of which [the accused] was 'suspected,'" including "two murders" and the "alleged taking of bribes while a policeman." *Id.* at 761. This sort of clearly improper and prejudicial conduct is not alleged here.

For the same reasons, the Court should reject the defendants' contention, in a different motion, that "the prosecutors essentially made closing arguments in front of the grand jury." Dkt. No. 53-1 at 15. The defendants provide two examples in support of their argument. First, the Government asked Ms. Enright, a staffer for defendant Menendez, "[t]here were allegations that Senator Menendez used his senate office to advocate on behalf of Dr. Melgen and his financial interests, correct?" *Id.* (quoting Enright Tr. (07/02/14) at 24:18-20). And second, the Government asked Mr. Barnard, another staffer, "Senator Menendez had some meetings with senior officials at CMS and HHS in order to advocate on behalf of Dr. Melgen in his $8.9 million Medicare dispute. Isn't that right?" *Id.* (quoting Barnard Tr. (08/13/14) at 53:1-4). These are perfectly permissible leading questions. *See Calandra*, 414 U.S. at 343; *R. Enterprises*, 498 U.S. at 298; *Costello*, 350

U.S. at 364. The Government may not always ask questions in the way that the defendants would like, but defendants do not enjoy the privilege of investigating their own conduct.

Moreover, the first question was merely foundational, seeking to establish the nature of the corruption allegations in order to pursue natural follow-up questions about defendant Menendez's demonstrably false public response to those allegations. Notably, Ms. Enright's response to this question was quite unremarkable: "One was about -- yes, financial interests in a -- yes." Ex. 25 at 24:21-22. Ms. Enright—defendant Menendez's own Communications Director—simply did not exhibit the outrage expressed in the defendants' brief.

Notably, the response to the second question was, "[t]hat would fall under the speech-and-debate privilege." Ex. 26 at 53:5-6. As discussed in more detail in the Government's consolidated response to the defendants' Speech or Debate motions, if defendant Menendez advocated on behalf of defendant Melgen during these meetings, then this was an improper assertion of the Speech or Debate Clause. If, however, defendant Menendez's meetings were not about defendant Melgen, then the answer would have been an exculpatory, "No," which also does not implicate the Speech or Debate Clause. Either way, the answer demonstrates the importance of the question, indicates that the defendants are confusing leading questions with closing arguments, and illustrates the defendants' improper interpretation of the Speech or Debate Clause.

It is perhaps not surprising that the defendants do not like the way the Government framed its questions in the grand jury. It is surprising, however, that the defendants would use their displeasure as the basis to allege misconduct and ask for the indictment's dismissal. The Government's questions to witnesses in the grand jury were properly probing, and consistent with the grand jury's constitutional mandate. Thus, the defendants' claim should be rejected.

IX. THE DEFENDANTS' MISCELLANEOUS ALLEGATIONS OF MISCONDUCT OMIT MATERIAL FACTS AND ARE CONTRAVENED BY THE GOVERNMENT'S CONSCIENTIOUS SAFEGUARDING OF THEIR PRESUMPTION OF INNOCENCE. (Mot. No. 3, Dkt. No. 50; Mot. No. 6, Dkt. No. 53.)

The defendants allege additional misconduct that is equally unavailing. The defendants contend, for example, that the Government erroneously instructed the grand jury that it could not call live witnesses. Dkt. No. 50-1 at 23-26. Specifically, among the more than 2,900 pages of grand jury testimony, the defendants allege that it was outrageous government conduct warranting dismissal of the indictment for the Government to have given a one-word response during the following exchange that occurred while reading to the grand jury the transcripts of testimony from witnesses in the Southern District of Florida:

Grand Juror:	"Can I ask you a question? Eventually are these people going to come here?"
Mr. Koski:	"No."
Grand Juror:	"Never? Okay."

Id. at 23 (quoting Sheehy Tr. (2/26/14) at 144). From this brief exchange, the defendants urge dismissal of the indictment because the Government "compromise[ed] the independence of the grand jury," *id.* at 25, "the grand jury simply became a tool of the prosecution," *id.* at 25-26, and the "[d]efendants' right to an independent and informed grand jury was violated," *id.* at 26. The defendants' turgid reaction to this simple response—among more than 2,900 pages of grand jury transcripts—is indicative of the approach they have taken in their pretrial motions. The defendants infer so much from so little, and every inference is expressed in sensational language describing catastrophic results. There was no erroneous instruction here, and the grand jury's independence was never threatened.

