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 UNITED STATES OF AMERICA

14 UNITED STATES DISTRICT COURT

15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA,  
 17  
 Plaintiff,  
 18  
 v.  
 19  
 MICHAEL JOHN AVENATTI,  
 20  
 Defendant.

No. SA CR 19-061-JVS

GOVERNMENT'S OPPOSITION TO  
 DEFENDANT'S MOTION FOR AN ORDER TO  
 SHOW CAUSE RE CIVIL CONTEMPT AND  
 FINDING OF CONTEMPT; DECLARATION  
 OF BRETT A. SAGEL, EXHIBITS

*[GOVERNMENT'S EXHIBITS 4, 6, 8,  
 AND 10 ARE LODGED UNDER SEAL  
 CONCURRENTLY HEREWITH]*

Hearing Date: April 5, 2021  
 Hearing Time: 9:30 AM

24  
 25 Plaintiff United States of America, by and through its counsel  
 26 of record, the Acting United States Attorney for the Central District  
 27 of California and Assistant United States Attorneys Brett A. Sagel  
 28 and Alexander C.K. Wyman, hereby files its Opposition to defendant

1 MICHAEL JOHN AVENATTI's Motion for an Order to Show Cause re Civil  
2 Contempt and a Finding of Contempt (CR 415).

3 This Opposition is based upon the attached memorandum of points  
4 and authorities, the attached Declaration of Brett A. Sagel and  
5 accompanying exhibits, the files and records in this case, and such  
6 further evidence and argument as the Court may permit.

7 Dated: March 15, 2021 Respectfully submitted,

8 TRACY L. WILKISON  
9 Acting United States Attorney

10 BRANDON D. FOX  
11 Assistant United States Attorney  
Chief, Criminal Division

12 /s/  
13 \_\_\_\_\_  
BRETT A. SAGEL

14 ALEXANDER C.K. WYMAN  
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15 Attorneys for Plaintiff  
16 UNITED STATES OF AMERICA  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Without citation or attribution, and copying a motion nearly word for word from another attorney in an unrelated criminal prosecution against former National Security Advisor Michael Flynn in the District of Columbia (see Ex. 1),<sup>1</sup> defendant MICHAEL JOHN AVENATTI seeks to hold the government in civil contempt for alleged violations of this Court's recent Order under Rule 5(f) of the Federal Rules of Criminal Procedure. (Mot. at 3.) The government has not violated this or any other court order, and, as the government has repeatedly informed defendant, it has complied and will continue to comply with its discovery obligations. Defendant offers no evidence to the contrary, choosing yet again to rely on unsupported (and inaccurate) speculation and accusations. Indeed, there is no clearer indication that defendant's motion is unmoored from the facts in this case than his plagiarizing of a motion based on entirely different facts and circumstances.<sup>2</sup> Defendant's claims in the present motion, like all the previous misconduct claims he has made in this case, are baseless. The Court should deny the motion.

**II. RELEVANT PROCEDURAL BACKGROUND**

In the almost two years since defendant was first arrested in March 2019, the government's prosecution team has produced to defendant over 1.1 million pages of discovery, including reports, financial records, transcripts, and other documents. (See CR 99,

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<sup>1</sup> All exhibit citations are references to exhibits attached to the accompanying Declaration of Brett A. Sagel.

<sup>2</sup> The Honorable Emmet G. Sullivan, United States District Judge, denied the nearly identical motion in the Flynn case. United States v. Michael T. Flynn, No. 17-232-EGS, Dkt. 143 (D.D.C. Dec. 16, 2019) (attached hereto as Exhibit 9).

1 195, 293, 399 (describing government discovery productions).) Within  
2 these productions are numerous materials that either fall outside the  
3 scope of the government's discovery obligations or were produced far  
4 in advance of any discovery deadlines, including, for example Jencks  
5 Act disclosures that were produced many months -- and years -- in  
6 advance of trial. (Id.) During the same time, the government's  
7 privilege review team has separately produced to defendant additional  
8 materials, as well as complete copies of certain digital devices  
9 obtained during the government's investigation. (Id.) As of the  
10 time of this filing, trial on Counts 1-10, the Client Counts, remains  
11 approximately four months away, and trial on the remaining counts is  
12 seven months away.

