



USA v. Pacific Gas and Electric Company

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Northern District of California

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff, v. PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

Case No. 14-cr-00175-TEH-1 (MEJ) ORDER RE: JOINT DISCOVERY LETTERS Re: Dkt. Nos. 380-85

INTRODUCTION

and confer on March 16, 2016. See Dkt. Nos. 380-85; see also Dkt. No. 376 (stipulation

authority, and the record in this case, the Court issues the following Order.

BACKGROUND Defendant Pacific letter briefs, all concerning requests for discovery from the government. See Dkt. Nos.

331-35; see also Dkt. No. 337 (Suppl. Ltr. Order requires both parties to include their positions in any discovery letter, the government did not provide its portion of the letters. See Discovery Standing Order ¶ 2. PG&E attached copies of draft letter briefs that indicated the government did not find it appropriate to raise these discovery matters before the undersigned. The presiding judge in this matter, the Honorable Thelton E. Henderson, referred all discovery to the undersigned in December 2015. See Referral Order, Dkt. No. 200. Accordingly, after reviewing the letters and the related documents, the undersigned ordered the parties to an in-court meet and confer, after which they could re-file their letters if necessary and the government could more fully articulate its position as to why the undersigned should not 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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hear this dispute. See Dkt. No. 354. The parties attended the in-court meet and confer on March 16, 2016 and filed amended discovery letters. Dkt. Nos. 380-85; see also Dkt. No. 376.

Following an initial review of these letters, the undersigned issued an Order acknowledging the parties resolution of the dispute described in the letter at Dkt. No. 380 and that the government would produce document as described in their letter. Dkt. No. 388. The undersigned also ordered supplemental responses

concerning (1) and what relief PG&E may still seek at this point (see Dkt. No. 382); and (2) materials (see Dkt. No. 383). The parties timely filed responses on March 25. Dkt. Nos. 403, 404.

Additionally, the Court notes that Judge Henderson already considered several of the issues in these discovery letters in a Dkt. No. 103), in which Judge Henderson granted in part four of motions to compel, as well as in a November 12, 2015 Dkt. No. 195), where he motion to enforce the June 29 Order. The Court refers to

LEGAL STANDARDS A. Rule 16 Discovery

In relevant part, Federal Rule of Criminal Procedure 16 requires the government to allow a other items] . . . if the item is within item is material to preparing the Fed. R. Crim. P. 16(a)(1)(E). s Notes explain that this in the view that broad discovery contributes to the fair and efficient administration of criminal justice. United States v. Johnson, 2015 WL 2125132, at *1 (N.D. Cal. May 6, 2015) (quoting Fed. R. Crim. P. 16 s notes (1974 Amendment)).

of facts which would tend to show that the Government is in possession of information helpful to United States v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995) (quotations omitted). 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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claim of materiality. Id. at 894-95.

conclusory allegations of materiality suffice . . . United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990) (citations omitted). Nonetheless, the Ninth Circuit the government to interpret the disclosure requirement broadly and turn over whatever evidence it has United States v. Hernandez-Meza, 720 F.3d 760, 768 (9th Cir. 2013) (citations omitted). ateriality is a low threshold; it is or mation . . . would have helped Information planned defense and Id. (quotation omitted). That said, s Rule 16 inquiry does not end merely because the Government says the requested documents are not material. Johnson, 2015 WL 2125132, at *4. the district court should not merely defer to government assertions that discovery would be fruitless. Id. (quoting United States v. Budziak, 697 F.3d 1105, 1112-13 (9th Cir. 2012)).