Moreover, the context of this brief exchange is informative. When the exchange occurred, the Government had just completed reading the transcript of testimony provided by one of defendant Melgen's girlfriends—a former model from the Dominican Republic. The Government announced that it was about to read the transcript of testimony provided by defendant Melgen's Brazilian girlfriend, and informed the grand jury that the Government also needed to read the transcript of the Dominican model's younger sister at a later date. Ex. 27 at 144:13-20. Notably, the grand juror did not ask if he could hear live testimony from defendant Melgen's girlfriends, if he could ask them questions, or if he could subpoena them. The grand juror merely asked if defendant Melgen's girlfriends—and a younger sister—were "going to come here." This is hardly the sort of exchange that would "compromise the independence of the grand jury."

Moreover, the grand jury transcripts are filled with numerous examples of the Government informing the grand jury that it did indeed have the power to call, excuse, recall, and question witnesses. For instance, the transcript of the very first witness the Government put in the grand jury concludes with the following exchange:

> Mr. Koski: With the foreperson's permission, may we excuse the witness briefly so that we can see if the members of the Grand Jury have any questions for this witness.
>
> . . .
>
> By Mr. Koski:
>
> Q: Ms. [Witness], welcome back. I just want to remind you that you're still under oath. Ms. [Witness], the members of the Grand Jury have a few additional questions that they want me to follow up with you on.

Ex. 28 at 56:13-16, 56:22-24. The transcript for one of the final witnesses to appear before the grand jury—defendant Menendez's chief of staff—includes the following exchange:

> Mr. Koski: May this witness be excused, or would you like him just to step out and we can canvas any questions? All right. If there are no objections, may this witness be excused?
>
> Foreperson: Yes.

Ex. 29 at 141:3-6. Every grand jury transcript in between includes some version of the same exchange, with careful deference to the grand jury's power to excuse, recall, and question witnesses. Tellingly, however, the defendants do not include any of these exchanges in their analysis, despite their dispositive relevance to the defendants' assertion that the Government erroneously deterred the grand jury from examining live witnesses.

In addition, the Benchbook for U.S. District Court Judges, described above, includes instructions that expressly inform the grand jury that "[t]he government . . . will subpoena for testimony before you such witnesses as the government attorney may consider important and necessary *and also any other witnesses that you may request or direct be called before you*." BENCHBOOK FOR U.S. DISTRICT COURT JUDGES at 224 ¶ 13 (emphasis added); *see also id.* at 224 ¶ 14 (advising the grand jury that "you can subpoena new witnesses"). The instructions emphasize the point several times, repeating that "[y]ou alone decide how many witnesses you want to hear. You can subpoena witnesses from anywhere in the country, directing the government attorney to issue necessary subpoenas." *Id.* at 225 ¶ 17; *see also id.* at 227 ¶ 26 ("[Y]ou may direct the government attorney to subpoena the additional documents or witnesses you desire to consider."). Therefore, the grand jury here was well informed of its powers, and was not deprived of live testimony it was otherwise interested in hearing.

In perhaps their most desperate attempt to allege misconduct, the defendants actually complain that the Government dissuaded the grand jury from investigating another aspect of defendant Menendez's conduct. Dkt. No. 50-1 at 24 n.14 ("[T]he prosecution misdirected the

grand jury into believing that the prosecution was in control of the grand jury, and that it did not have the independence to make inquiries on their own."); *see also id.* ("Of course, the grand jury can decide for itself what it wants to investigate."). Specifically, the defendants object that when a grand juror asked an FBI case agent about defendant Menendez's legal defense fund—to which defendant Melgen contributed $40,000—the FBI case agent "refused to provide further explanation, stating 'that is not part of . . . . [t]he subject of that was not the subject of this.'" *Id.* (quoting Sheehy Tr. (05/07/14) at 73-74). An objective reading of this complete exchange, however, demonstrates that this was clearly an effort to eliminate any risk that the grand jury would make a negative inference against defendant Menendez for the mere existence of a legal defense fund. *See* Ex. 11 at 73:3-10 (answering that defendant Menendez's legal defense fund was "[u]nrelated to -- this investigation," thus emphasizing that it was unrelated to any criminal investigation). Therefore, the FBI case agent did indeed provide further explanation—explanation that protected the defendants' presumption of innocence.