13 Despite the government's robust discovery productions far in  
14 advance of trial, defendant has repeatedly lobbed unsupported  
15 misconduct claims against the government related to discovery, often  
16 only to withdraw them. On September 14, 2020, for example, defendant  
17 filed a motion for disclosure of grand jury materials that he  
18 believed -- based on unsubstantiated and erroneous claims as well as  
19 inaccurate speculation -- were obtained through abuse of the grand  
20 jury process. (CR 276, hereinafter referred to as defendant's "grand  
21 jury motion.") Other than a declaration from counsel saying that he  
22 "became aware that another grand jury had been convened," that two  
23 witnesses had received subpoenas from that grand jury, and that one  
24 of the witnesses "testified before the grand jury" (CR 276-1 ¶¶ 2-4),  
25 defendant offered no support for his claims that the government was  
26 misusing the grand jury process for its own discovery purposes. The  
27 government opposed the motion, arguing, among other things, that  
28 defendant had failed to carry his burden of demonstrating that grand

1 jury abuse had occurred -- for the simple fact that no such abuse had  
2 occurred. (CR 302, 303.)<sup>3</sup> As part of its opposition, the government  
3 lodged an in camera submission with potential grand jury materials it  
4 had obtained. (Id. at 16.) In response, defendant withdrew his  
5 motion, advising that the Court "need not review the motion, the  
6 opposition . . . , or the in-camera submission filed by the  
7 government in connection with the opposition." (CR 321.)

8 Also on September 14, 2020, defendant filed a motion alleging  
9 various forms of misconduct and seeking a variety of remedies and  
10 disclosures, including an evidentiary hearing, based on the  
11 inadvertent review by the government's prosecution team of a handful  
12 of emails between defendant's office manager and his former law  
13 firm's bankruptcy counsel that were subsequently removed from the  
14 prosecution team's possession. (CR 286, hereinafter referred to as  
15 defendant's "privilege motion.") The government opposed this motion  
16 as well, noting that defendant appeared to be on a fishing expedition  
17 and maintaining that defendant had failed to carry his burden of  
18 demonstrating that any misconduct had occurred -- again, because no  
19 misconduct had occurred. (CR 305, 317.) Defendant then submitted  
20 several filings in reply, none of which provided any evidence of  
21 misconduct by the government. (CR 327, 345, 355.)<sup>4</sup>

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22  
23 <sup>3</sup> The government also noted that defendant's grand jury motion  
24 and the attached declaration were factually incorrect, such as  
25 claiming that "Witness Two" testified before the grand jury -- a fact  
that defense counsel could have easily determined was untrue by  
asking the witness's counsel prior to the filing. (CR 302 at 8-9.)

26 <sup>4</sup> Defendant's numerous filings related to his privilege motion  
27 claimed, in conclusory fashion, that the documents at issue were  
28 privileged and defendant maintained the privilege. Although  
defendant withdrew his motion before a ruling could be issued,  
defendant likely held no such privilege to the documents in question  
-- if the documents even contained privileged information in the  
first place.

1 After the Court issued its tentative order denying defendant's  
2 privilege motion, heard arguments from the parties during the October  
3 19, 2020, motions hearing, and gave defendant additional time to  
4 supplement his privilege motion, defendant withdrew his motion. (CR  
5 378.) In withdrawing his motion, defendant claimed that new  
6 information "necessitate[d] the withdrawal of the prior Motion and  
7 the filing of a new motion," which promised to seek such draconian  
8 relief as "dismissal of the indictment, the dismissal of various  
9 counts in the indictment, the disqualification of one or more members  
10 of the prosecution team, sanctions under the Court's inherent powers,  
11 an evidentiary hearing, and/or discovery." (Id.) Defendant was  
12 given multiple opportunities to file a renewed motion, including as  
13 recently as the January 6, 2021, status conference at which the Court  
14 set a deadline of January 22, 2021, for any new motion. Defendant  
15 never filed such a motion.<sup>5</sup>

16 On January 18, 2021, defendant filed a motion requesting an  
17 order by the Court requiring the government's compliance with the Due  
18 Process Protections Act ("DPPA"). (CR 398.) The DPPA is a recent  
19 statute that amended Rule 5 of the Federal Rules of Criminal  
20 Procedure to require courts to provide a "Reminder of Prosecutorial  
21 Obligation" in all criminal proceedings by issuing an order "that  
22 confirms the disclosure obligation of the prosecutor under Brady v.  
23 Maryland, 373 U.S. 83 (1963) and its progeny, and the possible  
24 consequences of violating such order under applicable law." Pub. L.

