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10 **Attorney For Defendant,**
11 **Bojidar Zachariev**

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 **UNITED STATES OF AMERICA,))**
15 **Plaintiff,)**

16 **v.)**

17 **BOJIDAR ZACHARIEV,)**
18 **Defendant)**

CR 99-1162-TJH
CR 99-1157-TJH

NOTICE OF MOTION AND
MOTION BY DEFENDANT
BOJIDAR ZACHARIEV FOR
PRETRIAL DISCOVERY RE:
(1) GOVERNMENT'S INFORMANT;
(2) RECORDED CONVERSATIONS;
MEMORANDUM OF POINTS AND
AUTHORITIES

DATE: January 22, 2001
TIME: 10:00 a.m.
CTRM: HON. Terry J. Hatter

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23 **TO: THE U.S. GOVERNMENT, THROUGH ITS COUNSEL OF RECORD,**
24 **ASSISTANT U.S. ATTORNEY CHRISTOPHER D. JOHNSON:**

25 **PLEASE TAKE NOTICE that on January 22, 2001, at 10:00 a.m., before the**
26 **Honorable Terry J. Hatter, Chief Judge of the United States District Court, defendant**
27 **Bojidar Zachariev will move the Court for an Order directing the Government to disclose**
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1 to the defense the discovery items listed on the following page.

2 **The grounds supporting this motion are based on Rule 16 of the Federal Rules of**
3
4 **Criminal Procedure, as well as principles of constitutional discovery which are discussed**
5 **in the published case law cited in this motion.**

6 **The motion is based on this notice of motion, the attached Memorandum of Points**
7 **and Authorities, the files and records of this case, and all other evidence and argument**
8 **that may be presented at a hearing on this motion.**
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11 **DATED: December 15, 2000**

Respectfully Submitted,

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GREGORY NICOLAYSEN
Counsel for Defendant,
Bojidar Zachariev

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DISCOVERY REQUESTED BY THIS MOTION

This discovery motion is in two parts:

First, the motion seeks the production of documents and information pertaining to each and every informant and cooperating witness who has assisted the government in the investigation leading up to the indictment in either CR 99-1157 or CR 99-1162, or in both cases (hereafter referred to as “each informant / cooperating witness”).

Second, the motion seeks the production of audio recordings that apparently were made by the government regarding conversations between its informant and defendant Zachariev, in the course of the subject investigation.

The specific discovery requests which are the basis of this motion are listed in detail below and are hereby made part of the notice of motion:

**DISCOVERY PERTAINING TO EACH GOVERNMENT
INFORMANT / COOPERATING WITNESS**

A. Identity And Criminal Record Of Informant / Cooperating Witness

- 1. Disclose the true names, dates of birth and present locations of any informant and cooperating witness who has assisted the government in any way in either of the two pending cases.**
- 2. With respect to each such informant and cooperating witness, disclose any**

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and all aliases and nicknames, and dates of birth used by or attributed to that person.

- 3. Produce each informant / cooperating witness to the defense for a pretrial interview.
- 4. With respect to each such informant / cooperating witness, produce a true copy of any FBI rap-sheet, CII printout, NCIC printout and all other records available to the government which reflect any dates of arrest, criminal charges and disposition of any charges, together with the actual documents concerning each such charge.
- 5. Disclose whether any informant / cooperating witness involved in the investigation(s) leading up to the indictments in the pending cases has been arrested within the past twelve (12) months and, if so, produce all documents and information pertaining to each such arrest, including:
 - A. The arrest report;
 - B. The charging instrument (e.g., complaint, indictment), if charges were filed;
 - C. If no charges were filed, the identity and professional address / phone of the prosecutor who made the decision not to file charges.

B. Personal Information About Each Informant / Cooperating Witness

- 1. Produce all documents and information which pertains to personal matters about each informant / cooperating witness which would have bearing on

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credibility at trial, including without limitation, any evidence of:

- A. Mental illness or impairment, as well as any psychological / psychiatric treatment;
- B. Physical illnesses (and treatment, if any);
- C. Alcohol or drug abuse (and treatment, if any);
- D. Financial debts, including taxes owed to the IRS.

C. Working Relationship Between Each Informant / Cooperating Witness And

Government In The Cases Currently Pending Before This Court

- 1. Provide the date on which each informant / cooperating witness first began to provide assistance to the Government in the investigation(s) leading up to the indictments in the two cases pending before this Court: CR 99-1157 or CR 99-1162, or both (if involved in both cases) [hereinafter, the “pending cases”].
- 2. Provide the total number of hours undertaken by the informant / cooperating witness in connection with the investigation(s) leading up to the indictments in the pending cases.
- 3. Provide the name of the agent(s) and his/her law enforcement agency, who has been in charge of the informant / cooperating witness, sometimes referred to in law enforcement parlance as the “controlling agent” in connection with the pending cases.
- 4. Produce all documents that reflect any formal or informal agreement,

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whether oral or written, pursuant to which the informant / cooperating witness has agreed to cooperate or render assistance or information of any kind in connection with the criminal investigation leading up to the indictments in the pending cases. The documents requested include, without limitation:

- A. plea agreements;
- B. agreements not to prosecute;
- C. immunity agreements;
- D. agreements to settle a matter through pretrial diversion;
- E. agreements pertaining to reduction of sentence; and
- F. agreements regarding service of time in custody.

5. Produce the following documents pertaining to each and every interview or proffer session conducted between the government and each informant / cooperating witness:

- A. The government's notes from each interview session;
- B. Any proposal for cooperation that was extended by the government to the informant / cooperating witness before any final cooperation deal was reached;
- C. All correspondence between the government and counsel for the informant / cooperating witness pertaining to any interview or proffer session.