This is one of several examples where the Government carefully guarded the defendants' presumption of innocence, and strengthened the impartiality of the grand jury. Indeed, throughout this grand jury investigation, the Government rigorously safeguarded the defendants' constitutional rights:

> I also want to admonish you again that you've heard testimony about Senator Menendez being represented by attorneys. As I mentioned before, you should not make any negative inference against Senator Menendez merely because he is represented by attorneys. There are perfectly legitimate reasons why innocent people would need to retain an attorney, and it is a constitutional right to have an attorney. And merely because someone like Senator Menendez is exercising that right to have attorneys, that is not something that you should hold against him in any way.

Ex. 30 at 28:2-11; *see also* Ex. 31 at 19:14-17 ("I also want to give you the same warning I've given you repeatedly, which is do not make any negative inference against Senator Menendez or anyone else merely because witnesses are asserting certain privileges.").

In addition, the grand jury transcript for one witness includes the following answer about defendant Melgen's motivation for purchasing the cargo screening contract in the Dominican Republic: "It was more about the drugs because a lot of drugs coming in from Dominican Republic, and that's what he wanted to sell." Ex. 28 at 30:20-23. When asked about that response in a later interview, the witness clarified and withdrew her remark. Notably, when the Government read this transcript—of testimony given in the Southern District of Florida—to the grand jury in New Jersey, the Government expressly noted this witness' later clarification to avoid presenting misleading evidence that risked prejudicing the grand jury. Specifically, after reading this witness' transcript to the New Jersey grand jury, the Government elicited the following testimony from Agent Sheehy about that witness' answer regarding defendant Melgen's desire to sell drugs: "She advised that that was mistaken and that what she meant to express was that Dr. Melgen intended to interdict drug trafficking, not to sell drugs." Ex. 32 at 59:11-13.

These are hardly the sort of prophylactic warnings given by prosecutors with an "insatiable need to bring the present charges against Senator Menendez and Dr. Melgen." Dkt. No. 53-1 at 2. The Government's careful management of this grand jury investigation stands in stark contrast to the defendants' representation of the record or the objectionable conduct described in the cases upon which the defendants rely. The defendants' misrepresentation of the record, mischaracterization of the law, and concealment of material facts, however, suggest an insatiable need to deflect attention from the current charges by accusing the Government of misconduct. Thus, these additional arguments should be rejected.

X. THE GOVERNMENT CONSCIENTIOUSLY PREVENTED THE LEAK OF INVESTIGATIVE INFORMATION. (Mot. No. 6, Dkt. No. 53.)

As the defendants themselves have acknowledged, the media attention to this case has been considerable. *See* Dkt. No. 52-1 at 2 ("[T]he scandal and subsequent government investigation were extensively covered in the tabloids and mainstream media."). During its investigation, the Government interviewed over 200 witnesses and served over 200 grand jury subpoenas, requiring some large entities to notify dozens of employees in order to ensure compliance. *See, e.g.*, Ex. 33. Therefore, there were numerous people who were aware of the existence of the investigation, and of the existence and timing of specific investigative steps.

Leaks are improper. They are improper on principle, and because they are prejudicial to the investigative team, as well as the subjects of the investigation. Specifically, leaks chill witness cooperation, compromise investigative strategy, and foreclose potential avenues of information. No benefit is inured to the Government by leaking information about an ongoing investigation. Accordingly, during this investigation, the Government strove diligently and rigorously to prevent the unauthorized disclosure of investigative information.

In recognition of this harm, whenever there was media attention to the investigation or allegations, the Government distributed an email to the investigative team with a reminder that there should be no contact with the media. *See* Ex. 34. For instance, when the Washington Post published a story about defendant Menendez's request that DOJ investigate whether there was a Cuban plot to smear him, the Government used the "opportunity to provide another reminder that there should be absolutely no contact with the media. In fact, all press inquiries or communications with the media should be handled by our respective public affairs offices." *Id.* (Email from Peter Koski, July 21, 2014). When media reports contained information that could have resulted from

leaks, the Government referred the issue to OPR and OIG, twice—to OIG on April 5, 2013, and to both OIG and OPR on March 9, 2015. Exs. 35 and 36.[3]