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26  
27 <sup>5</sup> As detailed in Section III.C., infra, in addition to these two  
28 motions in which defendant accused the government of misconduct only  
to withdraw his motion, defendant on at least two other occasions  
stated in open court he would file misconduct motions against the  
government, never to file the motions.



1 N. 116-182, 234 Stat. 894 (Oct. 21, 2020) (emphasis added); Fed. R.  
2 Crim. P. 5(f). The government filed a response two days later. (CR  
3 405.) Despite defendant's repeated claim in the instant motion that  
4 the government objected to an order under the DPPA (Mot. at 2, 3),  
5 the government stated plainly in the first paragraph of its response  
6 that the government had "no objection to the Court entering an order  
7 consistent with the requirements of Federal Rule of Criminal  
8 Procedure 5(f)." (CR 405 (emphasis added).) The government  
9 explained, however, that defendant's motion mischaracterized the  
10 DPPA, which did not expand or alter the government's existing  
11 discovery obligations, and lodged a proposed order that the  
12 government believed was more appropriate than the proposed order  
13 defendant submitted with his motion. (Id.)

14 The Court then issued an Order on January 25, 2021, that  
15 differed substantially from defendant's proposed order. (CR 408,  
16 "the Rule 5(f) Order.") The Rule 5(f) Order acknowledged that the  
17 government "has a continuing obligation to produce all information or  
18 evidence known to the government that is relevant to the guilt or  
19 punishment of a defendant, including, but not limited to, exculpatory  
20 evidence," and then ordered the government to produce such evidence  
21 to defendant "in a timely manner." (Id. at 1.)

22 On February 17, 2021, counsel for defendant sent a letter to the  
23 government making a "Demand for Immediate and Full Compliance" with  
24 the Court's Rule 5(f) Order. (Ex. 2.) The letter, which also  
25 erroneously stated that the Court issued the Rule 5(f) Order over the  
26 government's objection, requested various categories of evidence that  
27 defense counsel alleged the government had failed to produce,  
28 including criminal history reports of the victims of defendant's

1 crimes. (Id. at 21-22.) Defense counsel's letter then "demand[ed]"  
2 that the government comply with its discovery obligations and the  
3 Court's Rule 5(f) Order by "no later than March 5, 2021," or else  
4 defendant would "seek the imposition of significant consequences,"  
5 such as "dismissal of all charges." (Id. at 23-24.)

6 The government responded to defense counsel on March 1, 2021.  
7 (Ex. 3.) In its response, the government stated, as it has  
8 repeatedly throughout this case, that it "is aware of its discovery  
9 obligations, has complied with them, and will continue to do so," and  
10 that defendant's repeated accusations that the government had  
11 withheld discovery were baseless. (Id. at 25.) While making clear  
12 that neither Rule 5(f) nor the Court's Order expanded the  
13 government's discovery obligations, the government also agreed to  
14 voluntarily produce additional materials that fall outside the scope  
15 of the government's discovery obligations -- such as correspondence  
16 and documents the government received from defendant's former driver,  
17 J.C. -- as well as materials that need not be and are typically not  
18 produced until close to trial, such as the criminal history reports  
19 of defendant's victims. (Id. at 25-26 ("To be clear, these documents  
20 are similarly being produced voluntarily at this time as they exceed  
21 our discovery obligations."); see also Ex. 4 at 27-71 (J.C.  
22 materials).) With regard to the criminal history reports, the  
23 government wrote that, "[a]t least with respect to one victim, who is  
24 identified in the Indictment as Client 3, [defendant] appears already  
25 to have been in possession of this information for some time, given  
26 that [defendant] spent over a day at his state bar proceedings cross-  
27 examining Client 3 about his criminal history and the details  
28 regarding his criminal history." (Ex. 3 at 25-26.) The government

1 further noted that "Client 3's felony conviction was also included in  
2 the complaint affidavit (CR 1 at 5 n.1), which [defendant] received  
3 when arrested on March 25, 2019." (Ex. 3 at 26.)