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6. Produce all documents, including investigative reports (such as FBI-302s) and transcripts of recorded conversations, that reflect work performed, and information provided, by each informant / cooperating witness in connection with the investigation(s) leading up to the indictments in the pending cases. This request includes, without limitation, all reports (such as FBI-302s) pertaining to each informant / cooperating witness that relate to
 - A. debriefing sessions with government agents or prosecutors;
 - B. undercover work, including “sting” or reverse -“sting” operations;
 - C. consensual recordings and wiretap recordings or conversations with any target of an investigation; and
 - D. information that contributed to any search warrant affidavit.
7. Produce all writings made by each informant / cooperating witness, including handwritten notes and typed correspondence, reports or memoranda, which are in the possession of the government and which pertain or relate in any way to work or information provided to the government in connection with the investigation(s) leading up to the indictments in the pending cases.

D. Working Relationship Between Each Informant / Cooperating Witness And Government In Connection With Prior Criminal Investigations And Prosecutions

1. Provide a list of prior federal and state criminal investigations and prosecutions in which the informant / cooperating witness has worked for,

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or provided assistance or information to, the government. The list should include (a) the case name of any indictment or criminal complaint filed; (b) the federal district in which it was filed; (3) the docket numbers, including pre-indictment Miscellaneous Numbers and post-indictment CR Case Numbers, that were assigned by the Clerk's Office to each such investigation or prosecution.

- 2. Produce all documents that reflect any formal or informal agreement, whether oral or written, pursuant to which the informant / cooperating witness agreed to cooperate or render assistance or information of any kind in connection with any prior federal criminal investigation or prosecution to any agency of the United States Government, including but not limited to the United States Justice Department and its subsidiary law enforcement agencies. The documents requested include, without limitation:
 - A. plea agreements;
 - B. agreements not to prosecute;
 - C. immunity agreements;
 - D. agreements to settle a matter through pretrial diversion;
 - E. agreements pertaining to reduction of sentence; and
 - F. agreements regarding service of time in custody.

- 3. To the extent this information is possessed by, or reasonably available to, the U.S. Attorney's Office, produce all documents that reflect any formal or

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informal agreement, whether oral or written, pursuant to which the informant / cooperating witness agreed to cooperate or render assistance or information of any kind in connection with any prior state criminal investigation or prosecution. The documents requested include, without limitation:

- A. plea agreements;**
- B. agreements not to prosecute;**
- C. immunity agreements;**
- D. agreements to settle a matter through pretrial diversion;**
- E. agreements pertaining to reduction of sentence; and**
- F. agreements regarding service of time in custody.**

- 4. Provide the total number of hours undertaken by the informant / cooperating witness in connection with all prior federal and state investigation(s) and prosecutions.**
- 5. Provide the total number of hours undertaken by the informant / cooperating witness specifically in connection with all prior undercover “sting” or “reverse - sting” investigations.**
- 6. Identify all state and local law enforcement agencies for which each informant / cooperating witness has provided cooperation, assistance and/or information in connection with a criminal investigation or prosecution.**

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E. Benefits Provided By The Government To Each Informant / Cooperating Witness In Connection With The Pending Cases

- 1. Produce all documents that reflect benefits, compensation, or any form of leniency promised to, or received by, each informant / cooperating witness in return for cooperation, assistance or information provided to the government in connection with the pending cases. The information sought by this request includes, without limitation:
 - A. monetary payments;
 - B. reimbursements for expenditures;
 - C. deferred payment of taxes;
 - D. reduced or dismissed charges.
- 2. To the extent not already produced in response to Number 2 above, produce all documents -- including reports, ledgers and receipts --that reflect any payments received by the informant /cooperating witness from the government in connection with the pending cases.

F. Benefits Provided By The Government To Each Informant / Cooperating Witness In Connection With Prior Criminal Investigations And Prosecutions

- 1. Produce all documents that reflect benefits, compensation, or any form of leniency promised to, or received by, each informant / cooperating witness in return for cooperation, assistance or information provided to the

1 government in connection with each prior investigation or prosecution. The
2 information sought by this request includes, without limitation:

- 3
4 A. monetary payments;
5 B. reimbursements for expenditures;
6 C. deferred payment of taxes;
7 D. reduced or dismissed charges.
8

- 9 2. To the extent not already produced in response to Number 2 above, produce
10 all documents -- including reports, ledgers and receipts --that reflect any
11 payments received by the informant / cooperating witness from the
12 government in connection with each prior investigation or prosecution.
13

14 **G. Other Benefits Provided By The Government To The Informant / Cooperating**

15 **Witness**

- 16 1. Disclose whether the informant / cooperating witness has ever committed a
17 crime for which he was not arrested, or for which he was arrested but not
18 prosecuted, due to the intervention of a law enforcement agency or
19 prosecuting office on whose behalf that individual had been providing
20 assistance in connection with a criminal investigation or prosecution.
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22 2. In connection with any disclosure made in response to subsection (1) above,
23 produce all documents that relate or pertain to the disclosure.
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25 3. Disclose whether the informant / cooperating witness has been offered or
26 provided with any special financial opportunities or benefits by a law
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enforcement agency or prosecuting office, as part of that individual's working relationship with the government in criminal investigations or prosecutions. Examples include:

- A. low-interest or interest-free loans;
- B. employment, or assistance in obtaining employment, in addition to being employed as a paid informant;
- C. additional cash handouts, or extra spending money, beyond the formal compensation arrangement between the informant / cooperating witness and the government;
- D. any compensation that was regarded as a bonus or reward for performance as an informant / cooperating witness;
- E. money with which to gamble.

4. In regard to any disclosure made in response to Number 3 above, produce all documents that pertain or relate to that disclosure.