In addition, when the U.S. Court of Appeals for the Third Circuit inadvertently put on its public web site a link to the sealed opinion from the parties' grand jury litigation, the Government promptly alerted the court and the clerk's office in a successful effort to remove it. Specifically, the Government sent a member of the clerk's office, and cc'd defense counsel, an email titled, "URGENT: 14-4678 – Sealed Opinion is Publicly Available." Ex. 37. The email read, "I just left a message for you and Tena and spoke to someone in Judge Fisher's chambers. The sealed opinion in 14-4678 is publicly available on the Third Circuit's web site. It should not be. Could you please remove it from the web site?" *Id.* Eight minutes later, the Government sent a follow-up email that said, "I see that the sealed opinion has been removed from the web site. Thank you for your prompt action." *Id.* In response to media coverage about the sealed opinion, the Government distributed another email to the investigative team with a reminder that "there should be absolutely no contact with the media. In fact, all press inquiries or communications with the media should be handled by our respective public affairs offices." Ex. 34 (Email from Peter Koski, March 1, 2015).

The defendants, however, accuse the prosecution team of leaking information to the media during its investigation, warranting dismissal of the indictment. *See* Dkt. No. 53-1 at 17-21. In support of their accusation, the defendants rely on several news stories that they attribute to leaks from the Government—stories that do not actually attribute their sources to the Government, stories that the Government could not have leaked, and stories that report inaccurate information,

[3] The defendants argue that the Government compounded the prejudice associated with heightened media attention by failing to take any action in response to it, crediting themselves with initiating an OPR and OIG investigation into the alleged leaks. *See* Dkt. No. 53-1 at 2 (citing to their March 25, 2015, letter to OPR requesting an inquiry). The Government's referrals to OPR and OIG, however, predated the defendants' request for an investigation.

undermining any inference that the Government leaked it. For example, the defendants complain that a February 6, 2013, *Daily Caller* article reported that "two FBI sources" disclosed that the investigation had been moved to New Jersey. *Id.* at 18 (citing David Martosko, "FBI sources: Menendez investigation moved to Newark, NJ," *The Daily Caller* (Feb. 6, 2013), http://dailycaller.com2013/02/06/fbi-sources-menendez-investigation-moved-to-newark-nj/). This report, however, was false. The grand jury investigation was not moved from Miami to New Jersey until January 2014, one year after the inaccurate media report. *See* Ex. 38.

Next, the defendants note that a March 15, 2013, *Daily Caller* article identified "an FBI agent in a supervisory position on the East Coast" disclosing the existence of the grand jury investigation. Dkt. No. 53-1 at 18 (citing David Martosko, "FBI sources confirm grand jury investigation of Sen. Bob Menendez," *The Daily Caller* (Mar. 15, 2013), http://dailycaller.com/2013/03/15/fbi-sources-confirm-grand-jury-investigation-of-sen-bob-menendez/). Notably, this attribution is made by the same author that, just one month earlier, attributed to "FBI sources" information that was false, undermining any inference that the FBI was the source of the information. Equally notable is that by March 15, 2013, the Government had issued over 60 grand jury subpoenas and executed a search warrant at defendant Melgen's offices. The fact that there was a grand jury investigation in March 2013 was certainly not news that would have benefitted the Government or prejudiced the defendants in the eyes of the grand jurors, since the grand jurors were already aware of the investigation by virtue of their participation in it. *See Id.* at 17 ("Illegal media leaks tainted and prejudiced the grand jury proceedings."). Finally, it cannot be ignored that from the moment the allegations were made to the moment they filed their motions to dismiss, the defendants have taken the position that the *Daily Caller* fabricated its reporting. *See* Dkt. No. 52-1 at 6 (asserting that "the accusations leveled against the Senator and

Dr. Melgen by *The Daily Caller* were later proven to be completed fabricated"). The defendants cannot consistently advance the position that although the *Daily Caller* fabricated the substance of its stories, it truthfully attributed the source of its stories to the FBI.

Moreover, the majority of the articles relied on by the defendants do not actually attribute their sources to the Government. Instead, the defendants merely speculate that the Government leaked the reported information. They rely, for example, on a March 2013 *Washington Post* article entitled "Grand jury investigating Sen. Robert Menendez (D-N.J.), people familiar with probe say." *See id.* at 9-10 (quoting Carol D. Leonnig, "Grand jury investigating Sen. Robert Menendez (D-NJ), people familiar with probe say," *Wash. Post* (Mar. 14, 2013), http://www.washingtonpost.com/politics/grand-jury-investigating-sen-robert-menendez-d-nj-people-familiar-with-probe-say/2013/03/14/2eb4fad4-8b24-11e2-9838-d62f083ba93f_story.html). "People familiar with probe" is not a term that one traditionally uses to describe the Department of Justice or the FBI. "People familiar with probe" could just as likely refer to witnesses who have been interviewed, witnesses who have testified in the grand jury, their attorneys, or employees of corporations and other entities that have received a grand jury subpoena. By the time this article was published, 49 subpoenas had been issued and dozens of interviews had been completed.