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Moreover, Rule 16 mat as long as there is a strong indication that . . . the evidence will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal. *United States v. Johnson*, 2015 WL 3630952, at *1 (N.D. Cal. June 10, 2015) (quoting *United States v. Bergonzi*, 216 F.R.D. 487, 501 (N.D. Cal. 2003)); see also *United States v. Price*, 566 is not admissible so long as it is reasonably likely t (quotations

omitted)). e triggering requirement under rule 16(a)(1)(E) is that the papers, documents, and tangible objects be in the actual possession, custody or control of the *United States v. Fort*, 472 F.3d 1106, 1118 (9th Cir. 2007) (quotation, internal marks, and footnote omitted). B. Brady/Giglio Obligations

Brady v. Maryland United States v. Dejarnette, 2011 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 *United States District Court*

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WL 838898, at *2 (N.D. Cal. Mar. 4, 2011) (quoting *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978)) (additional citation omitted). The government thus has a separate due process favorable to an accused . . . [that] is material either to guilt or to *Brady*, 373 U.S. at 87. Favorable evidence includes that which impeaches a prosecution witness. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

information extends to information that is not in the possession of the individual *Amado v. Gonzalez*, 758 F.3d 1119, 1134 (9th Cir. 2014). information known to other agents of the government, it may not be excused from disclosing what it does not know but *Id.* (quotation omitted). However, the federal g state law enforcement files not within its possession or *United States v. Dominguez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992). Furthermore, the g *Brady* -executing responsibility on the part of the prosecutor. . . . [T]here is no need for a court order to require compliance with *Brady/Giglio United States v. Flores*, 2011 WL 1100137, at *1 (N.D. Cal. Mar. 24, 2011); see also *United States v. Jennings*, 960 F.2d 1488, 1491-92 (9th Cir. 1992) (admonishing courts to avoid interfering with executive *Brady* obligations unless there law or fact to believe that [interference is] necessary . . . *United States v. Miller*, 722 F.2d 562, . . .

No the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure. *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (citations omitted).

The *Brady* standard for materiality is much higher, and its scope much narrower under Rule 16. *Johnson*, 2015 WL 3630952, at *2 (citing *Brady*, 373 U.S. at 87 (*Brady* evidence is exculpatory evidence relating to guilt or punishment) and *United States v. Muniz-Jaquez*, 718 F.3d 11 *Brady*. Information that is not . // 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 *United States District Court*

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C. Federal Rule of Evidence 404(b) Notice

Federal Rule of Evidence 404(b) provides or other Fed. R. Evid. 404(b)(1). the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of United States v. Hill, 953 F.2d 452, 457 (9th Cir. 1991), as amended (Dec. 16, 1991) (quotations omitted). In this case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor Fed. R. Evid. 404(b)(2). What constitutes Fed. R. Evid. 404(b) amendment (citations omitted). D. Jencks Act Disclosures

The Jencks Act, 18 U.S.C. § 3500, provides another discovery mechanism: it requires that any statement in possession that is made by a government witness, whether exculpatory or not, be produced to the defense after the witness testifies. United States v. Yan Juan Zhen, 2015 WL 727923, at *3 (D. Nev. Feb. 19, 2015); United States v. Griffin, 659 F.2d 932, 936 (9th Cir. 1981) (the Jencks Act prohibits the pre-trial discovery of statements made by prospective government witnesses. However, after such a witness testifies at trial, the Act requires that the government produce upon demand any available statement made by the witness which relates to the witness testimony at trial.

18 U.S.C. § 3500(e).

DISCUSSION A. Letter re: (Dkt. No. 381)

The parties dispute whether the government has completed its document production related Dkt. No. 381 at 1. PG&E explains the government has intertwined 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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two of which are also Rule 404(b) topics. Id. On February 12, 2016, PG&E inquired with the government to confirm whether it had completed its document productions on its seven topics but contends the government declined to confirm this. Id. Accordingly, PG&E now seeks an order compelling the government to complete its production of discovery concerning:

1.

PG&E for Record described in Limine #5. See Dkt. 236 at 7. (The government disclosed this under Rule 404(b)). 2.

evidence described in the See id. at 9. (The government also attempted to disclose this under Rule 404(b)). 3. evidence described in the See id. at 12.



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4.

in Limine #7.2. See id.

5. See id. at

13. 6. e described in

See id. 7.

See id. Dkt. No. 381 at 1-2 (brackets in original).