5. To the extent not disclosed in response to Number 3 above, disclose whether the informant / cooperating witness has been offered or provided with anything of value by any law enforcement agency or prosecuting office, as part of that individual's working relationship with the government in criminal investigations or prosecutions.. Examples include:

- A. The purchase of a vehicle or boat for the informant / cooperating witness;

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- B. The purchase of a residence for the informant / cooperating witness, or assistance in obtaining a residence;**
- C. Assistance with immigration matters;**
- D. Recreational items, such as sports equipment;**
- E. Entertainment items, such as tickets to ballgames, concerts or the theatre;**
- F. Free (or discounted) travel;**
- G. Free (or discounted) meals;**
- H. Special access to real estate or personal property of others which is being made available to the informant / cooperating witness by virtue of his working relationship with the government (e.g., vacation homes, night clubs, boats).**

H. Prior Testimony By Each Informant / Cooperating Witness

- 1. Produce a transcript of all sworn testimony of each informant / cooperating witness in every federal, state and local proceeding in which that individual has testified as a witness for the government, to the extent such transcripts are in the possession of, or reasonably accessible to, the U.S. Attorney's Office.**
- 2. To the extent a transcript cannot be produced to the defense, identify each proceeding with sufficient particularity to enable the defense to order a transcript directly from the court or court reporter.**

1 **I. Evidence Of The Informant's Unreliability**

- 2 **1. Produce all documents and information regarding any false or misleading**
3 **statements made by the informant / cooperating witness to any law**
4 **enforcement officer or representative of a prosecutor's office;**
5
6 **2. Produce all documents and information regarding any perjury committed**
7 **by the informant / cooperating witness in any sworn affidavit (or**
8 **declaration), or at any grand jury appearance, deposition, pretrial hearing,**
9 **trial or other legal proceeding;**
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11 **3. Produce all documents and information regarding any deceptive behavior**
12 **that has been displayed by the informant / cooperating witness to any law**
13 **enforcement officer or representative of a prosecutor's office;**
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15 **4. Produce all documents and information regarding any conduct by the**
16 **informant / cooperating witness that amounted to a violation of any**
17 **directives, instructions or guidelines given to that individual by any law**
18 **enforcement officer or representative of a prosecutor's office;**
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20 **5. Produce all documents and information regarding any sanctions or penalties**
21 **imposed on the informant / cooperating witness by any law enforcement**
22 **agency or prosecuting office, specifically in connection with misconduct**
23 **related to that individual's work on behalf of the government in a criminal**
24 **investigation or prosecution;**
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- 6. Produce all documents and information regarding any conduct by the informant / cooperating witness that amounted to a violation of any directives or instructions given to that individual by any law enforcement officer or representative of a prosecutor's office;
- 7. Produce all documents and information regarding any conduct by the informant / cooperating witness that amounted to a violation of any condition of probation or parole, and documents indicating the disposition of any such violation.
- 8. Produce all documents and information regarding any assets (including income) derived by the informant / cooperating witness during the time period in which this individual was cooperating or working with law enforcement in connection with criminal investigations and/or prosecutions.
- 9. Produce all documents and information regarding any tax violations committed by the informant / cooperating witness, including the failure to file tax returns and the willful failure to pay taxes owed, during the time period in which this individual was cooperating or working with law enforcement in connection with criminal investigations and/or prosecutions.

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DISCOVERY PERTAINING TO RECORDED CONVERSATIONS

A. Audio Recordings Between Defendant And Each Informant / Cooperating Witness

1. Produce all audio recordings of conversations between the defendant and each informant / cooperating witness, including conversations made when the defendant was in state custody. This request seeks both consensual recordings and recordings made pursuant to wiretap authorization.
2. Produce all transcripts made by the government for each such recorded conversation.
3. Produce all investigative reports (such as FBI-302s) that pertain to each such recorded conversation.
4. With regard to any wiretap recordings, produce all monitoring logs, ten-day reports and wiretap applications, including affidavits to such applications.

B. Videotaped Recordings Between Defendant And Each Informant / Cooperating Witness

1. To the extent not yet produced to the defense, produce all videotaped recordings of conversations between the defendant and each informant / cooperating witness. This request seeks both consensual recordings and recordings made pursuant to wiretap authorization.
2. Produce all transcripts made by the government for each such videotaped

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conversation.

- 3. Produce all investigative reports (such as FBI-302s) that pertain to each such videotaped conversation.
- 4. With regard to any videotapes made pursuant to court authorization, produce all monitoring logs, ten-day reports and applications to the district court, including affidavits to such applications.

C. Audio Recordings Between Defendant And Undercover FBI Agent

- 1. Produce all audio recordings of conversations between the defendant and any FBI agent acting in an undercover capacity in connection with the investigation(s) leading up to the indictments in the pending cases. This request seeks both consensual recordings and recordings made pursuant to wiretap authorization.
- 2. Produce all transcripts made by the government for each such recorded conversation.
- 3. Produce all investigative reports (such as FBI-302s) that pertain to each such recorded conversation.
- 4. With regard to any wiretap recordings, produce all monitoring logs, ten-day reports and wiretap applications, including affidavits to such applications.

D.

1 **E. Audio Recordings Between Defendant's Counsel And Each Informant / Cooperating**

2 **Witness**¹

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- 4 1. Produce all audio recordings of conversations between the defendant's
- 5 former counsel, Anthony Brooklier (or representatives of his office), and
- 6 each informant / cooperating witness, during the time period in which Mr.
- 7 Brooklier served as counsel of record for the defendant in a pending
- 8 criminal action. This request seeks both consensual recordings and
- 9 recordings made pursuant to wiretap authorization.
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- 11 2. Produce all transcripts made by the government for each such recorded
- 12 conversation.
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- 14 3. Produce all investigative reports (such as FBI-302s) that pertain to each
- 15 such recorded conversation.
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- 17 4. With regard to any wiretap recordings, produce all monitoring logs, ten-day
- 18 reports and wiretap applications, including affidavits to such applications.