The defendants devote most of their accusation to developing a fictional narrative about a single news report that they attribute to Government leaks—attribution made through conjecture that is demonstrably false. Specifically, the defendants accuse the Government of leaking information reported in a March 6, 2015, CNN story that Attorney General Eric Holder personally authorized the indictment. *See id.* at 10; Dkt. No. 53-1 at 19-21. The defendants aver that CNN was "relying on an anonymous source likely from within the Department of Justice," Dkt. No. 52-

1 at 10, but in support of this allegation cite only to some articles repeating defendant Menendez's public accusation that the Department of Justice leaked the Attorney General's decision to indict him, *see* Dkt. No. 52-1 at 10 n.17. CNN attributed the information to "[p]eople briefed on the case." *See* Evan Perez, "Sen. Bob Menendez: 'I Am Not Going Anywhere," *CNN* (Mar. 9, 2015), http://www.cnn.com/2015/03/06/politics/robert-menendez-criminal-corruption-charges-planned/ (last visited Aug. 23, 2015). The defendants, however, attribute the information to the prosecution team. *See* Dkt. No. 53-1 at 29 ("[I]t is clear that the leaks came from . . . government personnel close to the investigation, or even government attorneys (*e.g.*, 'people briefed on the case' and 'sources familiar with the investigation').)." If the defendants' speculation were accurate, it is more logical that CNN would have attributed this information directly to DOJ or the FBI.

The defendants surmise that the Government leaked the Attorney General's decision to CNN in an effort to pressure the Attorney General against changing his mind. Specifically, the defendants note that shortly before the story was published, counsel for defendant Menendez requested a meeting with the Deputy Attorney General to advocate against an indictment. *See id.* at 19-20 ("It certainly would not make it easier for any politically-appointed official to countermand or overrule a recommendation of a career prosecutor. That is what someone in the government (which includes the FBI) must have thought as well."). The defendants' attorneys further speculate that their request for a meeting triggered the leak, proffering the motive for something they merely surmise to have occurred. *See id.* at 20 ("When defense counsel asked [Assistant Attorney General Leslie] Caldwell on March 6, 2015 for the review and a meeting with the Deputy Attorney General to further evaluate the case, the result was yet another leak, and this one was very deliberately timed."); *id.* ("The same day that Ms. Caldwell offered to facilitate a review, law enforcement sources leaked the government's decision that a case was going to be

filed."). Undeterred by the absence of evidence, the defendants' aver that the prosecution team leaked the Attorney General's decision to CNN on March 6—the day of the CNN story—because of defense counsel's request to the Assistant Attorney General on March 6 to meet with the Deputy Attorney General. *See* Dkt. No. 53-1 at 20-21 ("So, at the exact moment Defendants' counsel had asked for the review that might have stopped a prosecution, some in law enforcement engineered a leak to thwart that review.").

The defendants' timeline is false. In fact, the actual timeline of events is as follows: (1) on March 5, the Government informed the defendants' counsel of the Attorney General's decision that the prosecutors could proceed with presenting an indictment to the grand jury, (2) on March 5, CNN reached out to DOJ requesting comment on CNN's report that the Attorney General authorized an indictment of the defendants, (3) on March 6, defendant Menendez's lead attorney asked the Assistant Attorney General for a meeting with the Deputy Attorney General, and (4) on March 6, CNN published its report. In short, CNN had the story and contacted DOJ for comment about it on March 5, but defendant Menendez's attorney did not ask for a meeting with the Deputy Attorney General until March 6. The defendants' pages of speculation, therefore, are contravened by a timeline that is inconsistent with their narrative.

It is equally illogical to suggest that the Government would leak the timing of an indictment, and yet not leak more substantive and incriminating information, like defendant Menendez's concealment of additional undisclosed, unreimbursed flights, defendant Menendez's solicitation and acceptance of a trip to Paris from defendant Melgen, defendant Menendez's advocacy on behalf of the visa applications of defendant Melgen's young, foreign girlfriends, or defendant Menendez's advocacy on behalf of defendant Melgen to a cabinet secretary. Notably, none of these things were reported in the media, indicating that whoever was the source, it was not

someone on the prosecution team. In fact, the Government had this evidence for months, and yet these details were not publicly reported until the indictment was returned by the grand jury.