PG&E asserts that in the June 29 Order, Judge Henderson ordered the government to provide notice of its Rule 404(b) evidence and to produce a host of materials, including Rule 16 and Brady materials, and that in the Nov. 12 Order, he motion to enforce the June 29 Order. Id. at 1. PG&E or clarity and completeness, consistent with the June 29 and November 12 orders and include: (i) all Brady and Rule 16 materials for all seven 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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topics (including (a) PHMSA and NTSB[1

] statements about and interpretations of the various underlying rules and regulations and (b) materials from other operators) and (ii) CPUC information such as evidence related to the 2013 CPUC fine involving Line 147 and the 2015 Instituting Investigations. Id. at 2.

The government believes it has fully complied with its disclosure responsibilities, including all Brady and Rule 16 obligations regarding the PHMSA and NTSB. Id. at 3. It contends Judge Henderson has ordered that ions do not extend to the CPUC and that categories (2) through (6), above, misconstrue the theory of relevance of this evidence. Id. (citing June 29 Order at 10-11). Specifically, the government explains it prove willfulness in violating the charged regulations on the lines contained in the prove the violations of uncharged regulations. Id. Consequently, it argues tations of other re Id. PG&E disagrees that protects these materials from discovery, arguing that the act is only relevant and the proceedings only meaningful to the extent it involves violating some particular law. Id. at 3.

Having considered the parties arguments, the Court finds the government must produce all Brady and Rule 16 materials for all seven topics and the CPUC information listed above. The government s objections are limited to the relevance of these requests and the fact that Judge 16 discovery obligations do not extend to the CPUC. First, as to the relevance of the information sought, even if the government is not show Id. at 3. The government - rd motive, opportunity, intent, preparation,



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plan, knowledge, identity, absence see Fed. R.

1 is the National Transportation Safety Board. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23
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Evid. 404 ense to be able to question this evidence n of it, and to do so, PG&E should have access to the information the government relies on in the seven topics above. Second, while the government is documents in the possession of the CPUC, and not in the actual possession of the Government, do not f June 29 Order at 10-11, he did not rule that PG&E could not obtain materials in the government possession and control that relate to the CPUC. To the extent the materials in the seven topics

possession, it can be required to turn over such materials. See Fort, 472 F.3d at 1118 (state-gathered evidence becomes subject to disclosure when it passes into federal possession). As the government has provided no other objections to the disclosure of these materials, 2

the Court finds that they should be produced. B. Letter re: Expert Discovery Materials (Dkt. No. 382)

The parties dispute whether the government failed to produce certain expert materials. Dkt. No. 382. Specifically, PG&E production of discoverable expert materials are deficient for three witnesses: Howard Lubow,

Steven Nanney, and Margaret Felts. Id. at 1. It asserts that

defendant a written summary of any testimony that the government] the bases

United States v. Duvall, 272 F.3d 825, 828 (7th Cir. 2001); see also United States v. Peel, No. 2:14-cr-192, 2014 WL 5473141, at *2 (E.D. Cal. Oct. 23, 2014). In conjunction with a compliant Rule 16(a)(1)(G) summary, the government must produce, or at least specifically identify, materials on which its expert relies. See United States v. Grace, 526 F.3d 499, ation of] the documents or

2 The government mentions that PG including its allegedly late disclosure, in motions in limine 381 at 3. It is not clear whether the government intends this as an additional objection, but in any event, the fact that Judge Henderson may ultimately decide not to admit any such evidence does not mean that it should be barred from discovery. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
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Id. The Court production for each of the three witnesses.



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1. Mr. Lubow The government and PG&E have arrived at a resolution of sorts considering the See id. at 1-2; Dkt. No. 403 (suppl. ltr.). That said, PG&E continues to raise six areas where it believes Court intervention is required:

analysis is in part based. . . .

ng Mr. . . . 3. Materials used by Mr. Lubow to create a timeline attached to his report.

ve . . .

proceedings (over 100). . . . Dkt. No. 382 at 2; Dkt. No. 403 at 1-2. have not truly met and conferred on these matters as their positions do not align in many respects.

