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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 04-0044 SI

Plaintiffs,

**ORDER RE: MOTIONS TO DISMISS,
MOTIONS TO QUASH AND DISCOVERY
MOTIONS**

v.

VICTOR CONTE, JAMES VALENTE, GREG
ANDERSON, and REMI KORCHEMNY,

Defendants.

Now before the Court are various motions brought by defendants: 1) Valente and Conte’s motion to dismiss for outrageous government conduct; 2) Anderson’s motion to dismiss for outrageous government conduct, or in the alternative, sanctions; 3) Valente and Conte’s motion to dismiss for prejudicial pretrial publicity; 4) Valente and Conte’s motion to suppress; 5) Anderson’s motion to quash search warrants; 6) Anderson’s motion to suppress statements; 7) Anderson’s motion to traverse the search warrants; and 8) Anderson’s various discovery motions. Defendant Remi Korchemny joins in both motions to dismiss for outrageous government conduct and several of Anderson’s discovery motions.

I. Defendants’ motions to dismiss for outrageous government conduct

Defendants move to dismiss the indictment based on outrageous government conduct in the course of the investigation and prosecution of this case. In order to prevail on claim of outrageous conduct, a defendant must allege and show that the government’s conduct was “so grossly shocking and so outrageous as to violate the universal sense of justice.” United States v. McClelland, 72 F.3d 717, 721 (9th Cir. 1995). This is “an extremely high standard.” United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991); see also United States

1 v. Ryan, 548 F.2d 782, 789 (9th Cir. 1976) (due process defense for outrageous government conduct is a
2 narrow one). Outrageous government conduct requires more than negligence or poor judgment. See United
3 States v. Wiley, 794 F.2d 514, 515 (9th Cir. 1986). The government’s alleged dissemination of information
4 to the media lies at the heart of defendants’ motion.¹ Aside from Iran White’s involvement in the May 2004
5 article published in Playboy magazine, defendants present argument, but no evidence, that any government
6 agent is responsible for disclosing sensitive material, including grand jury testimony, to the media. Defendants
7 have presented no evidence that the government endorsed Iran White’s actions; in fact, the government
8 disputes several of the assertions in the article. See Government’s Opp’n at 11. White is no longer a state law
9 enforcement agent. The Court finds that White’s actions do not rise to the level of outrageous government
10 conduct.

11 Therefore, defendants have not presented a sufficient factual basis to warrant an evidentiary hearing
12 on this motion, given the “extremely high standard” of outrageous conduct. At this time, the Court DENIES
13 without prejudice defendants’ motion to dismiss for outrageous government conduct.

14

15 **II. Valente and Conte’s motion to dismiss for prejudicial pretrial publicity**

16 Defendants argue that pretrial publicity in this case has made it impossible to receive a fair trial.
17 Defendants renew their claim that the government is responsible for the leaks, and, because of the publicity,
18 ask the Court to dismiss the indictment in order to protect their Sixth Amendment rights. The government
19 argues that the case law supports continuances, careful voir dire, or a change of venue to deal with pretrial
20 publicity, instead of dismissal.

21 As discussed above, the defendants have presented no evidence in support of their claims that the
22 government is responsible for providing sensitive information relating to the case to the media. With regard to
23 pretrial publicity generally, courts have found that defendants may demonstrate actual or presumptive prejudice.
24 Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir. 1998).

25 Actual prejudice requires a showing that a substantial number of veniremen “admit to disqualifying
26

27 ¹Defendants also claim wrongdoing by the government in securing and executing various search
28 warrants. These claims do not rise to the level of outrageous conduct and will be addressed in connection with
defendants’ other motions.

1 prejudice.” Murphy v. Florida, 421 U.S. 794, 803 (1975). In Irvin v. Dowd, 366 U.S. 717, 727 (1961),
2 the Supreme Court found a “pattern of deep and bitter prejudice” based in part upon the court’s removal for
3 cause of 268 of the jury panel’s 430 members. Defendants have made no such showing in this case of actual
4 prejudice.

5 Presumptive prejudice can be proven when the “defendant proffers evidence of pervasive community
6 prejudice in the form of highly inflammatory publicity or intensive media coverage.” Capo v. Lukefahr, 595
7 F.2d 1086, 1090 (5th Cir. 1979). However, “[w]here there is a reasonable likelihood that prejudicial news
8 prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to
9 another county not so permeated with publicity.” Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). The
10 defendants do not request a change of venue or continuance; instead, defendants seek a dismissal of the entire
11 action. The cases cited by defendant do not support so drastic a remedy. See, e.g., Rideau v. Louisiana, 373
12 U.S. 723 (1963); Sheppard, 384 U.S. 333. Therefore, the Court DENIES defendants’ motion to dismiss
13 based on prejudicial publicity.