In any event, the defendants have not advanced a valid basis for dismissal of the indictment. Conjecture and speculation are an insufficient substitute for concrete and particularized evidence. *See United States v. Sweig*, 316 F. Supp. 1148, 1155 (S.D.N.Y. 1970) ("[D]efendants have failed to present a concrete basis for inferring that government officials were responsible in any substantial degree for the unquestionably considerable amount of publicity preceding the indictment. . . . The unspecified 'sources' mentioned in the newspaper stories defendants cite are nowhere particularized."). The defendants' conclusory allegations are illogical and demonstrably false. *See United States v. Kahaner*, 204 F. Supp. 921, 923 (S.D.N.Y. 1962) (finding defendant's contention that government was source of leaks was "conclusory and without substantiation"). The fact is that the public allegations regarding this investigation generated considerable media attention, and the Government diligently safeguarded sensitive investigative information in an effort to prevent its unauthorized disclosure.

Moreover, defendant Menendez cannot credibly complain about pretrial publicity when he has been deliberately generating so much of it. Defendant Menendez held a post-indictment political rally, delivered a press conference on the courthouse steps, issued extrajudicial statements through his Senate office, and created a website designed to publicize statements favorable to his defense, which even has an "In the News" section promoting the more favorable pretrial publicity. Defendant Menendez's attorney published a letter in the New York Times addressing the charges against his client. Defendant Menendez's Senate office issued an extrajudicial statement supplementing his motion to transfer venue, and issued another statement responding to the Court's order denying the motion to transfer venue. Defendant Menendez has been using his legal

defense fund as part of a post-indictment media campaign. *See* Mike DeBonis, "Sheldon Adelson, Bill Richardson help Sen. Robert Menendez fight corruption charges," *Wash. Post* (July 15, 2015), http://www.washingtonpost.com/news/post-politics/wp/2015/07/15/sheldon-adelson-bill-richardson-help-sen-robert-menendez-fight-corruption-charges/ (last visited Aug. 23, 2015) (describing defendant Menendez's expenditures from his legal defense fund in the second quarter of 2015 and noting that "$30,000 went to public relations and fundraising expenses"). Moreover, during the investigation, one of defendant Melgen's friends informed the Government that "Melgen's people were working with the Washington Post." Ex. 39 at 10. Unlike defendant Menendez, who held a public political rally the day the indictment was returned, the Government did not even organize a routine press conference regarding the newsworthy indictment. In sum, defendant Menendez has been generating much of the media attention to this case, while the Government has been trying to prevent it.

In January 2014, the defendants, through counsel, sent an email to undersigned counsel noting that "when Public Integrity took over leadership, we have seen a distinct and welcome lack of such leaks by government personnel." Ex. 40. Now that the defendants have been indicted, however, they accuse Public Integrity of having deliberately leaked prejudicial information to the media "since at least the beginning of 2013." Dkt. No. 53-1 at 18 ("Perhaps most disturbing about the instances of misconduct are the leaks that have pervaded the prosecution's investigation since at least the beginning of 2013."). The defendants' change in position is supported by conjecture and contravened by concrete evidence. Thus, this argument should be rejected.

CONCLUSION

The defendants' sensational motion titles and hyperbolic section headings are supported by anecdotes so unremarkable and demonstrably false that they suggest the defendants wrote the titles and headings before the indictment was returned, and then struggled to fill the empty spaces in between after having received discovery. At their best, the defendants merely complain about routine and lawfully permitted conduct; at their worst, the defendants mischaracterize cases and conceal material facts from the Court; in between, the defendants take post-indictment positions that are inconsistent with their pre-indictment positions. It is striking that the defendants are willing to commit such brazen concealment in support of their allegations that the Government engaged in misconduct. Indeed, the defendants' motions are replete with so many factual inaccuracies and material misrepresentations that it is difficult to dismiss them as simply inadvertent. The defendants' factual premises are false, and the conclusions they reach should be rejected. Accordingly, the Government respectfully requests that this Court deny the defendants' motions to dismiss predicated on allegations of misconduct.

Respectfully submitted this 24th day of August, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record for the defendants.

Dated: August 24, 2015

s/ Peter Koski
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