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9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11  
12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 vs.

15 JACOB BYCHAK, MARK  
16 MANOOGIAN, MOHAMMED  
ABDUL QAYYUM, AND PETR  
PACAS

17 Defendants.

CASE NO. 3:18-cr-04683-GPC

**MOTION FOR INFORMANT  
DISCOVERY**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' JOINT MOTION  
TO COMPEL DISCLOSURE OF  
DISCOVERY RELATING TO  
CONFIDENTIAL INFORMANT**

Date: April 19, 2019  
Time: 1:00 p.m.  
Dept.: 2D

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As the Court is aware, this case spun off from a larger ongoing investigation  
4 into the commercial email practices of Company A, a large digital advertising  
5 company with offices in San Diego. Company A was in the business of delivering  
6 bulk commercial emails on behalf of client companies to advertise their goods and  
7 services. Many of Company A’s clients are well-established companies, such as  
8 AT&T and Fidelity Life. On October 31, 2018, the Government brought federal  
9 criminal charges in the instant case against four employees of Company A—  
10 Defendants Jacob Bychak, Mark Manoogian, Mohammed Abdul Qayyum, and Petr  
11 Pacas (collectively “Defendants”). None of these Defendants are part of the control  
12 group of Company A. None have ever been in trouble with the law prior to this case.

13 The Indictment alleges that Defendants, acting on behalf of Company A, took  
14 actions to acquire IP addresses to send commercial emails.<sup>1</sup> To deliver large  
15 amounts of emails, advertising companies must seek out a steady supply of Internet  
16 Protocol (“IP”) addresses that are not blocked by spam filters. This is because an  
17 email sent through an IP address that has been blocked by a spam filter will not  
18 reach the intended recipient. The dispute in this case is whether Defendants, as  
19 employees of Company A, acquired certain IP netblocks<sup>2</sup> unlawfully, and whether  
20 Defendants along with Company A unlawfully sent bulk commercial emails  
21 facilitated in part by these netblocks. The Government has alleged that Defendants  
22 “hijacked” certain abandoned IP netblocks by means of wire fraud (Counts 2  
23 through 5), and that Defendants sent commercial emails from “hijacked” IP  
24

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25 <sup>1</sup> Defendants are not accused of sending “spam” emails involving investment  
26 scams or pornography. As argued in the concurrently-filed motion to dismiss based  
27 on misadvisement to the grand jury, on a broader level, the Government is also  
28 improperly alleging that unsolicited commercial emailing itself is criminal.

<sup>2</sup> A “netblock” is a large group of IP addresses.

1 netblocks in violation of the CAN-SPAM Act (Counts 6-10). The Government has  
2 also alleged that all Defendants were engaged in a conspiracy to commit these  
3 federal crimes (Count 1). Defendants deny these allegations and intend to mount a  
4 vigorous defense.

5       According to the discovery, the genesis of the Government's investigation  
6 started with information provided by a confidential informant known to the FBI as  
7 Confidential Human Source S-0009118 ("CHS"). Defendants must have access to  
8 discovery relating to the CHS to adequately prepare for trial. The requested  
9 informant discovery is necessary, relevant, and helpful to the defense for the  
10 following reasons:

11       First, during the time period alleged in the Indictment, the CHS was  
12 communicating with and receiving documents from Peter Holden, the owner of  
13 Hostwinds, which is the hosting company alleged to be the victim of the wire fraud  
14 counts. Holden will likely testify that one or more Defendants deceived him into  
15 thinking that Company A owned the IP netblocks identified in the Indictment.  
16 It will be critical for Defendants to question the CHS on statements made by  
17 Holden, including any statements that may go to his motives or credibility.

18       Second, the CHS was also communicating with a former Company A  
19 employee who provided detailed information about Company A's operations. The  
20 defense must be permitted to flesh out who this former employee is and what he told  
21 the CHS, especially in a case where the Government is alleging that there was a  
22 broader conspiracy between Company A and Defendants. In particular, the defense  
23 must be able to explore a good faith defense, which will depend on what Defendants  
24 knew and what they and other employees at the Company were being told by  
25 management regarding the legality of certain actions.