For instance, as to the materials used by Mr. Lubow to create a timeline attached to his report, PG&E notes the government has represented it already produced this information, but PG&E requests the government identify the Bates numbers so that it does not have to sift through millions of pages of documents to locate the specific documents Mr. Lubow chose to support his timeline. Dkt. No. 403 at 2, 4. The government does not say whether it will produce those Bates numbers or whether it objects to doing so. Additionally, entire program, the government states PG&E has misstated the government will produce any documents, which again shows that the parties have not adequately met and

conferred on these issues. Id. at 4. Finally, much of the disputed information was supposed to be produced by the government this week, which could make many of the issues raised in this letter 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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moot. See id. at 1- discovery as to Mr. Lubow. If it wishes to re-assert these matters, the parties must again meet and , and then they may file another letter in

2. Mr. Nanney The Dkt. No. 382 at 2. Mr. Nanney replaced a previously-disclosed expert witness, Alan Beshore. Id. PG&E now requests an order compelling Id. at 3.

a. Rule 16(a)(1)(G) Summary PG&E indicates it has received no written summary from the government as to Mr. pinions, the bases and reasons for those opinions, or his qualifications as required under Rule 12(a)(1)(G), while the government responds that it

382 at 2-3, 5. Rather than the actual document in Dkt. No. 367, the government appears to be referring to the motion in limine to exclude Mr. Nanney. Specifically, attached to Owen P. Martikan declaration is a copy of a letter the -2.



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PG&E does not appear to night, suggesting they have not adequately conferred on these matters before raising them with the

Court. Given this situation, it is not appropriate to rule on these matters at this time. Accordingly, the Court orders the parties to meet and confer on this matter by April 8, 2016, and if PG&E still adequate and the government otherwise refuses to supplement the summary, PG&E may re-raise the issue with the Court at that time in compliance 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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b. Relied on Materials According to PG&E, the government has not produced, or even identified, any specific materials on which Mr. Nanney relies Dkt. No. 382 at 3 (quoting Grace, 526 assertion and does not give any indication about whether it believes it has identified or produced

any documen highlighted documents concerning Nanney, which PHMSA has withheld under the deliberative process privilege for confidential agency material concerning a pending rule-making, that may state his current interpretatio Id. at 5. The government states it agreed to look into this issue and has proposed to PHMSA the release of those documents under an attorney- eyes only protective order. Id. It provides no other information about whether it has produced or identified documents.

certain PHMSA materials. See Dkt. No. 395. Additionally, having reviewed the letter the

it appears some of the materials Nanney relies on are identified in that document. Dkt. No. 368-2 at 4. Nonetheless, as to specific materials Mr. Nanney relies on, and indicating whether it has in fact identified or produced more relevant materials elsewhere to PG&E, the Court cannot confirm that the government has met its Rule 16 obligations. Accordingly, the Court will order the government to identify and produce to PG&E any non-privileged materials Mr. Nanney relied on by April 8.

3. Ms. Felts There is a dispute between the parties about whether government witness Margaret Felts will serve as an expert witness at trial. According to the government, it has repeatedly told the defendant . . . that it intends to call Felts only as a summary witness; it will not elicit expert testimony from her. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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requirements do not pertain to Ms. Felts. Id. But PG&E the government disclosed retainer



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agreements for Ms. Felts that expert witness services. Id. at 3. Additionally, it notes the discovery that the government produced on February 12 and 22, 2016 reveals that Ms. Felts has Id. PG&E questions how -keeping without giving any opinions. Id. (citing Dkt. No. 367 at 7 testimony at trial). Consequently, PG&E believes that it is entitled to Rule 16(a)(1)(G) materials

necessarily based on opinions and on her previous expert work for the CPUC regarding PG&E. Id. In the alternative, PG&E argues that even if Ms. Felts does not testify as an expert, the government should still be required to provide full disclosures of her expert w - her prior work for the CPUC and her long history with the prosecution team is relevant to her potential bias. Id.