14

15 **III. Valente and Conte’s motion to suppress**

16 On September 3, 2003, the government conducted a search of BALCO Laboratories. Defendants
17 Valente and Conte have brought a motion to suppress all evidence obtained in that search on numerous
18 grounds.

19

20 **A. Subpoenas of financial records**

21 Defendants bring a challenge, based on the Right to Financial Privacy Act, to the government’s use of
22 grand jury subpoenas to obtain their personal financial records. The RFPA, 12 U.S.C. § 3401 et seq.,
23 generally prohibits any federal entity from obtaining access to copies of or information contained in financial
24 records unless the customer consents or the government complies with the customer notice provisions required
25 by law. In re Grand Jury Subpoena, 41 F.Supp.2d 1026, 1032 (D.Alaska 1999).

26 However, under 12 U.S.C. § 3413(i), the customer notice requirement in the RFPA does not apply
27 to federal grand jury subpoenas. Id. Sections 3415 and 3420, which are the only sections of the RFPA which
28

1 apply to federal grand jury subpoenas, deal with cost reimbursement and the presentation and maintenance of
2 financial records. Id. Therefore, the grand jury subpoena of defendant's financial records without notice is
3 proper and the government may rely on the information obtained pursuant to that warrant in the affidavit for the
4 September 3, 2003 warrant.

5
6 **B. June and July 2003 search warrants**

7 Defendants challenge the June and July 2003 search warrants for Yahoo! and AOL email accounts
8 used by Conte and BALCO, claiming that the warrants were stale, overbroad and lacked probable cause.

9 When reviewing a magistrate judge's determination of probable cause, this Court's duty "is simply to
10 ensure that the magistrate judge had a substantial basis for concluding that probable cause existed." Illinois v.
11 Gates, 462 U.S. 213, 238-9 (1983). The Court finds that Judge Lloyd had a substantial basis for concluding
12 that the email accounts would contain email regarding the distribution of performance-enhancing drugs, based
13 on the affidavits submitted by Agent Novitzky that demonstrated a multi-year history of involvement in
14 performance-enhancing drugs.

15 The affidavits contained evidence linking BALCO to performance-enhancing drugs as late as May
16 2003. See Defendants' Ex. C at 19, 23. Additionally, the email accounts named in the search had been used
17 recently. Id. at 48-49. Staleness must be evaluated in light of the particular facts of the case and the nature
18 of the criminal activity and property sought. United States v. Greany, 929 F.2d 523, 525 (9th Cir. 1991). The
19 Court finds that the warrants were not stale, given the evidence present in the affidavits that spanned many years
20 until May 2003.

21 The Court finds that the warrants were not overbroad. The warrants did not, as defendants argue,
22 authorize the seizure of "all electronic messages" from the accounts. Instead, the emails seized under the
23 warrant were restricted to financial matters and performance-enhancing drugs. See Defendants' Exs. B, C
24 (Attachment A). Warrants must clearly state the material sought and must be limited in scope commensurate
25 to the basis for probable cause. United States v. Towne, 997 F.2d 537, 544 (9th Cir. 1993). The Court finds
26 that the warrants in question were sufficiently limited to the probable cause described above.

27 Defendants also claim that the July 2003 warrant contains a violation of Franks v. Delaware, 438 U.S.
28

1 154 (1978), because the attached affidavit failed to include: 1) that BALCO was publicly engaged in the testing
2 of blood samples for individuals other than athletes; 2) that Conte had stated publicly that he was not involved
3 in distributions of illegal substances; and 3) that Conte was the target of competitors' ill will. Defendants have
4 the burden in making a Franks claim. United States v. Tham, 960 F.2d 1391, 1396 (9th Cir. 1991). In order
5 to have a valid Franks claim, defendants must make a "substantial preliminary showing that a false statement
6 was 1) deliberately or recklessly included in an affidavit submitted in support of a search warrant; and 2)
7 material to the magistrate's finding of probable cause." United States v. Motz, 936 F.2d 1021, 1023 (9th Cir.
8 1991). Defendants must make this showing as well for the reckless or intentional misstatement of facts. Tham,
9 960 F.2d at 1395. Defendants have made no showing that these omissions were intentional or reckless.
10 However, even if these assertions are accepted as true for purposes of this motion and included in the affidavit,
11 the affidavit is still sufficient to establish probable cause.