4 On March 8, 2021, the Chief Judge of the Central District of  
5 California issued a General Order, In Re: Federal Rule of Criminal  
6 Procedure 5(f) and the Due Process Protections Act (attached hereto  
7 as Exhibit 5). C.D. Cal. Gen. Order No. 21-02 (Mar. 8, 2021),  
8 available at [https://www.cacd.uscourts.gov/sites/default/files/  
9 general-orders/GO%2021-02.pdf](https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2021-02.pdf). The General Order required the judges  
10 of this District to issue the following order in all criminal cases:

11 In all criminal proceedings, the prosecutor is ordered to  
12 comply with the disclosure obligations under Brady v.  
13 Maryland, 373 U.S. 83 (1963), and its progeny and is  
14 reminded of the possible consequences of not doing so,  
including exclusion of evidence, adverse jury instructions,  
dismissal of charges, contempt, referral to a disciplinary  
authority, and sanctions.

15 Id. Consistent with the government's position in both its filings  
16 with the Court and the Ninth Circuit and its discovery letter to  
17 defendant, the General Order makes clear that Rule 5(f) does not  
18 expand or alter the government's discovery obligations.

19 That same day, defendant filed the instant motion seeking to  
20 hold the government in civil contempt. The sole basis for such a  
21 remedy provided in defendant's motion is his claim that the  
22 government has failed to comply with the Court's Rule 5(f) Order.

### 23 **III. ARGUMENT**

24 Defendant asks the Court to hold the government in civil  
25 contempt, a remedy generally used to address a party's "refusal to  
26 obey a court order." Shillitani v. United States, 384 U.S. 364, 371  
27 (1966). A party seeking civil contempt "must demonstrate that the  
28 alleged contemnor violated the court's order by 'clear and convincing

1 evidence,' not merely a preponderance of the evidence," and that such  
2 violation was "beyond substantial compliance" and "not based on a  
3 good faith and reasonable interpretation of the order." In re Dual-  
4 Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th  
5 Cir. 1993).

6 Defendant's motion fails because the government has properly  
7 complied with its discovery obligations in this case and has not  
8 violated any court order. It is simply another example of  
9 defendant's repeated, meritless accusations of government misconduct  
10 that defendant appears to bring before this Court in bad faith for  
11 delay or distraction. The Court should deny the motion.

12 **A. The Government Has Complied, and Will Continue to Comply,**  
13 **with Its Discovery Obligations**

14 Implicit in defendant's motion is the allegation that the  
15 government has violated the Court's Rule 5(f) Order by not complying  
16 fully with its discovery obligations. Defendant goes so far as to  
17 claim that, "as of the date of this motion, the government has  
18 refused to state that it has complied with the clear requirements of  
19 the Order." (Mot. at 6.) Yet in its response letter to defendant on  
20 March 1, 2021, and on numerous occasions in previous correspondence,  
21 the government repeatedly represented to defendant, "the government  
22 is aware of its discovery obligations, has complied with them, and  
23 will continue to do so." (Ex. 3 at 25.)<sup>6</sup> Rule 5(f) does not alter  
24

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25  
26 <sup>6</sup> Defendant, without a specific citation or quotation, claims  
27 the government has made false representations to the Court and  
28 defense "that all Brady and Rule 16 material had long ago been  
produced." (Mot. at 6 (emphasis added).) The government does not  
believe it has ever made such a representation but has consistently  
and repeatedly told this Court and defendant that it has complied  
with and will continue to comply with its discovery obligations.

1 or expand the government's discovery obligations. Nor does the  
2 Court's Rule 5(f) Order, which, consistent with Rule 5(f), simply  
3 confirms the government's continuing duty to disclose Brady and Rule  
4 16 materials to the defense in a timely manner.