26       Third, the FBI case agent relied heavily on the CHS's expertise and  
27 observations to investigate this case and to later provide justification for multiple  
28 search warrants. The requested discovery is necessary for the defense to investigate



1 the credibility of the case agent, as well as the credibility of the CHS, and  
2 potentially the validity of the warrants.

3 Finally, the informant privilege does not apply because there is no threat to  
4 the safety of the informant or future investigations, and the materiality of the  
5 requested discovery to preparing a defense substantially outweighs any minimal  
6 interest the Government has in keeping the identity of the CHS confidential.

7 The Government has refused to produce the requested information on the  
8 basis that it does not intend to call the CHS at trial. But regardless of whether the  
9 Government intends to affirmatively call the CHS, the evidence requested is  
10 essential to the Defendants' ability to defend themselves because, among other  
11 things, it will permit the defense to explore flaws in the Government's investigation  
12 of this case, provide evidentiary support for pre-trial motions *in limine*, and enable  
13 the impeachment of Government witnesses *other* than the CHS. Defendants  
14 respectfully request that the Court order the Government to produce this information  
15 immediately so that Defendants may adequately prepare for trial. At minimum,  
16 Defendants ask that the Government submit the requested materials *in camera* so  
17 that the Court can decide this motion.

## 18 **II. BACKGROUND**

### 19 **A. The Government Alleges Defendants Defrauded Hostwinds, a** 20 **Hosting Company, by Using Purportedly Forged Letters of** 21 **Authorization**

22 The Government has summarized its theory of the case in previous filings  
23 before this Court. (*See, e.g.*, Dkts. 47 and 51.) In short, Defendants are accused of  
24 having purchased abandoned IP netblocks, without the permission of the actual  
25 owners of those netblocks, through a man named Daniel Dye, who has pled guilty to  
26 a violation of the CAN-SPAM Act and is cooperating with the Government. Once  
27  
28

1 an IP netblock is purchased, the IP address space must be “announced”<sup>3</sup> by a hosting  
 2 company so that the IP address can be connected to the internet and used to transmit  
 3 data. Hosting companies require the party requesting the announcement to provide  
 4 a Letter of Authorization (“LOA”)<sup>4</sup> that proves that the hosting company is  
 5 authorized to announce the IP address. The Government’s theory, apparently based  
 6 on circumstantial evidence and statements from Dye, is that Defendants knew they  
 7 were buying “hijacked,” i.e. stolen IP netblocks from Dye. But the transactions with  
 8 Dye are not where the Government alleges any fraud or misrepresentation occurred.  
 9 Instead, the alleged misrepresentations at the heart of the Indictment center around  
 10 purportedly forged LOAs that Defendants allegedly provided to hosting  
 11 companies—specifically a hosting company called Hostwinds.

12 Counts 2 through 5 of the wire fraud counts allege that the following wire  
 13 transfers were sent in furtherance of the scheme to defraud:

Count	Date	From	To	Description
2	11-11-13	San Diego	Oklahoma	PayPal wire transfer of \$600 for hosting of ECT netblock
3	1-9-14	San Diego	Oklahoma	PayPal wire transfer of \$600 for hosting of Telalink netblock
4	2-28-14	San Diego	Oklahoma	PayPal wire transfer of \$600 for hosting of MooreSolutions netblock
5	3-10-14	San Diego	Oklahoma	PayPal wire transfer of \$600 for hosting of Telalink netblock

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 23 (Dkt. 1 (“Indictment”) at p.4.) The discovery indicates that each of the \$600 PayPal  
 24 wire transfers described above were sent to a hosting company in Oklahoma called

25  
 26  
 27 <sup>3</sup> The “announcement” of an IP address alerts the internet to who is using the IP  
 address space so that it may be assigned to an Autonomous System.

28 <sup>4</sup> LOAs are also sometimes called Letters of Agency.

1 Hostwinds, a company owned by Peter Holden. Thus, Defendants are accused of  
 2 having defrauded Hostwinds by providing it with \$600 and an allegedly forged LOA  
 3 to announce each IP netblock.