12 Therefore, the Court finds that the evidence obtained based on the June and July search warrants was
13 properly included in the September 3, 2003 search warrant for BALCO.

14

15 **C. September 2003 search warrant**

16 Defendants challenge the validity of the September 3, 2003 search warrant of BALCO Laboratories,
17 claiming that the warrant lacks probable cause, is stale and overbroad, and constitutes a Franks violation.

18 Defendants argue that the warrant lacks probable cause because it was based upon evidence obtained
19 illegally from the June and July 2003 search warrants. However, the Court has found these warrants to be valid
20 and rejects this argument.

21 Defendants' staleness argument is also rejected, as the affidavit attached to the search warrant
22 contained evidence establishing a pattern of long-term involvement in performance-enhancing drugs as
23 described above and presented evidence of activity as late as June 2003. See Government's Ex. L ("Novitzky
24 September 2003 Affidavit") at 10, 13, 17, 22. In light of the particular facts of this case and the nature of the
25 alleged criminal activity, the magistrate judge was justified in believing that probable cause had been
26 demonstrated. United States v. Greany, 929 F.2d 523, 525 (9th Cir. 1991).

27 Defendants argue that the search warrant was overbroad, as it gives the government permission to
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1 search “all controlled substances and other athletic performance-enhancing drugs, substances and
2 paraphernalia.” According to defendants, this would include almost every item in a nutritional laboratory. The
3 Court disagrees and finds that the provision is valid considering the investigation involved the illegal distribution
4 of performance-enhancing drugs.

5 The provision authorizing the seizure of correspondence between BALCO, its agents, and athletes is
6 appropriate because of the evidence demonstrating a connection between athletics and BALCO’s distribution
7 of controlled substances, such as email and letter correspondence with athletes in which controlled substances
8 were discussed. See Novitzky September 2003 Affidavit.

9 Based on the above discussion, the Court finds that the September 2003 warrant was valid and now
10 turns to issues involving the execution of the warrant.

11
12 **D. Execution of September 2003 warrant**

13 Defendants raise a number of issues regarding the execution of the warrant by law enforcement at
14 BALCO on September 3, 2004. The Court will address each argument in turn.

15
16 **1. 18 U.S.C. § 3109**

17 Defendants claim that the agents violated 18 U.S.C. § 3109 by failing to knock and announce before
18 entering BALCO to conduct the search. 18 U.S.C. § 3109 allows a federal officer to break a window or door
19 of a house in order to gain entry to execute a search warrant only if, after notice of authority and purpose,
20 entrance is refused. In the Ninth Circuit, § 3109 does not apply to an office building if the officer enters
21 through an unlocked door into a reception area during business hours. United States v. Little, 753 F.2d 1420,
22 1435-1436 (9th Cir. 1985). However, § 3109 does apply if the officer enters a locked commercial
23 establishment at night. United States v. Phillips, 497 F.2d 1131, 1133-34 (9th Cir. 1974).

24 The search was conducted during normal business hours and the agents entered through an unlocked
25 door into a reception area; therefore, § 3109 is not applicable and the agents’ entry was lawful. Government’s
26 Ex. M, Decl. of Novitzky at ¶ 6. Defendants do not dispute that the front door of BALCO was unlocked at
27 the time of the agents’ entrance.
28

1 **2. Federal Rule of Criminal Procedure 41(f)(3)**

2 The officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property
3 taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the
4 warrant and receipt at the place where the officer took the property. Fed.R.Crim.P. 41(f)(3).

5 Given the warrant’s essential function of assuring the individual whose property is searched of the lawful
6 authority of the executing officer and the limits of his power to search, Rule 41 requires service of the warrant
7 at the outset of the search, absent exigent circumstances. United States v. Gantt, 194 F.3d 987, 990 (9th Cir.
8 1999). However, suppression is required under Rule 41 only if there was a “deliberate disregard of the rule”
9 or if the defendant was prejudiced. Id. at 995.

10 Defendants argue that they did not receive a copy of the search warrant until after the search was
11 completed. According to Conte’s declaration, he was not served a copy of the warrant during the entire search
12 of BALCO, nor did any agent mention a warrant. Id. at ¶ 3, 7. Agent Novitzky’s declaration states that he
13 showed the warrant to Conte and Joyce and James Valente once the premises were secured. Government’s
14 Ex. M, Novitzky Decl. at ¶ 10. He also states that he explained the warrant in detail to Conte before
15 interviewing him. Id. at ¶ 13.