PG&E specifically seeks the following:

1. A proper Rule 16(a)(1)(G) summary for Ms. Felts complete

summary and b) identify all documents Ms. Felts will purport to

[citation] 2. Materials on which Ms. Felts relied in reaching her opinions.

(See same issue discussed above for Mr. Nanney.) 3. r the

California Public Utilities Commission (which is her sole basis for any first-hand knowledge about PG&E). 4. All communications between Ms. Felts and the prosecution team

or related government agents in this matter. See Dkt. 103 at 30 (ordering the go 18 U.S.C. § 3500 (Jencks Act). Id. at 3-4 (citation omitted as indicated; other brackets in original). The government rejects production under for defense Requests (1)-(3), asserts dy been produced (Request (4)), and contends that all of the documents Ms. Felts will summarize have already been made available consistent with Fed. R. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Evid. 1006 (Request (2)). Id. at 5. Given the gover s will not offer expert opinions at trial, the Court will not order the government to produce a Rule 16(a)(1)(G) summary under Request 1 or the materials under Request 2. That said, under Requests 1 and 3, to the extent the government has not done so already, it must produce the documents Ms. Felts will summarize at trial, as well as inform PG&E about instance by identifying Bates numbers or other such data. Additionally, to the extent Ms. Felts

a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be government must also produce those documents under that Rule to PG&E in advance of trial. As to Request 4, the government contends it has already produced the



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information PG&E seeks, thus Court intervention is unnecessary. Nonetheless, as PG&E appears to dispute this fact,

production contains that information, for instance by identifying Bates numbers or other such data. C. Letter re: Redacted Materials Produced on February 22 (Dkt. No. 383)

The parties dispute whether the Court should compel the government to produce unredacted copies of documents produced on February 22, 2016. Dkt. No. 383. In that production, the government turned over hundreds of pages of documents, which it characterizes as proffer agreements, retainer and billing records, attorney and agent emails s witness list, and attachments. Id. at 1, 3-4. According to PG&E, the id. at 1), which the government explains is due to the fact that , Jencks requires the government to produce the prior statement of a witness not the document itself. Id. at 4 (citing 18 U.S.C. § 3500(e)(1)).

PG&E seeks un-redacted versions of all documents originally produced on February 22. Id. at 3. First, it that it need only provide the words a witness

actually wrote, contending the government has no authority for this position and also that the redacted portions of the production contain statements the government witnesses adopted or 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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be agreeing or disagreeing with something in the prior email message. Id. at 1- impossible to fully ascertain what statements Id. at 2. Second, PG&E contends the materials are discoverable under Rule 16, Brady, Giglio orders. Id. visible portions of these documents indicate that the blacked-out

portions likewi a fact PG&E believes was confirmed when, after the first discovery letter on this matter was filed, the government went back and produced portions of an email it previously redacted and which PG&E argues is exculpatory under Brady. Id. at 2; see also Suppl. Ltr., Dkt. No. 404 at 1. Third, PG&E notes that the government has not produced a privilege log or argued that any of the redacted information is privileged or otherwise protected. Dkt. No. 383 at 2-3. Fourth, and finally, PG&E argues the information is likely to be required at trial under the Rule of Completeness. Id. (citing Fed. R. Evid. 106).

The government primarily sets forth its position on this matter in the supplemental letter, providing a lengthy background of the disclosure requirements associated with Rule 16, the Jencks Act, and Brady/Giglio. Dkt. No. 404 at 2-4. 3

It provides one paragraph of conclusory analysis:



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redactions should be denied. The emails are not subject to discovery under Rule 16(a)(1). Nor does an email necessarily constitute a [United States v.] Kimoto, 588 F.3d [464,] 491-92 [7th Cir. 2009] those of the prospective witnesses have been provided, and well -direct examination deadline. Finally, the United States is aware of the nature of the information that has been redacted, has determined that none of it is exculpatory, and presently sees no impeachment value in it.