4 **B. The Government Has Relied on the CHS Since 2013 to Investigate**  
 5 **This Case and Used that Information to Obtain Search Warrants**

6 According to the discovery, the CHS is an employee of Spamhaus, a foreign,  
 7 anti-spam organization described in an FBI 302 as an agency that “works with law  
 8 enforcement to identify and pursue spammers worldwide.” (ADCONION-DISC02-  
 9 REPORTS-001001.)<sup>5</sup> In June of 2013, the CHS contacted the FBI and claimed that  
 10 he had received emails promoting television, internet, and dating websites that came  
 11 from Company A through hijacked IP addresses. Over the course of the next few  
 12 months, the CHS emailed the FBI evidence to support his belief that Company A  
 13 was sending emails through hijacked IPs, including:

- 14 • A detailed report titled “Current [Company A] Direct Hijacks, July 13,  
 15 2013,” which laid out a digital forensic analysis of several of the IP  
 netblocks specified in the Indictment (ADCONION-DISC02-  
 16 REPORTS-00984);
- 17 • One allegedly forged LOA addressed to Hostwinds that the CHS had in  
 his possession in October of 2013 (ADCONION-DISC02-REPORTS-  
 18 001000, 001002); and
- 19 • A spreadsheet of IP netblocks suspected to have been hijacked by  
 Company A, along with associated domain names (ADCONION-  
 20 DISC02-REPORTS-001005).

21 During an interview on June 2, 2014, the CHS revealed that he had obtained  
 22 LOAs directly from Peter Holden, the owner of the allegedly defrauded hosting  
 23 company. (ADCONION-DISC02-REPORTS-01011.) The CHS also provided  
 24 detailed information regarding which Company A employee was communicating  
 25 with Holden to announce the IP netblocks.

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26  
 27 <sup>5</sup> Defendants have provided citations to the bates numbers of the discovery for the  
 28 Government’s reference but have not attached these pages as exhibits to avoid  
 publicly filing potentially sensitive information contained in the FBI 302s.

1           During that same June 2 interview and later on November 30, 2014  
2 (ADCONION-DISC02-REPORTS-01018), the CHS provided the FBI with detailed  
3 information about Company A’s history, internal operations, and the relationships  
4 between Defendants and other employees and executives at the Company. The CHS  
5 indicated that he was receiving this information from a former employee of  
6 Company A. (ADCONION-DISC02-REPORTS-01016.)

7           **C.     The Case Against Defendants Is Highly Circumstantial**

8           Without witness testimony, the evidence against Defendants is highly  
9 circumstantial. The bulk of the Government’s case appears to be made up of emails  
10 where Defendants discuss the acquisition and announcement of IP netblocks  
11 purchased from Dye, and summary email reports indicating that commercial emails  
12 were sent from those netblocks. These emails do not show that Defendants knew  
13 the IP netblocks were obtained without consent from the original owners. Mr. Pacas  
14 does not even appear on any email communications relating to the acquisition of the  
15 IP netblocks identified in the Indictment. This will make the testimony of people  
16 who interacted with the Defendants, including Holden and any former company  
17 employees, even more important to understanding the Defendants’ states of mind.<sup>6</sup>

18           **D.     The Government Has Refused to Produce the Requested Discovery**

19           On November 20, 2018, Defendant Qayyum filed a motion to compel  
20 discovery relating to confidential informants in this case, and other defendants  
21 similarly requested this discovery in joinders to the motion. (Dkt. 36 at pp. 8-9;  
22 Dkt. 37; Dkt. 39-1 at p. 3.) In response, the Government stated it would not provide  
23 informant discovery because the CHS was “not a percipient witness to the offenses,  
24

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25 <sup>6</sup> Defendants have been charged with wire fraud, which is a specific intent crime.  
26 *See U.S. v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013) (“The specific intent  
27 requirement is an aspect of the ‘scheme to defraud’ requirement; i.e., there is no  
28 fraudulent scheme without specific intent”).

1 and is not contemplated as a witness in the government’s case in chief.” (Dkt. 47 at  
2 pp. 13.) At the January 25, 2019, hearing, the Court granted Defendants’ leave to  
3 provided supplemental briefing on the need for disclosure of informant discovery.