5 The government has produced a significant amount of material to  
6 defendant in this case, often far in advance of the government's  
7 discovery deadlines and including numerous materials that exceed the  
8 government's discovery obligations. The materials defendant claims  
9 have been withheld or recently produced by the government either are  
10 not Brady or Rule 16, have already been produced, or, just as likely,  
11 do not exist. Without attaching either the materials or the  
12 government's recent discovery letter to his motion, defendant claims  
13 that the 67 pages of discovery produced on March 1 was "information  
14 in the possession of the government that should have been produced  
15 long ago pursuant to the government's Brady and Rule 16 obligations."  
16 (Mot. at 5-6.) But even a cursory review of these materials, which  
17 the government concurrently submits as Exhibit 4 under seal  
18 consistent with the Protective Order, shows that, to the extent they  
19 are not being produced far in advance of the government's discovery  
20 deadlines (in the case of the witness criminal history reports and  
21 witness statements), they fall outside the government's discovery  
22 obligations. The government's discovery letter made this clear: "The  
23 government is providing these materials to you voluntarily, at your  
24 request, even though they either exceed the government's discovery  
25 obligations or are being produced far in advance of the government's  
26 discovery deadlines." (Ex. 3 at 25.)

1           1.    J.C. Emails

2           For example, 45 of those 67 pages are emails and attached  
3 documents that government agents received from defendant's former  
4 driver, J.C. (Ex. 4 at 27-71.) Defendant's claim that the  
5 government "listed the individual as a witness in this case" (Mot. at  
6 6 n.5) is, at best, misleading. The government stated explicitly in  
7 providing that list that the government was merely providing "an  
8 updated list of victims and potential witnesses with whom defendant  
9 would be precluded from contacting either directly or indirectly  
10 (other than through counsel)," as part of defendant's bail  
11 conditions. (Ex. 6 at 1.) Moreover, the government indicated that  
12 the "list does not necessarily include all potential victims or  
13 witnesses in connection with the government's prosecution and  
14 investigation, and may include some witnesses who would be unlikely  
15 to be called to testify at trial or we have yet to formally  
16 interview." (Id.)

17           Further, in opposition to defendant's grand jury motion, the  
18 government provided the Court, in camera, the emails and documents  
19 J.C. sent the government for the Court to determine whether the  
20 material was discoverable pursuant to defendant's motion. (CR 302 at  
21 16; 9/28/2020 In Camera Filing Exs. 6-8.) Defendant withdrew his  
22 grand jury motion and asked that the Court not review the  
23 government's opposition or in camera submission. (CR 321.) The  
24 government also informed the Court that J.C. is not expected to be a  
25 government witness. (9/28/2020 In Camera Filing at 7 n.2.) The  
26 Court granted the government's application to file these exhibits in  
27 camera. (CR 311.)

1 More fundamentally, however, it is plain from reviewing the  
2 documents from J.C. that they are not "exculpatory," and they merely  
3 contain nonsensical and irrelevant information. (See Ex. 4 at 27-  
4 71.) They are neither Brady nor Rule 16 material, and they do not  
5 otherwise fall within the government's discovery obligations, such as  
6 Jencks Act material. To be clear, the government does not intend to  
7 call J.C. as a government witness at trial on the Client Counts.

8 2. Text Messages

9 Similarly baseless is defendant's claim that the government's  
10 March 1 production included "photographs of exculpatory text messages  
11 relating to the charges." (Mot. at 6.) To start, these text  
12 messages are far from exculpatory. Several text messages are between  
13 a Global Baristas employee and EA Employee 1, the office manager at  
14 defendant's former law firm, regarding a check deposit, and another  
15 text message is from the same Global Baristas employee informing  
16 defendant that a reporter asked about him. (Ex. 4 at 72-77.) To the  
17 extent they are even relevant, they are relevant only to the  
18 remaining counts of the Indictment that are not scheduled to be tried  
19 until October 2021. They have nothing to do with the Client Counts.

20 Moreover, defendant's complaint that the text messages "were not  
21 previously provided to the defense" (Mot. at 6), is factually  
22 inaccurate. The government previously produced the text messages  
23 between the Global Baristas employee and EA Employee 1 on November  
24 25, 2019 in producing the contents of EA Employee 1's iPhone 8 Plus.  
25 (Compare Ex. 4 at 72-75, with Ex. 10; see also Sagel Decl. ¶ 11.)

26 3. Criminal History Reports

27 Last among the documents that defendant complains were belatedly  
28 produced on March 1 are the criminal history reports of the victims

1 identified in the Indictment as Clients 1-5. (Mot. at 6.) As the  
2 Court is aware, the government typically runs criminal history  
3 reports of its government witnesses shortly before trial to ensure  
4 that it has complied with its Giglio obligations prior to trial.  
5 Here, however, the government obtained these reports and provided  
6 them early as a courtesy because defendant specifically requested  
7 them in his February 17, 2021, letter. (See Ex. 2 at 22.)