16 An evidentiary hearing on a motion to suppress ordinarily is required if there are contested issues of
17 fact going to the validity of the search. The moving papers must be sufficiently definite, specific, detailed, and
18 nonconjectural to enable the court to conclude that such a factual dispute exists. United States v. Licavoli, 604
19 F.2d 613, 621 (9th Cir. 1979). The Court GRANTS defendant’s request for an evidentiary hearing on this
20 matter, because there is a material discrepancy between the government and the defense regarding whether
21 the warrant was provided to the defendant. The evidentiary hearing will be held to determine if defendants
22 received service of the warrant at the outset of the search or if suppression is required under Gantt for
23 “deliberate disregard of the rule” by the agents or prejudice to the defendants.

24
25 **3. Excessive force**

26 Defendants also claim that the evidence should be suppressed because the agents used excessive force
27 in executing the search warrant. Claims of excessive force are evaluated under the “objective reasonableness”
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1 standard of the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 397 (1989). The standard is based
2 on the facts and circumstances confronting the officers at the time and does not consider their intent or
3 motivation. Id. This determination requires a “careful balancing of the nature and quality of the intrusion on the
4 individual’s Fourth Amendment interests against the countervailing government interests at stake.” Id. at 396
5 (internal quotations omitted).

6 Defendants argue that the use of force was completely unrelated to the reason for the search: obtaining
7 documents and controlled substances. Defendants also argue that there was no basis for believing defendants
8 were armed, uncooperative, or dangerous. James Valente alleges that the agents entered BALCO with “guns
9 drawn.” Valente Decl. at ¶ 3. Conte alleges that several agents pointed guns at himself and the Valentés.
10 Conte Decl. at ¶ 5. Agent Novitzky asserts that although the agents, following typical procedure, entered with
11 9 mm handguns, no agent pointed a gun at the defendants. Government’s Ex. M, Novitzky Decl. at ¶ 8.

12 The Court finds that the force was not excessive. Defendants present no testimony that the agents
13 continued to keep their firearms drawn during the conduct of the entire search. Instead, the testimony is that
14 the firearms were re-holstered once the premises was deemed secure by the agents within ten minutes of entry.
15 Government’s Ex. M, Novitzky Decl. at ¶ 9. This initial use of force is reasonable given the unknown nature
16 of the premises and the involvement of controlled substances. Additionally, the use of force was brief, and
17 lasted only as long as necessary to secure the premises.

18 19 **4. Media presence**

20 Defendants argue that the presence of the media at the September 3, 2003 search was illegal.
21 However, defendants present no evidence that members of the media entered BALCO’s offices or interfered
22 with the investigation in any way. Both cases relied upon by defendants, Wilson v. Layne, 526 U.S. 603
23 (1999) and Hanlon v. Berger, 526 U.S. 808 (1999), dealt with searches where the media entered the
24 defendant’s property. Agent Bergland has testified that her responsibility was to ensure that no member of the
25 media entered the premises. Government’s Ex. N, Bergland Decl. at ¶ 15. Therefore, the Court finds that the
26 presence of the media at the September 3, 2003 search was not itself illegal.

1 **5. Custodial interrogation**

2 The prosecution may not use statements, whether exculpatory or inculpatory, obtained from custodial
3 interrogation unless procedural safeguards guarantee that the accused has been informed of and freely waived
4 the Constitutional privileges of the Fifth and Sixth Amendments. Miranda v. Arizona, 384 U.S. 436, 444-5
5 (1966). Miranda warnings are required when an individual is in custody and subjected to law enforcement
6 interrogation. Illinois v. Perkins, 496 U.S. 292, 297 (1990).

7 All parties agree that the defendants were subjected to interrogation and were not provided with
8 Miranda warnings. Thus the central question for the Court is whether the defendants were in custody at the
9 time of the interrogations, and the facts which will determine the answer to this question are in substantial
10 dispute.

11 Determining whether a defendant was in custody requires the consideration of two factors: “first, what
12 were the circumstances surrounding the interrogation and, second, given those circumstances, would a
13 reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” Thomas v.
14 Keohane, 516 U.S. 99, 112 (1995). “The initial determination of custody depends on the objective
15 circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or
16 the person being questioned.” Stansbury v. California, 511 U.S. 318, 323 (1994)(per curiam).