19 **F. Videotaped Recordings Between Defendant's Counsel And Each Informant /**

20 **Cooperating Witness**

- 21 1. To the extent not yet produced to the defense, produce all videotaped
- 22 recordings of conversations between the defendant's former counsel,
- 23 Anthony Brooklier (or representatives of his office), and each informant /
- 24 cooperating witness, during the time period in which Mr. Brooklier served
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27 ¹ This request does *not* pertain to defendant's court-appointed counsel in the pending

28 criminal actions in this Court.

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as counsel of record for the defendant in a pending criminal action. This request seeks both consensual recordings and recordings made pursuant to wiretap authorization.

- 2. Produce all transcripts made by the government for each such videotaped conversation.
- 3. Produce all investigative reports (such as FBI-302s) that pertain to each such videotaped conversation.
- 4. With regard to any videotapes made pursuant to court authorization, produce all monitoring logs, ten-day reports and applications to the district court, including affidavits to such applications.

The foregoing list of requested discovery is incorporated by reference into the Notice of Motion.

DATED: December 15, 2000

Respectfully Submitted,

GREGORY NICOLAYSEN
Counsel for Defendant,
Bojidar Zachariev

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

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5 A. Brief Description Of The Two Related Prosecutions Pending In This Court

6 Pending before this Court are two related criminal prosecutions (CR 99-1157 and
7 CR 99-1162) which were indicted separately but which arose out of the same underlying
8 investigation.²

9
10 In one action (CR 99-1157), the government charges the defendant with solicitation
11 to commit murder-for-hire, in violation of 18 U.S.C. 373 and 1958, and with the possession
12 of unregistered firearms, in violation of 26 U.S.C. §5861(i).³ In the other action (CR 99-
13 1162), the government charges the defendant with violations of 18 U.S.C. 513(a) and
14 1029(a)(1) in regard to the alleged possession and trafficking of counterfeit checks and
15 unauthorized credit cards.⁴

16
17 While these cases have been consolidated by stipulation to be tried in this Court,
18 they will be tried sequentially, not jointly.⁵ This motion applies equally to both cases.⁶

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20 _____
21 ² Defense counsel has been appointed to represent the defendant in both actions.

22 ³ The four-count indictment names two defendants. Zachariev is charged in all counts
23 and is the only remaining defendant, as the government apparently dismissed all of the charges against
24 the codefendant, Oliverio Chavez.

24 ⁴ The forty-six count indictment in CR 99-1162 names four defendants, with Zachariev
25 being listed as the lead defendant and charged in sixteen counts.

26 ⁵ The trial in CR 99-1162-TJH, is presently scheduled to begin on January 16, 2001.
27 The trial in the second case, CR 99-1157-TJH, is scheduled to commence at the conclusion of the trial
28 (continued...)

1 **B. The Central Role Of The Government's Informant**

2 **In short, this is an informant - generated prosecution. The government's**
3 **investigation that produced the two indictments consisted of an aggressive sting operation**
4 **targeting the defendant, which utilized an informant who has apparently turned this type**
5 **of undercover work into a twenty-year career, without ever himself having been in law**
6 **enforcement.⁷ From the discovery produced to date, it seems that the government has**
7 **built this case by employing the services of a career informant who has years and years of**
8 **well-polished techniques on how to trap targets by acting in fictional roles that service the**
9 **investigative pleasures of law enforcement. For the very reason that the motives and**
10 **credibility of this witness will be a pivotal factor in the jury's assessment of the**
11 **government's evidence in each of the two trials, it can hardly be disputed that the**
12 **discovery sought by this motion is essential to the defense at trial.**

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16 **The central role of the informant in building these two cases is clear from the**
17 **affidavit filed in support of the wiretap application, which was prepared by FBI agent**
18 **David Smith. The affidavit explains the general background of the investigation, stating**

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22 ⁵(...continued)
23 in CR 99-1162. A motion to continue the trial date in each case was filed on December 18, 2001 and is
24 pending.

25 ⁶ **Because the two indictments have arisen out of the same investigation, this motion is**
26 **being filed in both cases, so as to ensure that any discovery order issued by this Court applies with**
27 **equal force to the government's obligations in both actions.**

28 ⁷ **The evidence supporting the counterfeit check, counterfeit credit card and murder-for-**
29 **hire charges is based largely on communications and meetings between the informant and the**
30 **defendant.**

1 that an undercover operation was established in Los Angeles “to identify members of
2 criminal organizations by attempting to purchase counterfeit securities, credit cards,
3 weapons and drugs.” (Affidavit at ¶ 12, at pg 9).
4

5 The agent goes on to explain that the design of the investigation was based on the
6 use of “a highly experienced cooperating witness (who) was selected to be the primary
7 operative of this undercover operation.”⁸ Ironically, the reference to the informant as
8 being “highly experienced” is almost an understatement, as the affidavit openly
9 acknowledges that this informant has worked for “the FBI and other law enforcement
10 agencies for over twenty years.” [emphasis added]. As is customary with paid informants,
11 the affidavit confirms that the informant was “compensated for the information and
12 assistance he” provided to “the FBI, and will if needed, testify as a witness.” (Affidavit at
13 ¶ 13, at pg 9).
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16 In light of the statements contained in the wiretap affidavit, it is hardly surprising
17 that the informant served as the central figure on the two dozen video tapes of secretly
18 recorded meetings between the informant and defendant which form the nucleus of the
19 government’s evidence in the murder-for-hire case (CR 99-1157).⁹ At trial, the
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22 ⁸ The affidavit refers to the individual as a “cooperating witness.” The FBI 302s refer to
23 him as a “cooperating source”, and the description of his undercover work falls squarely within the
24 operating definition of an informant as discussed in the case law. Accordingly, the Notice Of Motion
25 that lists the categories of requested discovery use the phrase “Informant / Cooperating Witness.”

26 ⁹ To date, the government has provided defense counsel with copies of twenty-four VHS
27 surveillance video tapes of secretly recorded meetings between the government’s informant and the
28 defendant, or between the informant, the defendant and other individuals. Each video tape averages
more than one hour in length. The government has informed the defense that if CR 99-1157 proceeds
(continued...)