8 In producing them, the government noted not only that it was  
9 producing these materials voluntarily "far in advance of when any  
10 Giglio material is due to be produced," and not because it was under  
11 obligation to, but also that, with respect to the only victim with a  
12 meaningful criminal history, defendant "appear[ed] already to have  
13 been in possession of this information for some time, given that  
14 [defendant] spent over a day at his state bar proceedings cross-  
15 examining Client 3 about his criminal history and the details  
16 regarding his criminal history," and that the victim's "felony  
17 conviction was also included in the complaint affidavit (CR 1 at 5  
18 n.1), which [defendant] received when arrested on March 25, 2019."  
19 (Ex. 3 at 25-26; see also Ex. 4 at 79-84.) The other victim with a  
20 "criminal history" was similarly known to defendant, as defendant  
21 represented this victim in connection with a civil rights lawsuit  
22 stemming from the victim's arrest related to the charges that were  
23 subsequently dropped. (Ex. 4 at 87-90.) In addition to violating  
24 the Protective Order by discussing these charges in a public filing,  
25 defendant misleadingly cites these charges -- not convictions -- in  
26 his motion to the Court as if they were substantiated rather than  
27 dismissed. (See Mot. at 6.)

28



1           4.    Remaining Discovery Allegations

2           Defendant's remaining discovery complaints about what the  
3 government has allegedly not produced are similarly meritless.

4           First, defendant (again) claims that the government has failed  
5 to provide "exculpatory information provided by" defendant's ex-wife,  
6 Christine Carlin.<sup>7</sup> (Mot. at 9 & n.9.) The government interviewed  
7 Ms. Carlin once pursuant to a letter immunity agreement in July 2019,  
8 and the government produced to defendant a memorandum summarizing  
9 this interview along with the documents Ms. Carlin produced in  
10 connection with the interview. (See CR 302 at 9 n.4.) In October  
11 2020, the government also voluntarily produced documents to defendant  
12 that Ms. Carlin's attorney provided to the government in March 2020  
13 while seeking additional protections for Ms. Carlin. (Ex. 7.) And  
14 the government has repeatedly explained to defense counsel, as  
15 recently as January 2021, that the government has no other  
16 discoverable information to provide regarding either Ms. Carlin or  
17 her attorney:

18           [N]either Ms. Carlin nor her criminal defense attorney, Ken  
19 Miller, will be witnesses in this case. Although we had  
20 entered into a letter immunity agreement with Ms. Carlin,  
21 we believe she was, at best, not fully candid or  
22 forthcoming during her interview in July 2019, or worse,  
23 untruthful. With respect to "Tab 9" from the materials we  
24 voluntarily produced to you in October 2020, we did not  
25 produce a "Tab 9" because we do not appear to have received  
26 a "Tab 9" from Mr. Miller. Please note we are providing  
27 this information solely as a courtesy.

28           <sup>7</sup> The government only uses Ms. Carlin's name herein as defendant  
refers to her by name in his motion.

1 (Id.) Absent any evidence that the government has withheld  
2 discoverable information regarding Ms. Carlin (and the government is  
3 aware of none), defendant's complaints are baseless.<sup>8</sup>

4 Second, defendant's complaints about the government's alleged  
5 failure to produce "exculpatory financial information relating to  
6 fees and expenses" (Mot. at 8) are easily explained: that information  
7 does not exist. The government has produced the fee and expense  
8 information related to defendant's victims and his law firm, as well  
9 as any information in its possession regarding work defendant  
10 performed for his victims that entitled him to attorney's fees and  
11 costs. Specifically, the government produced the firm's QuickBooks  
12 records and the firm's files and emails related to the victims, as  
13 well as voluntarily providing defendant with the government's Access  
14 Database detailing financial transactions related to the victims.  
15 Moreover, the government's expert disclosures detailed the fees and  
16 expenses related to the victim clients. Indeed, the government has  
17 already addressed these same complaints in its opposition to a prior  
18 motion by defendant, in which the government explained that it has  
19 produced this information in multiple ways. (CR 195 at 18-19, Sagel  
20 Decl. Exs. 3-7.) Defendant failed to specify any such missing  
21 exculpatory financial materials in his prior motion (CR 193), and he  
22 fails to do so here.