17 Defendants contend that their statements were made while they were in custody. Defendants assert
18 that the agents’ manner of entrance into the business, combined with the agents’ forcing defendants to sit in the
19 lobby with their hands on their knees, gave defendants the reasonable belief that they were not free to leave.
20 When Joyce Valente stood up to help an agent locate a key to a storage area, the agent yelled at her to sit
21 down. James Valente Decl. at ¶ 7. Hours later, when Joyce Valente’s interview ended, she was told that she
22 could leave, but that her husband could not. Id. at ¶ 14. Conte alleges that he was surrounded by armed
23 agents at all times. Conte Decl. at ¶ 8.

24 The government argues that Conte and Valente were not in custody at any time. Once the premises
25 were secured, defendants were told by Agent Novitzky that they were not under arrest, that they were not
26 required to talk with any of them, and that they were free to leave. Government’s Ex. M, Novitzky Decl. at
27 ¶ 10. Again, before interviewing Conte and Valente, Novitzky told them that they were not under arrest and
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1 free to leave. *Id.* at ¶ 11, 20.

2 “An evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are
3 sufficiently definite, specific, detailed and nonconjectural to enable the court to conclude that contested issues
4 of fact going to the validity of the search are in issue.” United States v. Walczak, 783 F.2d 852, 857 (9th Cir.
5 1986).

6 The Court finds that there are issues of fact regarding whether defendants Conte and Valente were in
7 custody at the time of the interrogations and GRANTS defendants’ request for an evidentiary hearing.

8
9 **6. Consent to search storage locker**

10 Defendant Conte argues that he did not voluntarily consent to the government’s search of the off-site
11 storage locker on September 3, 2003. The government has the burden of showing that consent to a
12 warrantless search is voluntary. See United States v. Ritter, 752 F.2d 435, 439 (9th Cir.1985). The Ninth
13 Circuit utilizes several factors when determining whether consent is voluntary, including (1) whether the
14 defendant was in custody, (2) whether the arresting officers had their guns drawn during the arrest, (3) whether
15 Miranda warnings had been given, (4) whether the defendant was told he had a right not to consent, and (5)
16 whether defendant was told a search warrant could be obtained. No single factor is dispositive. See United
17 States v. Morning, 64 F.3d 531, 532 (9th Cir. 1995). The court determines voluntariness by considering the
18 totality of the surrounding circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041
19 (1973). The fact of custody does not itself negate voluntariness. See United States v. Alfonso, 759 F.2d 728,
20 741 (9th Cir. 1985) (citing United States v. Watson, 423 U.S. 411, 424, 96 S. Ct. 820, 828 (1976)).

21 At the hearing, the government acknowledged its burden to prove that Conte’s consent to search was
22 voluntary and recognized the necessity of an evidentiary hearing. The Court agrees, and GRANTS an
23 evidentiary hearing to determine whether Conte voluntarily consented to the government’s search of the off-site
24 storage locker.

25
26 **7. Summary**

27 Regarding the government’s search of BALCO on September 3, 2003, the Court grants defendants’
28

1 request for an evidentiary hearing on only the following matters: 1) whether defendants received service of the
2 warrant at the outset of the search and if suppression is required under Gantt for “deliberate disregard of the
3 rule” by the agents or prejudice to the defendants; 2) whether defendants Conte and Valente were in custody
4 at the time of the interrogations; and 3) whether Conte provided voluntary consent for the government to search
5 the off-site storage locker.

6
7 **IV. Anderson’s motion to quash search warrants**

8 Defendant Anderson moves to quash the September 3, 2003 search warrants for the search of his
9 vehicle and residence, as well as the September 5, 2003 search warrant for his residence and computer.
10 Anderson raises a number of arguments in his motion, and the Court will address each motion in turn.

11
12 **A. Probable cause**

13 Defendant argues that the September 3, 2003 search warrants lacked probable cause and contained
14 stale information. When reviewing the magistrate judge’s determination of probable cause, this Court’s duty
15 “is simply to ensure that the magistrate judge had a substantial basis for concluding that probable cause existed.”
16 Illinois v. Gates, 462 U.S. 213, 238-9 (1983).