1 government will likely rely on these tapes in presenting its claim that the defendant
2 solicited the undercover informant to arrange for the informant's fictional "Mexican
3 Associates" to kill an individual whom the defendant identified to the informant, and to
4 establish its allegation that the defendant gave the informant twenty-four firearms which
5 were not registered and which lacked serial numbers.
6

7 The informant played a similarly central role in building the fraud case (CR 99-
8 1162), as the government alleges that the defendant gave the informant counterfeit checks
9 allegedly worth more than \$90,000, as well as approximately thirty counterfeit credit
10 cards.
11

12 Despite the obvious significance of the informant's role in building the two related
13 prosecutions, the government has not provided the defense with any information relating
14 to this individual. The reason is obvious: the government clearly has an ongoing interest
15 in using this informant to build cases and thus does not want to disclose impeachment-
16 related information that may impair his investigative value in the future. Thus, in the
17 poker analogy, the government is playing the informant issue close to the vest, hoping that
18 it can avoid producing discovery and thereby ensure this individual's value to prosecutors
19 for the next case that beckons the talents of a career sting operator.
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22 Against this backdrop, the discovery produced to date is meager in relation to the
23 totality of information to which the defense is entitled. The defense has only the twenty-
24 four videotapes and standard wiretap documentation consisting of the application, ten-
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26 _____
27 ⁹(...continued)
28 to trial, the videos will comprise a principal part of the government's case-in-chief.

1 day reports, and the like. The government has failed to provide any information
2 regarding the informant's (a) working relationship with the government in this and any
3 prior criminal investigations or prosecutions; (b) benefits received by the informant from
4 the government; (c) personal information that impacts on credibility; or (d) prior
5 testimony. These categories of information, which are enumerated in detail in the Notice
6 Of Motion, are critical to the ability of the defense to raise proper challenges at trial
7 regarding the credibility of the informant. Therefore, on the basis of the authorities cited
8 in the following section of this memorandum, the Court should order the government to
9 produce the requested information.
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12 However, the government's failure to provide discovery regarding the informant
13 goes much further. The discovery produced to date, together with information
14 independently obtained by defense counsel, indicates that there are numerous audio
15 recordings of conversations between the informant and the defendant. The defense has
16 reason to believe that there may be in excess of one thousand such audio recordings, which
17 apparently include recordings of telephone conversations between the informant and the
18 defendant while the defendant was serving time in state custody.
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21 None of these audio recordings, or their transcripts, has been produced to the
22 defense.
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24 In addition, the defense has reason to believe there are additional videotapes of
25 secretly-recorded conversations / meetings between the informant and defendant, beyond
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1 II.

2 THE GOVERNMENT SHOULD BE ORDERED
3 TO PRODUCE ALL EVIDENCE REGARDING
4 THE HISTORY OF THE INFORMANT'S WORKING
5 RELATIONSHIP WITH THE GOVERNMENT,
6 HIS BACKGROUND, BENEFITS RECEIVED,
7 AND PRIOR TESTIMONY, IN ORDER TO ENABLE
8 THE DEFENSE TO PROPERLY CHALLENGE
9 THE INFORMANT'S CREDIBILITY AT TRIAL
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14 A. Because The Informant Is A Percipient Witness To The Events At Issue, The
15 Defense Is Entitled To Discovery Regarding The Informant

16 In the seminal case of Roviaro v. United States, 353 U.S. 53 (1957), the Supreme
17 Court promulgated the standard that determines when the government's privilege to
18 withhold information about an informant must yield to the defendant's request for access
19 to the information:
20

21 Where the disclosure of an informant's identity, or of the
22 contents of his communication, is relevant and helpful to the
23 defense of an accused, or is essential to a fair determination of
24 a cause, the privilege must give way. In these situations the
25 trial court may require disclosure and, if the Government
26 withholds the information, dismiss the action.

25 Roviaro, 353 U.S. at 60-61.

26
27 Where, as here, the informant is a percipient witness to the events that underscore
28

1 the government's case-in-chief at trial, the defendant's request for information commands
2 even greater merit. Indeed, in such cases, the Ninth Circuit has reversed convictions
3 based upon the government's failure to provide information about informants who are
4 percipient witnesses. See, e.g., United States v. Kojayan, 8 F.3d 1315, 1322 (9th Cir. 1993)
5 (remanded based on failure to disclose existence of cooperation agreement); United States
6 v. Montgomery, 998 F.2d 1468, 1478 (9th Cir. 1993) (reversing and remanding for new
7 trial based upon failure to produce the informant at trial where the informant had been a
8 percipient witness to drug transaction that formed basis of indictment); United States v.
9 Bonilla, 615 F.2d 1262, 1264 (9th Cir. 1980) (discovery of informant's identity warranted
10 "because the informant was a percipient witness to the criminal transaction underlying
11 [the defendant's] conviction").

12
13
14
15 The Ninth Circuit has expressly recognized that it is critical to the defense at trial
16 to test an informant's credibility. "By definition, criminal informants are cut from
17 untrustworthy cloth and must be managed and carefully watched by the government and
18 the courts to prevent them from falsely accusing the innocent, from manufacturing
19 evidence against those under suspicion of crime, and from lying under oath in the
20 courtroom." United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993); see also,
21 Carriger v. Stewart, 132 F.3d 463,479 (9th Cir. 1997). In the instant cases, the discovery
22 produced thus far, revealed the informant is a percipient witness, and the government
23 plans to call him at trial.
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1 **B. The Categories Of Information About The Informant Which Are Enumerated In**
2 **The Notice Of Motion Are Proper Subjects For Disclosure To The Defense**

3
4 The categories of information that are listed in the Notice Of Motion have not been
5 compiled arbitrarily but, rather, correspond directly to case law authority establishing a
6 defendant's entitlement to the requested information:

7 1. **Identity of the Informant and Production Of Informant For Pretrial**
8 **Interview by the Defense**¹¹

9
10 In Smith v. Illinois, 390 U.S. 129 (1968), the Supreme Court expressly recognized
11 the critical importance of allowing the defense to prepare for cross-examination of the
12 informant at trial by conducting a thorough pretrial investigation:

13 The witness' name and address open countless avenues of in-
14 court examination and out-of-court investigation. To forbid
15 this most rudimentary inquiry at the threshold is effectively to
16 emasculate the right of cross-examination itself.