3 (Dkt. No. 404), indicating that this was the first time the government presented these arguments to

supplemental arguments are largely a discussion of the applicable law already known or researched by the Court, and its substantive analysis is a mere paragraph of generally conclusory assertions. While the government should have presented these arguments and authorities in earlier briefs, the Court matter. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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Id. at 4.

arguments, the legal authorities, and the supporting documents, the Court finds no grounds to produce this information at this time under the Jencks Act, Rule 16, or Brady/Giglio.

First, as to Jencks, although the government claims to have produced these redacted

delay production of the complete, unredacted emails until the witness testifies, as required by the recorded -4. The government notes that Rule 16(c)(2) prevents the discovery or inspection of statements made by prospective government witnesses except as provided in the Jencks Act, and that under the Ac no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness . . . shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. Id. (quoting 18 U.S.C. § 3500 advantage of the Jencks

has testified, while on the other hand arguing the emails are not Jencks materials at all. In any

Jencks discovery. United States v. Taylor, 802 F.2d 1108, 1118 (9th Cir.1986) (stating that a discovery order requiring earlier disclosure for Jencks United States v. Yan Juan Zhen, 2015 WL 727923, at *3 (D. Nev. Feb. 19, 2015) During the pretrial phase, the Jencks Act is not the sword and cannot be used as a discovery device. . . . Rather, it equips the government with a shield, which functions like a protective order.

Second, as to Rule 16, subsection (discovery or inspection of reports, memoranda, or other internal



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government documents made by an attorney for the government or other government agent in connection with invest except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G). Fed. R. Crim. P. 16(a)(2). The 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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protections, but given the context of the emails submitted to the Court, it appears they were made in connection with the investigation and prosecution of this case. As such, these materials may However, articulated need for the materials falls under Rul

See United States v. Rajaratnam, 2010 WL 1691745, at *1 n.1 (S.D.N.Y. Apr. 27, 2010) (allowing limited redactions made for legitimate investigative purposes Rule 16(a)(2) would seem to allow the government, subject to other disclosure obligations, to refuse to produce interview notes made by government agents in connection with investigating this case. As such, the Court has no basis to order the government to disclose these materials under Rule 16.

Third, under Brady/Giglio, the Court does not currently have a basis to believe the government is withholding materials that must be disclosed as exculpatory or impeachment evidence. Cf. June 29 Order at 11-

and for ordering the production of related Brady Brady

omitted)); see id. that the Government will comply with its Brady obligations and obey the law, absent evidence to the contrary. (citing In re Hergenroeder, 555 F.2d 686, 686 (9th Cir. 1977) (per curiam) (court should presume that government will obey the law)); Jennings, 960 F.2d at 1491-92 (admonishing courts to avoid interfering with executive Brady While PG&E may be correct that the newly unredacted portions of these

emails should have been disclosed earlier under Brady/Giglio, it has not shown why the remaining redaction portions are likely to be exculpatory or useful for impeachment purposes. Nor has it articulated why there is a clear basis in fact or law to believe that the Court should interfere with how the government has complied with its Brady/Giglio obligations, particularly now that the government has again reviewed these documents for Brady/Giglio compliance. See Nov. 12 Order 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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at 6 (declining Brady obligations. Accordingly, at this time, the Court does not find a basis under Brady/Giglio to order the



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government to unredact these documents.