4 **III. THE LEGAL STANDARD REQUIRES THE GOVERNMENT TO**  
5 **PRODUCE THE REQUESTED DISCOVERY PURSUANT TO RULE**  
6 **16, BRADY AND THEIR PROGENY**

7 Rule 16(a) of the Federal Rules of Criminal Procedure requires the  
8 Government to make available, upon a defendant’s request, documents and other  
9 materials “within the government’s possession, custody, or control” that are either  
10 “material to preparing the defense,” or that the government intends to use in its case-  
11 in-chief at trial. Fed. R. Crim. P. 16(a)(1)(E)(i).

12 To obtain discovery under Rule 16, all that is required is that the defendant  
13 make a threshold showing of materiality. *Hernandez-Meza*, 720 F.3d at 768.  
14 Materiality is a “low threshold” satisfied by a presentation of facts which tends to  
15 show that the Government is in possession of information helpful to the defense.  
16 *Id.*; see also *United States v. Muniz-Jaquez*, 718 F.3d 1180, 1183 (9th Cir. 2013)  
17 (“Even inculpatory evidence may be relevant. A defendant who knows that the  
18 government has evidence that renders his planned defense useless can alter his trial  
19 strategy.”)

20 The Government has a duty to disclose exculpatory and impeaching evidence.  
21 *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150,  
22 154 (1972); United States Attorneys’ Manual (“USAM”) § 9-5.001(B)  
23 (“Government disclosure of material exculpatory and impeachment evidence is part  
24 of the constitutional guarantee to a fair trial.”). In *Brady*, the Supreme Court ruled  
25 that evidence favorable to the accused must be turned over by the prosecutor, even if  
26 it is not subject to discovery under Rule 16(a). *Brady v. Maryland*, 373 U.S. at 87.

1 **IV. DISCOVERY RELATING TO THE CHS IS MATERIAL TO THE**  
2 **DEFENSE BECAUSE IT GOES TO THE CREDIBILITY OF KEY**  
3 **WITNESSES**

4 The Government must produce the requested discovery under Rule 16 and  
5 *Brady* because it is both material to the preparation of the defense and is likely to  
6 lead to the discovery of exculpatory evidence. It is clear from the discovery that the  
7 CHS was in contact with at least three potential witnesses whose credibility will be  
8 at issue during the trial: (1) Peter Holden, the owner of Hostwinds, (2) a former  
9 employee of Company A, and (3) the case agent. Defendants must be permitted to  
10 interview the CHS regarding his interactions with these three potential witnesses to  
11 adequately prepare for trial. Moreover, the Government cannot invoke the limited  
12 informant privilege in this case where there is no credible threat to the CHS's safety,  
13 and there is no indication that the CHS must remain anonymous to continue to be a  
14 source of information.

15 **A. The Discovery Must Be Produced Because the CHS Communicated**  
16 **with Holden, the owner of Hostwinds**

17 As part of its case-in-chief, the Government will have to show that  
18 Defendants deceived Holden, owner of the alleged victim Hostwinds, into believing  
19 that the LOAs they were providing were authentic. Holden has told agents that a  
20 Defendant represented to him that Company A had purchased the companies listed  
21 as the author of the LOAs. (ADCONION-DISC02-REPORTS-00039.) Holden's  
22 credibility is a key issue because the line between whether he was a victim or a co-  
23 conspirator is a blurry one. This is evident from the Government's decision to file  
24 criminal charges against Vincent Tarney, the owner of *another* hosting company  
25 who allegedly announced IP netblocks on behalf of Company A. As the  
26 Government has indicated in prior filings, Mr. Tarney is accused of having  
27 announced IP netblocks on behalf of Company A despite knowing that the LOAs he  
28 was given may have been forged. (*See, e.g.*, Dkt. 47 at p. 4.) Rather than being

1 treated as a victim, he was charged as a co-conspirator in a separate case before this  
2 Court and has pled guilty to conspiring to violate the CAN-SPAM Act. *See United*  
3 *State v. Tarney*, CR 18-3469 GPC. Mr. Holden, on the other hand, has not been  
4 charged or arrested for his similar role in announcing the IP netblocks involved in  
5 this case. To the contrary, he is being treated as the victim as to the wire fraud  
6 counts. As is apparent from the case against Tarney, Holden's knowledge regarding  
7 the alleged falsity of the LOAs is the critical difference between whether the  
8 Government views him as a criminal or a victim. Therefore, his credibility and  
9 motives are a critical area for the defense.

