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15 UNITED STATES DISTRICT COURT
 16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 17 WESTERN DIVISION

19 UNITED STATES OF AMERICA,
 20 Plaintiff,
 21 v.
 22 Sergio De Leon SYJUCO, et al.,
 23 Defendants.

No. CR 12-037-RGK

**GOVERNMENT'S OPPOSITION TO
 DEFENDANTS' MOTION TO DISMISS
 INDICTMENT DUE TO DESTRUCTION
 OF EVIDENCE**

25 Plaintiff, United States of America, by and through its
 26 counsel of record, hereby files this Opposition to Defendant
 27 Syjuco's Motion to Dismiss Indictment Due to Destruction of
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1 Evidence [Doc. No. 111]. In their second motion to dismiss the
2 charges based on the government's handling of the investigation,
3 defendants claim that the government acted in bad faith and
4 violated due process by preserving only incoming text messages
5 from the defendants, but failing to preserve the outgoing
6 messages that were sent to the defendants. The government acted
7 in good faith at all times, and there is no reason to believe
8 that the agents' outgoing texts were exculpatory in any way,
9 particularly in light of the very incriminating nature of the
10 defendants' email, text, and other communications to the agent.
11 Defendants cannot meet the high threshold required for dismissal
12 of an indictment, and, accordingly, their motion should be
13 denied.
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16 **I. FACTUAL BACKGROUND**

17 During the course of this investigation, the undercover
18 agent communicated with the defendants through email, telephone,
19 cellular telephone, text message and in person. In the instant
20 motion, defendants focus on certain text messages that were sent
21 from a cellular telephone (Philippine phone number ending in
22 "4752") which the undercover agent began using in May 2011
23 ("undercover phone").¹ This undercover phone is a pre-paid cell
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27 ¹ Prior to May 2011, the undercover agent utilized a different Philippine
28 pre-paid phone to communicate with defendants Ubaldo and Syjuco when the
undercover agent was in the Philippines (the undercover agent did not meet or

1 phone that was purchased in the Philippines. See Exhibit 2
2 (Sept. 14, 2012 reply email by government to defense counsel).
3 The undercover phone was not capable of sending photographs and
4 emails, but it was used to send and receive text messages
5 between the undercover agent and the defendants.
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7 After the defendants were arrested, the undercover agent
8 preserved the text messages that were present on the undercover
9 phone, all of which were messages that the defendants sent to
10 the undercover agent. Those messages were produced to defense
11 counsel. See Exhibit 3 (June 1, 2012 discovery letter from
12 government to defense forwarding documents bates labeled USA
13 2097 - 2516); Exhibit 4 (June 13, 2012 discovery letter from
14 government forwarding USA 4142 - 4304). In all, the government
15 produced 581 photographs of the undercover agent's telephone
16 displaying the text messages that he received from the
17 defendants.² In addition, the government provided copies of all
18 of the email exchanges between the agent and defendants that
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22 communicate with defendant Revereza until May 9, 2011). That phone was lost
23 by the undercover agent and is not in the government's possession. See
24 Exhibit 1 (a May 16, 2011 email from the undercover agent to defendant Syjuco
25 wherein the undercover agent informed Syjuco that he lost his phone, provided
26 his "new phone number" (ending 4752) and asked Syjuco to pass on his new
27 number to defendant Ubaldo). On May 16, 2012, the undercover agent left the
28 phone behind when exiting a taxi cab in Manila and was unable to retrieve it.
The government does not have any text messages from this phone. It is
undisputed that all three defendants communicated with the undercover agent
at this "new" Philippine phone number when the undercover agent was in the
Philippines.

² The government also produced to defense 93 photographs of incoming texts
from two unindicted co-conspirators. See Exhibit 2; Exhibit 5 (Sept. 25,
2012 letter from government to defense counsel).

1 occurred via computer and all reports memorializing the
2 substance of conversations via telephone, text messages, and
3 meetings between the undercover agent and defendants.