17 The Court finds that Magistrate Judge Lloyd had a substantial basis for concluding that probable cause
18 existed that evidence of a crime would be found in Anderson’s residence and car. The Watson affidavit
19 provides ample evidence of Anderson’s connections with BALCO, through FedEx receipts and surveillance.
20 See Government’s Ex. A (“Watson Affidavit”) at ¶¶ 9-16. The warrant also contains Agent Novitzky’s
21 Affidavit submitted in support of the September 3, 2003 search warrant of BALCO Laboratories. As
22 discussed above in Section III(C), this affidavit presented extensive evidence of the distribution of performance-
23 enhancing drugs from the offices of BALCO. The government further strengthened the ties between Anderson,
24 BALCO and the distribution of performance enhancing drugs with the statements by Conte and Valente.
25 Watson Affidavit at ¶¶ 18-21. On September 3, 2003, Conte told government agents that he gave Anderson
26 steroids to give to professional players. Id. at ¶ 18. Conte also told agents that he gave Anderson testosterone
27 and epitestosterone to give to a professional baseball player. Id. at ¶ 20. Valente also informed agents that
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1 Anderson paid BALCO for steroids. Id. at ¶ 22.

2 For probable cause to exist, “[t]he magistrate need only conclude that it would be reasonable to seek
3 the evidence in the place included in the affidavit.” United States v. Fernandez, 388 F.3d 1199, 1238 (9th Cir.
4 2004). The government presented evidence that Anderson drove a Chevy Tahoe from BALCO laboratories
5 to his residence in June 2003. Watson Affidavit at ¶ 16. During the September 3 search of BALCO, James
6 Valente told agents that Anderson drove a Chevy Tahoe to a visit at BALCO three weeks earlier. Id. at ¶ 21.
7 Additionally, Agent Watson testified that individuals involved in the distribution of controlled substances often
8 store records of their activities, as well as the controlled substance, in their vehicle and residence. Id. at ¶ 23.
9 This information was sufficient for the magistrate to find that it was “reasonable” for the government to seek
10 evidence of performance-enhancing drugs in Anderson’s vehicle and residence.

11 Staleness must be evaluated in light of the particular facts of the case and the nature of the criminal
12 activity and property sought. United States v. Greany, 929 F.2d 523, 525 (9th Cir. 1991). The government
13 presented evidence of a FedEx receipt for materials sent to Anderson at BALCO in May 2003. Watson
14 Affidavit at ¶ 10. The government also presented evidence linking Anderson to BALCO as early as September
15 2002, demonstrating that Anderson had a long-term relationship with BALCO. Id. at ¶ 12. Just hours before
16 the government obtained the search warrant, Conte and Valente told agents that Anderson received steroids,
17 the “clear,” and the “cream” from BALCO. Id. at ¶¶ 18-21. Defendant argues that the statements were
18 limited to “early 2003”; however, that qualification only applied to Conte’s provision of the “clear” to Anderson.
19 Id. Valente told agents that Anderson visited BALCO three weeks earlier. Id. at ¶ 21. Additionally, the
20 government submitted testimony that records regarding the distribution of controlled substances can be
21 maintained for months. Id. at ¶ 23. This Court may “properly infer that . . . records of the criminal activity will
22 be kept for some period of time.” Greany, 929 F.2d at 525. Given the evidence presented linking Anderson
23 to BALCO as well as Conte and Valente’s statements on September 3, 2003, the Court finds a sufficient basis
24 for determining that Anderson was engaged in an ongoing criminal activity, which allows for “greater lapses of
25 time” than for completed acts. Id. Therefore, the Court finds that the warrant contained sufficient probable
26 cause and rejects defendant’s staleness argument.

1 **B. Federal Rule of Criminal Procedure 41(f)(3)**

2 Anderson claims that he was not provided with a copy of the search warrant, despite repeated
3 requests, during the search of his residence on September 3, 2003. Anderson asserts that the government’s
4 refusal to provide a copy of the search warrant constitutes a violation of Fed. R. Crim. P. 41(f)(3) and justifies
5 suppression.

6 As noted earlier, Rule 41 requires service of the warrant at the outset of the search, absent exigent
7 circumstances. United States v. Gantt, 194 F.3d 987, 990 (9th Cir. 1999). According to declarations
8 presented by defendant, Anderson and Gestas both requested a copy of the search warrant as agents
9 conducted the search, and the agents refused. See Decl. of Anderson at ¶ 31; Decl. of Gestas at ¶ 5. The
10 government has presented evidence that disputes Anderson’s account. See Government’s Ex. C (“Novitzky
11 Decl.”) at ¶¶ 15, 25. The Court GRANTS defendant’s request for an evidentiary hearing on this matter,
12 because there is a material discrepancy between the government and the defense regarding whether the warrant
13 was provided to the defendant. The evidentiary hearing will be held to determine if defendants received service
14 of the warrant at the outset of the search or if suppression is required under Gantt for “deliberate disregard”
15 of the rule by the agents or prejudice to the defendants.