10 The CHS's knowledge is particularly important with respect to Holden  
11 because he received an allegedly forged LOA addressed to Hostwinds as early as  
12 October of 2013. (ADCONION-DISC02-REPORTS-01000-01002.) This is one  
13 month *before* the earliest wire fraud and CAN-SPAM counts charged in the  
14 Indictment.<sup>7</sup> This suggests that the CHS was in communication with Holden during  
15 the time period that critical events alleged in the Indictment were taking place.  
16 Importantly, the CHS can shed light on what Holden knew about the likelihood that  
17 Company A was providing forged LOAs as of October of 2013, prior to the dates of  
18 any of the charged wire fraud transactions or CAN-SPAM emails. The fact that  
19 Holden may have continued to announce IP netblocks for Company A *after* he  
20 provided a suspicious LOA to the CHS calls into question his credibility and motive  
21 for claiming that Defendants made misrepresentations to him.

22 **B. The Discovery Must Be Produced Because the CHS Was**  
23 **Communicating with a Former Employee of Company A**

24 The CHS also received information, including emails, from a former  
25 employee of Company A. The CHS describes this person as having "intimate  
26 \_\_\_\_\_

27 <sup>7</sup> The dates in the wire fraud counts range from November 11, 2013, to March 10,  
28 2014; and the dates in the CAN-SPAM counts range from November 3, 2013 to  
January 26, 2014.

1 knowledge of [Company A’s] operations and of the hijacking of IPs.”  
2 (ADCONION-DISC02-REPORTS-01016.) Through this source, the CHS provided  
3 the FBI with detailed information about Company A’s alleged IP “hijacking”  
4 operation, including which of Company A’s locations were in charge of the  
5 “spamming,” and which employees were responsible for overseeing those activities.  
6 (ADCONION-DISC02-REPORTS-01017.) The CHS also provided information  
7 about the history of Company A’s involvement in “spamming” and certain  
8 acquisitions Company A made of other companies allegedly tied to “spamming.”  
9 (ADCONION-DISC02-REPORTS-01018.)

10 It is critical that Defendants be able to flesh out the information that the CHS  
11 received from this former employee of Company A for a number of reasons. At the  
12 heart of this case is what Defendants knew and intended. The Government’s theory  
13 is likely that Defendants’ knowledge grew over time—that even if they did not  
14 know that the first IP netblock Company A allegedly purchased from Dye was  
15 “hijacked,” they must have known by the second or the third or the fourth. The  
16 employee who was in communication with the CHS clearly has crucial information  
17 regarding who at Company A knew what and when. In addition to having relevant  
18 information as to the knowledge of one or more Defendants, the employee may also  
19 be able to provide details about what Company A’s management represented to  
20 Defendants about the legality of the acquisition and use of these IP netblocks. Such  
21 facts would go directly to the issue of whether Defendants were acting in good faith.  
22 Without access to the CHS, Defendants’ hands are shackled with respect to their  
23 ability to determine the identity of this former employee. It is therefore crucial that  
24 the Government provide the requested informant discovery so that Defendants may  
25 investigate the identity of this employee and adequately explore their defenses.

26 **C. The Discovery Must Be Produced Because the Case Agent Relied**  
27 **on the CHS to Make Sworn Statements**

28 The case agent for the Government relied on statements made by the CHS to



1 apply for at least two search warrants, including a warrant to search the email  
2 account of Defendant Mark Manoogian. Among other things, the agent relied on  
3 information provided by the CHS regarding (1) Company A’s alleged practice of  
4 sending forged LOAs to “hijack” netblocks, (2) the spam filtering practices of major  
5 webmail providers like Google, (3) the approximate market price of IP addresses,  
6 and (4) the approximate value of the IP addresses supposedly “hijacked” by  
7 Defendants. (ADCONIAN-REPORTS-00108-00109.) Defendants should be  
8 permitted to investigate the statements the CHS made to the case agent, as well as  
9 the credibility and reliability of the CHS himself, for possible impeachment material  
10 as to the case agent and for potential attacks on the legality of the search warrants.