4 Unfortunately, the undercover phone did not save outgoing
5 text messages, and they are not available on the undercover
6 telephone (*i.e.*, there were no messages in the "sent" box). See
7 Exhibit 2 (Sept. 14, 2012 reply by government to Sept. 13, 2012
8 email from George Buehler, counsel for defendant Reverezza). In
9 response to an inquiry from counsel for defendant Reverezza, the
10 government informed defense counsel of this fact on September 11
11 and September 14, 2012. See Exhibit 2. The government again
12 invited defense counsel to inspect the undercover phone, id.;
13 see also Exhibit 3 (June 1, 2012 letter from government to all
14 defense counsel forwarding select text messages on undercover
15 phone and inviting counsel to inspect the undercover phone), and
16 the government sent the undercover agent's phone to the FBI
17 laboratory in Quantico, Virginia, for analysis. On October 18,
18 2012, the government produced to defense counsel the results of
19 an analysis on the undercover phone and SIM card indicating
20 there are no messages on this phone, and no readable messages on
21 the SIM card. Exhibit 6 (Oct. 18, 2012 letter from government).
22 The report identified the presence of some data that might
23 constitute text messages, however, those messages are
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1 unreadable. The government has also agreed to make the
2 undercover phone available for examination by a defense expert.

3 At the time of the defendants' arrest, the government did
4 **not** seize from the defendants the cellular telephones that the
5 defendants used to communicate with the undercover agent, and to
6 which the undercover agent sent text messages.³ Those phones are
7 presumably available to defendants for their own examination.
8

9 **II. ARGUMENT AND CITATION TO AUTHORITY**

10 A. Defendants' Due Process Claim.

11 Defendants claim that the government's preservation of
12 incoming texts from the defendants, but not the undercover
13 agent's outgoing texts to the defendants, was a violation of due
14 process, and they move to dismiss the indictment under Arizona
15 v. Youngblood, 488 U.S. 51 (1988) and California v. Trombetta,
16 467 U.S. 479, 486 (1984). As the Ninth Circuit has made clear,
17 "[t]he mere failure to preserve evidence which could have been
18 subjected to tests which might have exonerated the defendant
19 does not constitute a due process violation." United States v.
20 Hernandez, 109 F.3d 1450, 1455 (9th Cir. 1997) (citation
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24 ³ Specifically, defendant Syjuco did not have a cell phone in his
25 possession, while defendants Ubaldo and Revereza each had three cell phones.
26 As to Ubaldo's phones, one of the three phones was not searched because
27 consent was not provided and a second phone was not searched because it is
28 password protected. Pursuant to a consent search, one of Ubaldo's cell
phones and all three of Revereza's cell phones were searched. See Exhibit 7
at 5 (May 14, 2012 letter from government to defense). None appear to be the
same phone on which the defendants communicated with the undercover phone.
All have been made available for inspection by defense.

1 omitted). Instead, "unless a criminal defendant can show bad
2 faith on the part of the police, failure to preserve potentially
3 useful evidence does not constitute a denial of due process of
4 law." Youngblood, 488 at 57-58 (quoting Trombetta, 467 at 486).

5 In order to establish a due process violation, the
6 defendants must prove that the (1) evidence at issue possesses
7 exculpatory value that was apparent before the evidence was
8 destroyed; (2) the evidence is "of such a nature that the
9 defendant would be unable to obtain comparable evidence by other
10 reasonably available means;" and (3) the government acted in bad
11 faith by failing to preserve the evidence. See Trombetta, 467
12 U.S. at 489; Youngblood, 488 U.S. at 56 n.*; United States v.
13 Cooper, 983 F.2d 928, 931 (9th Cir. 1993).