23 Finally, defendant's remaining discovery complaints (Mot. at 9)  
24 relate to communications, documents, and notes regarding government  
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27 <sup>8</sup> Defendant has repeatedly made unfounded allegations against  
28 the government relating to purported statements regarding Ms. Carlin  
at defendant's bail revocation. Not surprisingly, defendant has  
never raised the claim, supported by a declaration, because it is  
meritless.

1 witnesses. Such documents -- to the extent the materials exist and  
2 are discoverable -- constitute Jencks materials, not Brady or Rule  
3 16. But defendant mischaracterizes the record (again) by repeatedly  
4 referring to the government's "67 witnesses"; the list to which  
5 defendant is referring is the no-contact list for purposes of  
6 defendant's bond conditions. (See Ex. 6 (noting that the list "may  
7 include some witnesses who would be unlikely to be called to testify  
8 at trial or we have yet to formally interview"); see also Ex. 8  
9 (similar).) Defendant offers no support for his allegation that the  
10 government has withheld discoverable information about its witnesses.

11 In short, none of defendant's discovery complaints have any  
12 merit. Just as defendant has previously attempted in this case to  
13 claim that documents were privileged (and that he held the privilege)  
14 without making any showing of such privilege (CR 276), he is now  
15 attempting to claim Brady and Rule 16 violations without making any  
16 showing of such violations (or without showing discovery is Brady or  
17 Rule 16 material). Rather, he relies on the limited size of the  
18 government's recent production (67 pages) to claim that there must be  
19 more, even though he would likely have claimed even more forcefully  
20 that the government was withholding documents had it not produced  
21 anything. He ignores that the government has produced well over a  
22 million pages of discovery and numerous forensic copies of digital  
23 devices and has repeatedly confirmed to defendant that the government  
24 is continuing to comply with its discovery obligations. Here, as he  
25 has in the past, defendant is demanding exculpatory evidence that  
26 simply does not exist.

1           **B.     The Government Has Not Violated the Court's Order**

2           Defendant's motion is based on the sole premise that the  
3 government violated the Court's Rule 5(f) Order. It did not. Even  
4 if the materials the government produced on March 1 were Brady or  
5 Rule 16 materials (they are neither), the government still complied  
6 with both its discovery obligations and the Court's Rule 5(f) Order,  
7 which orders the government to produce evidence "in a timely manner."  
8 (CR 408 at 1.) Defendant offers no support for the notion that a 67-  
9 page production four months before trial is somehow not timely.  
10 Moreover, defendant appears to claim that productions after March 5,  
11 2021, would not be timely, suggesting that compliance with the  
12 Court's Rule 5(f) Order is somehow tied to the arbitrary deadline  
13 defendant set in his correspondence. It is not. The Court set no  
14 new deadlines in the Rule 5(f) Order, and the government has violated  
15 no deadlines.

16           Defendant also offers no support for his accusations that the  
17 government has withheld further discoverable materials. Instead, he  
18 relies on rank speculation, claiming that "it is readily apparent  
19 that the government has not complied with the Order" because "the  
20 government cannot seriously claim that the 67 pages of documents is  
21 the only information responsive to the Order that was not previously  
22 produced." (Mot. at 8; see also id. at 9 n.9 (asserting that the  
23 government "has not produced all of its 302s and memoranda" without  
24 identifying any reports he claims to be missing).) In short,  
25 defendant is asking the Court to issue an Order to Show Cause ("OSC")  
26 regarding whether the government should be held in contempt (and then  
27 actually hold the government in contempt, apparently regardless of  
28 what the OSC hearing reveals (Mot. at 3)) for failing to comply with

1 a court order. Yet defendant provides no evidence whatsoever -- let  
2 alone clear and convincing evidence -- that the government has failed  
3 to comply with a court order. Because defendant has failed to carry  
4 his burden of proving by clear and convincing evidence that the  
5 government has violated a court order, or even any reason to suspect  
6 that the government has, the Court should deny defendant's motion.<sup>9</sup>  
7 See Dual-Deck Video Cassette Recorder, 10 F.3d at 695.