11 **D. The Informant Privilege Does Not Apply under *Roviaro***

12 The Government has previously invoked the informant privilege to refuse to  
13 provide the requested discovery. But the limited informant privilege is overridden  
14 in this case because the requested informant discovery is crucial to the preparation  
15 of the Defendants’ preparation for trial: “Where the disclosure of an informer’s  
16 identity, or of the contents of his communication, is relevant and helpful to the  
17 defense of an accused, or is essential to a fair determination of a cause, the privilege  
18 must give way.” *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). The decision  
19 to disclose the identity of an informant “calls for balancing the public interest in  
20 protecting the flow of information against the individual’s right to prepare his  
21 defense.” *Id.* at 62. To effectuate this balancing test, courts consider three factors:  
22 1) the degree of the informant’s involvement in the alleged activity; 2) the  
23 relationship between the defense and the informant’s likely testimony; and 3) the  
24 governmental interests in nondisclosure. *United States v. Gonzalo Beltran*, 915 F.2d  
25 487, 488-89 (9th Cir. 1990). On balance, these factors favor production of the  
26 requested discovery.

27 With respect to the first factor, although the Government has characterized  
28 the CHS as a “tipster with no involvement in the offense,” (Dkt. 47 at pp. 14), the

1 discovery indicates that he had at least minor involvement. He claims to have  
2 received at least two emails from IP addresses “hijacked” by Company A’s IP  
3 addresses. (ADCONION-DISC02-REPORTS-00980.) Thus, the CHS claims to  
4 have been a recipient of emails that were allegedly sent as part of Defendant’s  
5 broader conspiracy to violate the CAN-SPAM Act. Moreover, the CHS was heavily  
6 involved in the Government’s investigation of Defendants and Company A. As an  
7 employee of a vigilante organization that has aligned itself with the Government on  
8 investigations related to commercial email, the CHS has essentially acted as an  
9 investigative agent for the FBI since 2013. Among other things, the CHS gave  
10 information to the FBI over the course of at least a year and a half, providing  
11 multiple interviews in person and over the phone. The CHS also analyzed numerous  
12 IP addresses allegedly used by Company A, including those that are identified in the  
13 Indictment, and generated reports for the FBI that included detailed digital forensic  
14 analysis to explain why he believed these IP addresses were hijacked. These facts  
15 indicate he was far more than a “tipster” for the Government.

16       The second factor—the relationship between the defense and the informant’s  
17 likely testimony—weighs heavily in favor of Defendants. The CHS may be a  
18 crucial witness for the defense to impeach or otherwise shed light on the motives of  
19 at least three potential government witnesses: Holden, the former Company A  
20 employee, and the case agent. As discussed above at length, the CHS was in direct  
21 communication with these witnesses during the relevant time period. Accordingly,  
22 the CHS can provide valuable impeachment evidence with respect to those  
23 witnesses. Such evidence is critical in a case such as this, where the evidence  
24 against Defendants is highly circumstantial. There is no smoking gun document  
25 establishing that Defendants knew any IP netblock was “hijacked.” Thus, the  
26 Government’s case will rise and fall on the credibility of witnesses who can testify  
27 as to Defendants’ knowledge and intent to defraud. The CHS is the witness in the  
28 best position to call the credibility of these witnesses into question.

1 Finally, the third factor—governmental interests in nondisclosure—also  
2 strongly weighs in favor of Defendants. The Government has no legitimate interest  
3 in nondisclosure. The Government cannot point to any threat to the CHS’s safety—  
4 Defendants have no prior criminal history, and there is no dangerous criminal  
5 organization alleged to be lurking in the background. As for the Government’s  
6 ability to use the CHS as a source in other cases, the Government has not articulated  
7 any reason why the disclosure of the CHS’s identity would interfere with their  
8 ability to continue to rely on him as a source. There is no indication that the CHS is  
9 a wired informant being sent to secretly infiltrate spamming rings; there is no  
10 indication that he is remaining anonymous to investigate on behalf of the  
11 Government or to communicate with key suspects. Because revelation of the CHS’s  
12 identity will neither endanger him nor jeopardize any ongoing investigations, the  
13 Government cannot withhold this discovery on the basis of the informant privilege.