16
17 **V. Anderson’s motion to suppress statements**

18 Defendant Anderson argues that his September 3, 2003 statements to law enforcement officials should
19 be suppressed because they were made in violation of Miranda. Specifically, Anderson claims that he was in
20 custody when he was interrogated by agents at his own home. The government concedes that Anderson was
21 interrogated by agents; however, it disputes Anderson’s assertion that he was in custody.

22 The Court finds that there are contested issues of fact regarding the validity of Anderson’s interrogation.
23 See Walczak, 783 F.2d at 857. Anderson has provided a declaration stating that he did not feel free to leave
24 throughout the encounter with law enforcement on September 3, that he could not take his son to another
25 location, and that he was not told that he could leave until thirty minutes after his interrogation with Agent
26 Novitzky. Decl. of Anderson at ¶¶ 4, 14, 27. Anderson’s girlfriend, Nicole Gestas, provided a declaration that
27 corresponds with Anderson’s version of events.

1 The government disputes these allegations and claims that Anderson was repeatedly told that he was
2 free to leave at any time and that he did not have to speak with the agents. Government’s Ex. C (“Novitzky
3 Declaration”) at ¶¶ 6, 12. The government also presented testimony that Anderson was told that he was not
4 under arrest and that he was free to leave before conducting the interrogation. Id. at ¶ 21.

5 The Court GRANTS defendant’s motion for an evidentiary hearing to determine if Anderson was in
6 custody when he responded to questions at his own home during the execution of the September 3, 2003
7 search warrant.

8
9 **VI. Anderson’s motion to traverse the search warrants**

10 Defendant Anderson requests that the Court hold an evidentiary hearing pursuant to Franks v.
11 Delaware, 438 U.S. 154 (1978), because the affidavit contains material misstatements and omissions. In order
12 to have a valid Franks claim, defendants must make a “substantial preliminary showing that a false statement
13 was 1) deliberately or recklessly included in an affidavit submitted in support of a search warrant; and 2)
14 material to the magistrate’s finding of probable cause.” United States v. Motz, 936 F.2d 1021, 1023 (9th Cir.
15 1991). Defendants must make this showing as well for the reckless or intentional misstatement of facts. Tham,
16 960 F.2d at 1395.

17
18 **A. September 3, 2003 warrant**

19 Defendant argues that Agent Watson’s affidavit contains misleading descriptions of legitimate activity
20 to create probable cause. Defendant asserts that BALCO is a registered laboratory testing facility, and
21 Anderson’s actions were consistent with legal activity. The Court rejects this argument. The inclusion of
22 evidence regarding Anderson’s contact with BALCO established a relationship with Anderson and BALCO
23 Laboratories. As described above, the government presented a great deal of evidence describing BALCO’s
24 involvement in the distribution of performance-enhancing drugs. Finally, Conte and Valente told government
25 agents that Anderson purchased steroids from BALCO and distributed “cream” and “clear” provided by
26 BALCO. Watson Affidavit at ¶ 18-22. Therefore, the inclusion of this information was not misleading, but
27 instead described Anderson’s connection with BALCO.
28

1 The Watson affidavit contained information from a confidential informant claiming that Anderson was
2 “well known” in the steroid community as a steroid dealer. Watson Affidavit at ¶ 6. Defendant argues that
3 Agent Watson intentionally misled the magistrate by failing to include the date of the informant’s information.
4 The Court will not decide this issue, because it finds that the information from the informant was not material
5 to the determination of probable cause given that the evidence discussed above was itself sufficient to
6 demonstrate probable cause.

7
8 **B. September 5, 2003 warrant**

9 Defendant argues that Agent Novitzky’s characterization of the steroids seized at Anderson’s residence
10 as “associated with distribution” is misleading, because the quantities were consistent with personal use. The
11 Court rejects this argument and finds that the defendant fails to make the necessary “substantial showing” under
12 Franks. During the September 3 search, the government seized evidence that supports the government’s
13 characterization of the steroids seized at Anderson’s residence. Among other things, the government seized
14 invoices that “appear to represent lists of substances sold to various individuals.” Government’s Ex. B
15 (“Novitzky September 5, 2003 Affidavit”) at ¶ 13. Based on the government’s evidence, it was not misleading
16 to classify the steroids seized as associated with distribution activities.