Finally, PG&E raises the argument under the Rule of Completeness, codified in Federal Rule of Evidence 106, that redacted portions of these documents should be revealed for completeness, presumably have the full context for the Brady/Giglio material in the produced documents. In general, Rule 106 seeks to avoid [t]he misleading impression created by taking matters out of context. *United States v. Dorrell*, 758 F.2d 427, 434 (9th Cir. 1985) (quoting Fed. R. Evid. 106 advisory committee note (1972 Proposed Rules)). f a party introduces all or part of a writing or an adverse party may require the introduction, at that time, of any other part or any other writing or recorded statement that in fairness ought to be considered at the same time. Fed. R. Evid. 106 (emphasis added). Thus the concern is more evidentiary and generally becomes ripe at trial. See Rajaratnam, 2010 WL 1691745, at *1 n.1 (rejecting request to unredact documents under the Rule 106 an evidentiary argument of As noted above, PG&E has not explained what basis the Court has for interfering Brady/Giglio obligations or how this evidentiary rule that is generally reserved for trial requires the government to produce such information at this point. PG&E has presented no authority demonstrating that the Rule of Completeness or Rule 106 requires the production of this information. Nonetheless, the Court admonishes the government to tread carefully and the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure. *Cone*, 556 U.S. at 470 n.15 (citations omitted). In any case, without more, the Court does not have a basis to require the government to unredact these materials at this time. D. Letter re: Witness Statements and Grand Jury Materials (Dkt. No. 385) This discovery letter contains two disputes: (1) whether the government has complied with 9 Order requiring the government to produce all witness statements consistent with its obligations under Rule 16 and Brady 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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June 29 Order at 28-29, which PG&E now contends includes witness statements from another grand jury investigation; and (2) whether the government has complied with Rule 6(e)(3)(B) and (E) for each of the grand juries that investigated this case. Dkt. No. 385 at 1-4. First, as to the witness statements, Judge Henderson recognized in the June 29 Order that the government had confirmed at the time materials consistent with its obligations under Rule 16 and Brady

produce all such materials as soon as practicable after they were obtained. June 29 Order at 28-29; *id.* The Government shall produce new witness statements as soon as practicable after such statements are obtained. e such materials without specifically ruling on what grounds these materials had to be produced. PG&E now argues that it has no idea whether the government has completed production of those statements and further contends that the government should, under the June 29 Order, G&E other grand jury investigation. Dkt. No. 385 at 2. It has requested these materials from the government, but according to PG&E, the government has told it that it will only produce materials that, in the view, are relevant to the upcoming trial of this case. *Id.* June 29 Order does not permit the



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government to decide unilaterally whether to produce these

Id. It requests an order compelling the government to confirm that it has produced all witness statements from the other grand jury investigation or to complete its production. Id. at 2-3.

the Jencks Act, and Brady/Giglio pretrial Id. at 4. It contends that witness statements grand jury investigation are not discoverable if they do not relate to the case proceeding to trial and are not Jencks, Giglio, or Brady [ma Id. It further asserts that PG&E is not entitled to know who the government calls as witnesses in another grand jury investigation. Id. (citations omitted). 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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As noted above, Judge Henderson has previously play referee with respect to Brady obligations. obligations under Brady/Giglio and absent a specific reason to suspect that Brady material may have a clear basis in la interference is necessary. See Jennings, 960 F.2d at 1491-92; Miller, 722 F.2d at 565. While

PG&E has posited that the other grand jury investigation may be related to this case, this is not enough to believe that the witness statements from that investigation are necessarily subject to disclosure under Rule 16, Jencks, or Brady/Giglio. Without more, PG&E has not identified a basis for which the Court must order such materials to be produced. See Fed. R. Crim. P. 6(e)(2)(B) (imposing general rule that certain parties, including attorneys for the government, see also For non-ministerial grand jury materi for disclosure, such as specific facts constitu is not enough. (quoting United States v. Ferreboeuf, 632 F.2d 832, 835 (9th Cir. 1980); United States v. Diaz, 236 F.R.D. 470, 480 (N.D. Cal. 2006)). That said, the Court finds it reasonable that the government, by April 12, 2016, either (1) submit a declaration confirming it has reviewed the materials and statements from the grand jury as well as the interview reports and agent notes reflecting communications between PG&E employees or contractors and PG&E attorneys for Rule 16 and Brady/Giglio materials, or (2) complete production of these materials.