17
18 Smith, 390 U.S. at 131. To justify disclosure of an informant's identity, the defense need
19 not bear a heavy burden. What must be shown is simply more than a "mere suspicion"
20 that the disclosure of the informant's identity will prove "relevant and helpful" or be
21 essential to a fair trial. United States v. Amador-Galvan, 9 F.3d 1414, 1417 (9th Cir.
22 1993). Moreover, when the informant is a percipient witness to critical events in the case,
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26 ¹¹ See Category A under the heading "Discovery Pertaining to Each Government
27 Informant / Cooperating Witness" in the Notice Of Motion (hereinafter referred to as
28 "Category").

1 this test is satisfied. As explained by the Ninth Circuit in United States v. Hernandez, 608
2 F.2d 741 (9th Cir 1979):

3
4 In light of [the informant's] role in the narcotics transaction
5 with which the appellants were charged, it cannot be said that
6 the disclosure of [the informant's] identity would not have
7 been "relevant and helpful" to the appellant's defense. . . .
8 Because [the informant] was a participant in the events that
9 were critical to the prosecution's case, no claim could be
10 raised under Roviaro, nor was it raised, that [the informant's]
11 identity could be lawfully withheld from the appellants.

12 Hernandez, 608 F.2d at 744 (emphasis in original) (citations omitted).

13 In addition to ordering the disclosure of the informant's identity, the Court should
14 order the government to either disclose the informant's address or produce the informant
15 for interview. The Fifth Circuit, in United States v. Opager, 589 F.2d 799, 804 (5th Cir.
16 1979), described as "undeniable" the importance to a litigant of interviewing potential
17 witnesses:

18 "In particular, in criminal cases, where a defendant's very
19 liberty is at stake, such interviews are especially crucial. Thus
20 it is that one of the first things responsible counsel does in
21 preparing a case is to seek to interview those witnesses
22 involved in the litigation."

23 United States v. Opager, 589 F.2d at 804.

24 In both Opager and Montgomery, the courts approved a request that the
25 informant be made available for interviews, if he was willing to be interviewed.

26 Montgomery, 998 F.2d at 1473; Opager, 589 F.2d at 804.

1 seminal case of Giglio v. United States, 405 U.S. 150, 154 (1972) (holding that evidence of
2 any understanding or agreement as to a future prosecution is relevant to an informant's
3 credibility and the prosecution's failure to disclose such information requires reversal),
4 and the proposition has been applied in a variety of contexts by circuit and district courts
5 to mandate disclosure of credibility-related information regarding the informant. See,
6 United States v. Cutler, 806 F.2d 933, 935 (9th Cir.1986) (affirming previous court order to
7 produce evidence of cash payments made to informant); Shaffer, 789 F.2d at 688-689 (full
8 benefits and promises made to an informant as well as his assets and tax liability have a
9 substantial effect on informant's credibility at trial and is material under the *Brady*
10 doctrine); see also, U.S. v. Colima-Monge, 962 F. Supp. 1337, 1341 (D.C. Ore. 1997)
11 (approving request for informant file detailing payments and benefits received as an
12 informant as well as leniency or consideration given to informant). It also includes the
13 details of any cooperation agreement and information as to what the government did to
14 satisfy its obligations under any such agreement; Kojayan, 8 F.3d at 1322 (reversing
15 conviction due to prosecutorial misconduct in disclosing requested discovery of witness'
16 cooperation agreement).

21 With respect to the disclosure of monetary benefits, the defense is entitled to a very
22 specific breakdown of all dates on which the informant received money (whether in cash
23 or some other form), how much he received on each date, and why he received the money.
24 See, e.g., Colima-Monge, 962 F. Supp. at 1341. The defense should also be provided with
25 information about what, if anything, the informant was required to do in return for the
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1 payment.

2 **Benefits received by an informant may also include other forms of consideration.**

3
4 **The defense should be informed of all other benefits, such as assistance in obtaining a**
5 **residence or employment, assistance with immigration matters, and any other help which**
6 **the government may have given the informant.**

7

8

9 **4. Personal Lifestyle Information About The Informant¹⁴**

10 **As the court explained in Shaffer, information which can be used to**
11 **discredit an informant at trial is material to the defense and therefore must be disclosed.**
12 **Shaffer, 789 F.2d at 689. Potentially discrediting information may include evidence**
13 **regarding an informant’s drug or alcohol abuse, mental health, and financial debts since**
14 **evidence of any or all of these could assist the jury in determining the weight to be given to**
15 **his testimony at trial and the absence of which could prejudice the defense if not disclosed**
16 **in advance. As in Shaffer, here the informant will likely be the government’s primary**
17 **witness whose testimony will be crucial to the determination of the defendant’s guilt or**
18 **innocence. Clearly, without complete information to thoroughly examine the informant’s**
19 **credibility at trial, the defense will suffer substantially.**

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27 ¹⁴ See Category B.