17 Defendant also argues that his statements on September 3, 2003 were made in violation of his rights
18 under Miranda. See Section V. The Court will hold an evidentiary hearing to determine whether Anderson
19 was in custody at the time of the interrogation on September 3, 2003. If the Court grants defendant’s motion
20 to suppress, defendant may re-file this motion; however, at this time, the motion to traverse the search warrant
21 is DENIED.

22
23 **VII. Anderson’s discovery motions**

24 Defendant Anderson brings several discovery motions, including: 1) motion to disclose governmental
25 informant pursuant to United States v. Kiser; 2) motion for prior bad acts evidence under Rule 404(b); 3)
26 motion for Henthorn material; 4) request for notice under Fed. R. Crim. P. 12(d)(2); and 5) motion for
27 government to retain rough notes. The Court will discuss each motion in turn.

1 **A. Disclosure of government informant**

2 Defendant requests that the Court conduct an in camera, ex parte hearing to learn the name and
3 address of the confidential informant relied upon by Agent Watson in his affidavit for the search warrants
4 obtained on September 3, 2003. Defendant argues that this disclosure is “essential to a fair determination of
5 the veracity of the affidavit.” This Court DENIES defendant’s motion, as the Court has found that the
6 information provided by the confidential informant was unnecessary for the determination of probable cause.
7

8 **B. Rule 404(b)**

9 The Court ORDERS the government to produce all evidence under Federal Rules of Evidence 404(b)
10 to defendants no less than 30 days before trial.
11

12 **C. Henthorn material**

13 The Court ORDERS government to provide defendants with Henthorn impeachment material by
14 December 31, 2004. The Court also GRANTS defendants’ request at oral argument to subpoena personnel
15 documents from state law enforcement agents involved in the case under Fed. R. Crim. P. 17(c).
16

17 **D. Rule 12(b)(4)(B) notice**

18 In its opposition, the government notified the Court that it had not provided certain grand jury
19 transcripts and sensitive materials under Rule 12 because of its fear that the documents would become public.
20 The Court ORDERS the government to provide all documents under Rule 12.
21

22 **E. Rough notes**

23 Defendant requests that the government preserve all rough notes compiled by law enforcement in the
24 course of the investigation, as it may contain discoverable material. See Harris v. United States, 543 F.2d
25 1247, 1253 (9th Cir. 1976) (holding that government must preserve agents’ original notes because they may
26 be discoverable under the Jencks Act or other applicable law). The government has agreed to preserve all
27 discoverable rough notes, and the Court ORDERS the government to do so. Under United States v. Spencer,
28

1 618 F.2d 605 (9th Cir. 1980), the government is required to preserve only discoverable notes.

2
3 **VII. Conclusion**

4 For the foregoing reasons and for good cause shown, the Court hereby:

5 1) DENIES defendants' motions to dismiss for outrageous government conduct, without
6 prejudice;

7 2) DENIES Conte and Valente's motion to dismiss for prejudicial pretrial publicity, without
8 prejudice;

9 3) DENIES in part Conte and Valente's motion to suppress and GRANTS an evidentiary hearing
10 to determine: a) if suppression is required under Gantt for "deliberate disregard" of the rule requiring service
11 of the warrant or prejudice to the defendants; b) whether defendants were in custody at the time of the
12 interrogations; and 3) whether Conte's consent to search the off-site storage locker was voluntary;

13 4) DENIES in part Anderson's motion to quash and GRANTS an evidentiary hearing to
14 determine: if suppression is required under Gantt for "deliberate disregard" of the rule requiring service of the
15 warrant or prejudice to the defendant;

16 5) GRANTS an evidentiary hearing for Anderson's motion to suppress to determine: if Anderson
17 was in custody when he responded to questions at his home during the execution of the September 3, 2003
18 search warrant;

19 6) DENIES Anderson's motion to traverse the search warrants; and

20 7) DENIES Anderson's motion for disclosure of confidential informant and GRANTS Anderson's
21 remaining discovery motions.

22 The evidentiary hearing required by this order shall be held on **January 31, 2005 at 10:00 a.m.**

23
24 **IT IS SO ORDERED.**

25
26 Dated: December 28, 2004

27 s/Susan Illston
28 SUSAN ILLSTON
United States District Judge

United States District Court

For the Northern District of California

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