8 **C. Defendant's Repeated and Meritless Misconduct Claims**  
9 **Reflect a Bad Faith Attempt to Delay and Distract**

10 This is not the first time defendant has demanded exculpatory  
11 information that does not exist. Nor is it the first time that he  
12 has mischaracterized the facts or the record in alleging government  
13 misconduct. Defendant has repeatedly, unsuccessfully, and often  
14 without following through, lobbed meritless misconduct claims against  
15 the government in an apparent attempt to delay the proceedings or  
16 distract the Court from the allegations in the Indictment. For  
17 example:

- 18 • Defendant previously told the Court that he would be filing  
19 a misconduct motion on the basis that the government's  
20 prosecution was motivated by defendant's public criticism  
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23 <sup>9</sup> The only evidence in the record shows that it is defendant,  
24 not the government, who has violated orders of this Court. For  
25 example, defendant has: (1) in the instant motion, included facts  
26 from documents produced pursuant to the Protective Order (see, e.g.,  
27 Mot. at 6), which requires defendant to submit such information under  
28 seal with the Court (CR 74 ¶ 18); (2) failed, to the government's  
knowledge, to pay contribution to the Public Defender's Office  
despite multiple orders from this Court to do so (CR 33; RT 5/15/19  
at 7-8); and (3) failed to collect acknowledgments of the Protective  
Orders from defendant's lawyers in other matters despite clear orders  
to do so from this Court (CR 72, 74).

1 of former President Trump. (RT 1/31/20 at 16.) It was  
2 not, and defendant never filed such a motion.

- 3 • Defense counsel unequivocally accused a government  
4 prosecutor of misconduct for having a "close relationship"  
5 with a law partner of one of defendant's victims. (RT  
6 1/15/20 at 14-15.) Defendant never filed a motion on this  
7 basis.
- 8 • Defendant filed a motion claiming that the government  
9 engaged in misconduct regarding its use of the grand jury.  
10 (CR 276.) The government opposed, and defendant withdrew  
11 his motion before the Court ruled on it. (CR 321.)
- 12 • Defendant filed a motion claiming that the government  
13 engaged in misconduct regarding its privilege protocols and  
14 review of search warrant materials. (CR 286.) The  
15 government opposed, the Court issued a tentative ruling  
16 denying the motion, and defendant withdrew the motion. (CR  
17 378.) The Court allowed defendant until January 22, 2021,  
18 to refile the motion, but he never did.

19 Accordingly, the present motion represents at least the fifth time  
20 defendant has accused the government of some form of serious  
21 misconduct, not one of which has been substantiated in any way.

22 In addition to being as meritless as any of defendant's other  
23 accusations, the instant motion is particularly representative of  
24 defendant's bad faith. It is not grounded in the facts of this  
25 case;<sup>10</sup> to the contrary, it is copied nearly word for word from a  
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27 <sup>10</sup> One such example is defendant claiming "[t]he very reason the  
28 Court adopted the Order was to impress upon the prosecutors their  
most solemn obligations and to enable the contempt process to address  
(footnote cont'd on next page)

1 filing in August 2019 by Sidney Powell in a completely unrelated  
2 prosecution against former National Security Advisor Michael Flynn in  
3 the District of Columbia. (Compare Mot., with Ex. 1.) In that case,  
4 the court denied the defendant's motion in its entirety (Ex. 9); the  
5 Court should do the same here. Defendant can continue bringing  
6 baseless misconduct claims that repeat his same unfounded  
7 allegations, but it does not give them any merit. As this Court  
8 aptly reasoned in an in camera submission to defendant that defendant  
9 then filed publicly: "While the Court does not subscribe to the view  
10 that repetition creates truth, others may wonder." (CR 377, Ex. B at  
11 2.)

12 **IV. CONCLUSION**

13 For the foregoing reasons, the government respectfully requests  
14 that this Court deny defendant's motion in its entirety.

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the government's failure to comply, rather than leaving openings for  
any excuses or being hamstrung to consider contempt charges as it was  
in Stevens by the absences of a preexisting order." (Mot. at 3.)  
This Court never made such statements; however, that identical  
sentence appears in the Flynn motion.