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1 At least one district court has expressly ordered the government to produce to the
2 defense the following in regard to interviews or proffer sessions conducted between the
3 government and each informant / cooperating witness:
4

5 A. The government's notes from each interview session;

6 B. Any proposal for cooperation that was extended by the government
7 to the informant / cooperating witness before any final cooperation
8 deal was reached;

9 C. All correspondence between the government and counsel for the
10 informant / cooperating witness pertaining to any interview or
11 proffer session.
12

13 United States vs. Sudikoff, 36 F.Supp. 2d 1196 (C.D. Cal. 1999, Pregerson, USDJ). In
14 Sudikoff, the defendant and an accomplice were indicted for securities violations for which
15 the accomplice received immunity in exchange for testimony against the defendant. In
16 finding the above documents discoverable, the court reasoned that the government was
17 required to disclose all evidence "that may reasonably be considered favorable to the
18 defendant's case and that would likely lead to admissible evidence." Id. at 1201. Similarly,
19 any evidence of the working relationship between the informant in this case and the
20 government, as illustrated by any type of correspondence between the informant and the
21 government referencing the terms of their agreement, would be favorable to the
22 defendant's case and would likely lead to other admissible evidence.
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6. Evidence Of The Informant’s Unreliability

The Government should also disclose all known occasions on which the informant has made false statements to any person, including, but not limited to, law enforcement officers or any law enforcement agency or court. See Bernal-Obeso, 989 F.2d at 333. Because a history of untruthfulness would clearly be relevant to an informant’s credibility it must also be disclosed to the defense upon proper request. See Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997). The request in this case specifically includes, but is not limited to, any aliases or false documents which the informant may have used and each occasion on which he is known to have used such an alias or false document.

The defense is also entitled to any other evidence bearing on the informant’s credibility. See United States v. Brumel-Alvarez, 991 F.2d 1452, 1461-63 (9th Cir. 1992); Bagley v. Lumpkin, 798 F.2d 1297, 1300 (9th Cir. 1986). The defense should therefore receive all information contained in any file, folder, or computer database which raise questions about the informant’s performance, reliability or truthfulness. Hernandez, at 608 F.3d at 746.

C. The Government’s Discovery Obligations Are Not Limited To The Local U.S. Attorney’s Office But Apply To All Agencies That Have Dealt With Each Informant / Cooperating Witness

In ordering discovery pursuant to this motion, the Court should direct the government to inquire with law enforcement agencies and prosecutors in other districts

1 who have dealt with the informant / cooperating witness at issue. This directive is in
2 accordance with the Ninth Circuit's ruling in United States v. Bryan, 868 F.2d 1032 (9th
3 Cir. 1989), in which the Court expressly recognized that the reach of Rule 16 of the
4 Federal Rules of Criminal Procedure extend outside the particular district in which the
5 prosecution is pending:
6

7 We find Bryan's argument persuasive that information "in
8 the possession of the government" under Rule 16(a)(1)(C)
9 may sometimes include out-of-district documents of which the
10 prosecutor has knowledge of and access to. Nothing in the text
11 of Rule 16(a)(1)(C) suggests that the government's obligation
12 to allow a defendant "to inspect and copy or photograph"
13 documents within its possession which are "material," or are
14 intended to be used in the government's case-in-chief, or were
15 obtained from or belong to the defendant is satisfied by
16 turning over only those documents physically located within
17 the district in which the defendant is tried. Moreover, as
18 Judge Coyle observed in United States v. Robertson, 634 F.
19 Supp. 1020 (E.D. Cal. 1986) (Robertson), aff'd, 815 F.2d 714
20 (9th Cir.), cert. denied, 484 U.S. 912, 108 S. Ct. 258, 98 L. Ed.
21 2d 215 (1987), "limiting 'government' to the prosecution alone
22 unfairly allows the prosecution access to documents without
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making them available to the defense." Id. at 1025.

Moreover, beyond the dictates of Rule 16, it has been well-recognized by both the Supreme Court and by circuits that discovery obligations apply to the government as a whole, not simply to the prosecutor as an individual. See Giglio, 405 U.S. at 154; United States v. Jennings, 960 F.2d 1488, 1490-91 (9th Cir. 1992), and case cited therein.

Therefore, compliance with any discovery order issued by this Court should be preconditioned on the prosecutor consulting with prosecutors and law enforcement personnel in other districts who have worked with the informant / cooperating witness, to obtain the documents and information in their possession that is responsive to the categories enumerated in the Notice Of Motion.

III.

THE GOVERNMENT SHOULD BE ORDERED
TO PRODUCE ALL EVIDENCE REGARDING
THE DEFENDANT’S STATEMENTS, DOCUMENTS
AND TANGIBLE OBJECTS

A. There Are Hundreds Of Recordings That Have Not Been Produced

1. Consensual Audio Recordings Made By The Informant

The government does not dispute that there are additional documents and recordings which have not been produced which involve the informant / cooperating witness. At this time, the defense believes that the informant may have made more than

1 one thousand audio recordings of telephone conversations and meetings between himself
2 and the defendant. These apparently include recorded conversations between the
3 informant and defendant while the defendant was in state custody after being arrested on
4 state charges on May 20, 1999.

6 2. Additional Video Tape(s)

7 Moreover, there is at least one videotape of a meeting between the informant and
8 defendant that has not been turned over, beyond the twenty-four tapes already
9 produced.¹⁶

11 3. Wiretap Recordings

12 In addition to the consensually-recorded audio recordings referenced above, it
13 appears from reviewing the wiretap documentation that more than four hundred (400)
14 telephone communications of the defendant's cell phone were recorded. To date, none of
15 the audio tape recordings or transcripts, memorandums, records, logs, reports and similar
16 data accumulated electronic pursuant to the wire tap intercept were provided to the
17 defense. The defense notes that the court ordered the audio tapes of the intercepted
18 communication sealed, and directed the FBI to maintain custody of audio tapes.

21 4. Consensual Audio Recordings Between FBI Agent And Defendant

22 In addition to the consensual recordings between the informant and the defendant,
23 the discovery reviewed reveals that an FBI agent, acting in an undercover capacity,
24 secretly recorded his conversations with the defendant. However, none of the consensual
25

27 ¹⁶ The defense believes that this videotaped meeting occurred on May 11, 1999.

1 recorded audio tapes or transcripts of secretly recorded meetings between the FBI
2 undercover agent and the defendant have been produced.