14 **V. THE GOVERNMENT MUST PRODUCE THE ITEMS OF**  
15 **DISCOVERY SPECIFIED IN THIS MOTION**

16 Defendants ask that the Court order the Government to immediately produce  
17 all discovery relating to the CHS. That discovery should include:

- 18 (1) the CHS’s identity and contact information;
- 19 (2) copies of all documents, materials, or summaries relating to any  
20 benefits, promises, or compensation the CHS has received to-date in  
21 connection with his cooperation in this case;
- 22 (3) copies of all communications between the Government (including both  
23 law enforcement and prosecutors) and the CHS recorded in any form,  
24 including written summaries, handwritten notes, emails, audio or video  
25 recordings, and specifically including the emails sent to the FBI on July  
26 15, 2013, July 31, 2013, October 17, 2013, and October 18, 2013;
- 27 (4) copies of all documents, materials, memoranda, reports, or any other  
28 items, whether tangible or intangible, provided to the Government

1 (including both law enforcement and prosecutors) by the CHS,  
 2 including the “numerous documents” provided and shown to the FBI  
 3 during its interview of the CHS on June 2, 2014;

4 (5) information relating to the CHS’s criminal history, including any arrest  
 5 reports, court records, or records of conviction; and

6 (6) any and all other evidence material to the preparation of the defense or  
 7 otherwise exculpatory or impeaching of any Government witness.

8 Defendants address each of the aforementioned categories of discovery below.

9 **A. The Identity and Contact Information of the CHS Must be**  
 10 **Disclosed Immediately**

11 The Government should be required to disclose the identity and contact  
 12 information of the CHS immediately to allow the defense enough time to locate and  
 13 interview him, particularly if he is in a foreign location. Exculpatory and  
 14 impeachment evidence material to guilt or innocence must be disclosed “in  
 15 sufficient time to permit defendant to make effective use of that material.” *LaMere*  
 16 *v. Risley*, 827 F.2d 622, 625 (9th Cir. 1987); USAM § 9-5.001(D) (citations  
 17 omitted). In order to make effective use of the evidence, the Court should order the  
 18 Government to disclose this information immediately. Such disclosure will not  
 19 endanger the CHS, and there is no justification for further delay of this critical  
 20 evidence.

21 **B. Evidence of any Benefits, Promises, or Compensation Provided to**  
 22 **the CHS Must Be Produced**

23 The Ninth Circuit has observed that confidential informants seeking benefits  
 24 from the government face “temptations to produce as many accused as possible” and  
 25 that “[t]he use of informants . . . is fraught with peril.” *United States v.*  
 26 *Montgomery*, 998 F.2d 1468, 1472 (9th Cir. 1993) (quoting *Velarde-Villareal v.*  
 27 *United States*, 354 F.2d 9, 13 (9th Cir. 1965) and *United States v. Bernal-Obeso*,  
 28 989 F.3d 331, 333 (9th Cir. 1993)). Benefits includes all monetary payments

1 received by the informant. *See, e.g., United States v. Cutler*, 806 F.2d 933, 935 (9th  
2 Cir. 1986); *United States v. Shaffer*, 789 F.2d at 688. It also includes the details of  
3 any cooperation agreement and information as to what the government did to satisfy  
4 its obligations under any such agreement. *See Giglio v. United States*, 405 U.S. 150,  
5 154 (1971); *United States v. Kojayan*, 8 F.3d 1315, 1322 (9th Cir. 1993). Disclosure  
6 should include benefits which are going to be considered in the future as well as  
7 ones which have been promised or already provided.