Second, as to the grand jury records, PG&E has asked the government to produce documents that r for each of the grand juries that have investigated or are investigating this case. Dkt. No. 385 at 3. Rule 6(e)(3)(B) An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule. Fed. R. Crim. P. 6(e)(3)(B). Although PG&E does not say as much, it seems to believe this information should be disclosed directly to it rather than the Court and that by obtaining this data 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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the pro No. 385 at 3. It does not explain how the relationship is material defense, but generally notes that the government has recently produced documents showing it Id.

finds no grounds for ordering this information produced as discovery. First, PG&E has not shown Second, while Judge Henderson previously held the public has a limited right of access to the of a grand jury dates that the relevant grand juries were impaneled and excused, as well as their empaneling instructions, his Order does not suggest that the identities of grand jury witnesses are discoverable. See June 29 Order at 23. Ministe generally relate to the procedural aspects of the impaneling and operation of the . . . Grand Id. at 21 (quoting In re Special Grand Jury (for Anchorage, Alaska), 674 F.2d 778, 779 n.1, 780

(9th Cir. 1982)). Judge Henderson followed Ninth Circuit precedent explaining that while proceedings before the grand jury are secret, [] the ground rules by which the grand jury conducts

Id. (alterations in original) (quoting United States v. Alter, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973)). The Court thus agrees with the government that the witness lists onducts its proceedings, and disclosure risks revealing substantive information about the grand jury proceedings, which are protected under for disclosure. As it has not done so, the Court sees no grounds for ordering the government to produce such information. // // // // // 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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CONCLUSION Based on the foregoing analysis, the Court ORDERS as follows: (1) The Court GRANTS by April 12, 2016,

the government must produce all Brady and Rule 16 materials for all seven topics and the CPUC information listed on page 16 of this Order to the extent they are in the

(2) The Court DENIES WITHOUT PREJUDICE in Dkt. No. 382 for

further discovery as to Mr. Lubow information PG&E seeks has been produced. If PG&E wishes to re-assert this request, the parties must again meet and confer, and then they may file another letter in compliance with the Although discovery has closed, the parties are GRANTED LEAVE to file such a letter by April 12, 2016 as it directly correlates with this Order. See Order Setting Deadlines, Dkt. No. 369 at 3. (3) Likewise as to Mr. Na discussed in Dkt. No. 382, the

Court ORDERS the parties to meet and confer by April 8, 2016 as to the summary report the government already produced, and if PG&E still contends that summary is inadequate and the government otherwise refuses to supplement this summary, PG&E is GRANTED LEAVE to re-raise the issue with the Court by April 12, 2016 in . Next, as to Mr. -on materials, the Court GRANTS



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equest and ORDERS the government to identify and produce to PG&E any non-privileged materials Mr. Nanney relied on by April 8, 2016. (4) As to Ms. Felts, as she will not offer expert opinions at trial, the Court DENIES

request in Dkt. No. 382 for a Rule 16(a)(1)(G) summary or the related materials she would have relied on; however, the Court GRANTS the government produce the documents Ms. Felts will summarize at trial as well as documents she intends to summarize under Rule 1006. To the extent the governments has already produced that information, it shall identify which 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 United States District Court

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production contains that information, for instance by Bates numbers or other such data. Finally, to the extent the government has already produced communications between Ms. Felts and the prosecution team or related government agents in this matter as it has represented, the government is ORDERED to identify for PG&E what part of its prior productions contains that information. The government must comply with this portion of the Order by April 12, 2016. (5) As to Dkt. No. 383, the Court DENIES

ordered to further unredact the documents it produced on February 22; that said, the Court admonishes the government to carefully review these documents to ensure that it has fully complied with its Brady/Giglio obligations and err on the side of transparency. (6) Finally, as to Dkt. No. 385, the Court GRANTS IN PART and

ORDERS the government, by April 12, 2016, to either (1) submit a declaration confirming it has reviewed the materials and statements from the grand jury as well as the interview reports and agent notes reflecting communications between PG&E employees or contractors and PG&E attorneys for Rule 16 and Brady/Giglio materials, or (2) complete production of these materials. The Court, however, DENIES request for the grand jury witness lists under Rule 6(e)(3)(B).

IT IS SO ORDERED.

Dated: April 4, 2016

_____ MARIA-ELENA JAMES United States Magistrate Judge