3
4 5. Audio Recordings Of Conversations Between Informant And Defendant's
5 Attorney

6 Finally, in addition to the informant's recording of telephone communications with
7 the defendant, a review of the discovery reveals that the informant may have secretly
8 recorded telephone conversations and meetings with the defendant's attorney, while that
9 attorney was representing the defendant on pending state charges. At this time, the
10 defense believes (although this needs to be confirmed through the production of evidence
11 requested by this motion) that an FBI agent and / or an Assistant U.S. Attorney concluded
12 that the conversations did not involve privileged information and thus allowed the
13 recording to proceed without minimization.
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16 No tapes or transcripts of the above-referenced conversations have been provided
17 to the defense.
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20 **B. The Requested Discovery Regarding Audio And Video Tapes Should Be Disclosed**
21 **Under Rule 16**

22 1. Rule 16(a)(1)(A)

23 All audio and video tapes that contain statements of defendant Bojidar Zachariev
24 should be ordered to be produced to the defense under Fed.R.Crim.P. 16(a)(1)(A), which
25 expressly entitles a defendant to receive evidence of his statements, including secretly
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1 recorded statement. See, Davis v. United States, 413 F.2d 1226, 1231 (5th Cir. 1969).

2 Moreover, the government’s obligation to produce a defendant’s statements applies
3 equally to the production of reports prepared by a government agent that memorialize
4 such statements. United States v. Garrett, 305 F. Supp. 267, 268 (S.D.N.Y. 1969); United
5 States v. Lubomski, 277 F. Supp. 713, 721 (N.D. Ill. 1967). See also, United States v.
6 Leighton, 265 F. Supp. 27, 34 (S.D.N.Y. 1967).

7
8 Moreover, this Court should direct the government to make available all wiretap
9 evidence pertaining to the investigation of this case that has not yet been turned over to
10 the defense, pursuant to 18 U.S.C. § 2518(8)(d).¹⁷ See, United States v. Walker, 538 F.2d
11 266, 268 (9th Cir. 1976). The evidence disclosed should include tapes, memos, records, logs,
12 reports and similar data accumulated as result of electronic surveillance. United States v.
13 Machi, 324 F.Supp. 153, 155 (E.D.Wis. 1971).

14
15
16 3. Rule 16(a)(1)(C)

17 To the extent the requested tapes and government documentation pertaining to
18 those tapes falls outside the purview of subsection (a)(1)(A) to Rule 16, such evidence is
19 discoverable under subsection (a)(1)(C), which entitled a defendant to have access to
20 documents and tangible things “which are material to the preparation of the defendant's
21 defense or are intended for use by the government as evidence in chief at the trial.”
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25 ¹⁷ Section 2518(8)(d) states in its pertinent part that “[t]he judge, upon the filing
26 of a motion, may in his discretion make available to such person or his counsel for inspection
27 such portions of the intercepted communications, applications and orders as the judge
28 determines to be in the interest of justice....”

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The Supreme Court has deemed the phrase, “material to the preparation of the defense,” to mean that Rule 16(a)(1)(C) “authorizes defendants to examine government documents material to the preparation of their defense against the Government’s case in chief.” United States v. Armstrong, 517 U.S. 456, 463 (1996). Accord: United States v. Olano, 62 F.3d 1180, 1203 (9th Cir. 1995) [production is required under Rule 16(a)(1)(C) if the “object would have been helpful to his or her defense.”].

Here, the requested tapes, transcripts and related reports falls squarely within the ambit of Rule 16 and should therefore be ordered to be produced by the government.

IV.

CONCLUSION

Based on the foregoing analysis, the defense respectfully requests that the Court issue an order directing the government to disclose the information and documentation enumerated in the Notice Of Motion.

DATED: December 20, 2000

Respectfully Submitted,

GREGORY NICOLAYSEN
Counsel for Defendant,
Bojidar Zachariev

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AFFIDAVIT OF GREGORY NICOLAYSEN

I, GREGORY NICOLAYSEN, duly sworn, depose and state:

1. I am court-appointed counsel in this action for defendant Bojidar Zachariev.

All of the statements contained herein are made and based on my own personal knowledge, and if called as a witness I would testify competently thereto.

2. I have received from government counsel the wiretap application, which was prepared by FBI agent David Smith. The affidavit explains the general background of the investigation, stating that an undercover operation was established in Los Angeles “to identify members of criminal organizations by attempting to purchase counterfeit securities, credit cards, weapons and drugs.” (Affidavit at ¶ 12, at pg 9). The agent goes on to explain that the design of the investigation was based on the use of “a highly experienced cooperating witness (who) was selected to be the primary operative of this undercover operation.” The affidavit openly acknowledges that this informant has worked for “the FBI and other law enforcement agencies for over twenty years.” The affidavit also confirms that the informant was “compensated for the information and assistance he” provided to “the FBI, and will if needed, testify as a witness.” (Affidavit at ¶ 13, at pg 9).

3. I have elected to quote from the affidavit, rather than attach it as an exhibit to this motion because it is voluminous and is being referenced in the motion primarily for purposes of explaining background information, as compared with a wiretap suppression motion which focuses directly on the affidavit itself.

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**I declare under penalty of perjury that the foregoing is true and correct. Executed
in Encino, CA. on December 20, 2000.**

GREGORY NICOLAYSEN

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PROOF OF SERVICE

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 16000 Ventura Blvd, Suite 500, Encino, CA 91436

On December 21, 2000, I served the foregoing document described as Notice of Motion and Motion by Defendant Bojidar Zachariev for Pretrial Discovery; Memorandum of Points and Authorities by delivering a true copy to:

**Christopher D Johnson
Ass't U.S. Attorney
14th Floor
312 No. Spring St.
Los Angeles, CA 90012**

Executed on December 21, 2000, at Los Angeles, CA. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

BRENDA DABNEY