8         With respect to the disclosure of monetary benefits, the defense is entitled to a  
9 specific breakdown of all dates on which the informant received money (whether in  
10 cash or some other form), how much he received on each date, and why he received  
11 the money. This is to enable the defense to evaluate the timing of the payments in  
12 relation to the instant case. The defense should also be provided with information  
13 about what, if anything, the informant was required to do in return for the payment.  
14 Benefits received by an informant may also include other forms of consideration.  
15 The defense should be informed of all other benefits, such as assistance in obtaining  
16 residence or employment, and any other help which the government may have given  
17 the informant. The defense is entitled not only to information regarding these  
18 benefits but documents that can be used to impeach or refresh the informant,  
19 including signed informant agreements, checks, written contracts, and immigration  
20 documents.

21         **C. All Communications with the CHS Recorded in any Form Must be**  
22         **Produced**

23         The FBI 302s produced in this case indicate that the Government is  
24 withholding certain communications from the CHS to the FBI. Specifically, the  
25 302s describe at least four emails from the CHS sent on July 15, 2013  
26 (ADCONIAN-DISC02-REPORTS-00982), July 31, 2013 (ADCONIAN-DISC02-  
27 REPORTS-00996), October 17, 2013 (ADCONIAN-DISC02-REPORTS-01000),  
28 and October 18, 2013 (ADCONIAN-DISC02-REPORTS-01004). While the

1 Government has produced copies of the attachments to those emails, it has not yet  
2 produced the emails themselves.<sup>8</sup> The Government should be ordered to produce  
3 those emails and any other communications between the Government and the CHS  
4 recorded in any form.

5 **D. All Materials Provided by the CHS to the FBI Must be Produced**

6 The FBI 302s also indicate that on June 2, 2014, the CHS provided the FBI  
7 with “numerous documents including LOA’s of hijacked netblocks, hijacked  
8 reports, profiles of individuals associated with spamming companies, various  
9 spreadsheets, and Powerpoint presentations” in electronic format. (ADCONION-  
10 DISC02-REPORTS-01011.) Defendants have been unable to find these materials in  
11 the discovery. The Government should be ordered to produce the described  
12 documents as well as copies of any other documents or items provided by the CHS.

13 **E. All Information Relating to the CHS’s Criminal History Must be**  
14 **Produced**

15 The informant’s prior criminal record must be disclosed. *See United States v.*  
16 *Price*, 566 F.3d 900, 911-12 (9th Cir. 2009); *Bernal-Obeso*, 989 F.2d at 333. This  
17 should include information about criminal activity which has not been the subject of  
18 arrests, charges, or convictions, such as information about assets acquired through  
19 criminal activity. *See United States v. Shaffer*, 789 F.2d 682, 688 (9th Cir. 1986). If  
20 a witness has failed to report income received for his work as an informant or  
21 income from criminal activity on his tax returns, that information must be provided  
22 as well. *See id.* Benefits of all types provided in connection with criminal cases  
23 must be disclosed. *See Benn v. Lambert*, 283 F.3d 1040, 1057 (9th Cir. 2002)  
24 (release from jail without being charged, dismissal of charge, and delay in issuance  
25 of warrant); *Singh v. Prunty*, 142 F.3d 1157, 1162 (9th Cir. 1998) (dismissal of  
26 \_\_\_\_\_

27 <sup>8</sup> To the extent that this discovery is buried within the terabytes of electronically  
28 stored information that the Government has produced on an ongoing basis, the  
Government should be required to identify its location.

1 charges, release on own recognizance, judge’s statement considering cooperation at  
2 sentencing, and suspended and probationary sentences).

3 **VI. CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request that the Court  
5 grant this motion.

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Respectfully submitted,

DATED: March 15, 2019

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**CERTIFICATE OF AUTHORIZATION**  
**TO SIGN ELECTRONIC SIGNATURE**

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures of the United States District Court for the Southern District of California, I certify that the content of this document is acceptable to counsel for the Defendants and that I have obtained authorization from David W. Wiechert, Randy K. Jones, and Whitney Z. Bernstein to affix their electronic signatures to this document.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Counsel for Defendants certify that the foregoing pleading has been electronically served on the following parties by virtue of their registration with the CM/ECF system:

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