14 Focusing on the third prong, the Supreme Court has noted
15 that "[t]he presence or absence of bad faith by the police . . .
16 must necessarily turn on the police's knowledge of the
17 exculpatory value of the evidence at the time it was lost or
18 destroyed." Youngblood, 488 U.S. at 56 n.*; see also Cooper,
19 983 F.2d at 931 ("Youngblood's bad faith requirement dovetails
20 with the first part of the Trombetta test: that the exculpatory
21 value of the evidence be apparent before its destruction.").
22 Even negligence or recklessness on the government's part will
23 not establish bad faith. Compare Youngblood, 488 U.S. at 58
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1 (finding no bad faith where police acted negligently in failing
2 to preserve evidence); United States v. Flyer, 633 F.3d 911, 916
3 (9th Cir. 2011) (holding that government's mishandling of data
4 leading to its corruption does not amount to bad faith); and
5 United States v. Barton, 995 F.2d 931, 936 (9th Cir. 1993)
6 (finding no bad faith where detective was negligent in storing
7 marijuana plants that could have been used for impeachment
8 purposes at suppression hearing) with Cooper, 983 F.2d at 931
9 (finding bad faith in manufacturing of methamphetamine case
10 where "the equipment's value as potentially exculpatory evidence
11 was repeatedly suggested to government agents" prior to seizure
12 and government confirmed that evidence was being preserved when
13 in fact government knew evidence was to be destroyed). Rather,
14 bad faith inheres only in "those cases in which the police
15 themselves by their conduct indicate that the evidence could
16 form a basis for exonerating the defendant." Youngblood, 488
17 U.S. at 58.

21 In short, dismissal is an extreme remedy that is warranted
22 only in those rare cases where the government acted in bad faith
23 by destroying evidence that was clearly exculpatory at the time
24 of destruction, where comparable evidence is not otherwise
25 obtainable, and less drastic alternatives cannot remedy the
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1 alleged harm.⁴ Cooper, 983 F.2d at 928. Those elements are not
2 present in this case.

3 B. The Government Did Not Act in Bad Faith.

4 In this case, the government has provided prompt and
5 generous discovery, exceeding its discovery obligations at every
6 turn. The government produced thousands of pages of text
7 messages, emails, and reports documenting communications between
8 the undercover agent and the defendants. Additionally, the
9 government has produced investigative reports further describing
10 email and text message correspondence between the defendants and
11 the undercover agent. In response to the defense's inquiry, the
12 government took extra steps to determine whether outgoing text
13 messages could be extracted from the undercover phone, shipping
14 the phone to Quantico, Virginia for analysis. Despite the
15 government's efforts, the outgoing texts from the undercover
16 phone are simply not retrievable from that device.
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20 With the benefit of hindsight, the government might have
21 done a better job of preserving the outgoing texts (perhaps by
22 having the foresight to select a device, if available, that had
23 more memory), and certainly the government should have taken
24 better care not to lose the cell phone that was used at the
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26 ⁴ At trial, the defendants will have the opportunity to cross-examine the
27 undercover agent about his correspondence with the defendants, the loss of
28 the first Philippine pre-paid phone, and the absence of sent messages on the
undercover phone.

1 outset of the investigation. However, there is no evidence that
2 the government intentionally deleted or destroyed outgoing
3 messages to the defendants.⁵ Instead, the undercover agent's
4 phone simply did not save those outgoing messages.

5 Accordingly, defendants cannot meet the threshold hurdle -
6 showing that the government acted in bad faith.

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8 C. There Is No Evidence the Text Messages Sent to the
9 Defendants Were Potentially Exculpatory.

10 Defendants' motion also fails because there is no evidence
11 or reason to believe that the text messages the undercover agent
12 sent to the defendants were exculpatory in any way. As the
13 defense concedes, text messages from the undercover phone were
14 only one of the ways in which the undercover agent communicated
15 with the defendants. Indeed, the government has produced in
16 discovery thousands of pages of email correspondence between the
17 undercover agent, the defendants and unindicted co-conspirators
18 dating from the investigation's inception in November 2010, to
19 the defendants' arrest in January 2012. See Exhibits 3 and 8
20 (select discovery letters from government to defense counsel
21 producing email correspondence bates stamped USA 97 - 317, 329-
22 1678, 1891 - 1970; 2517 - 4141). There is no hint of
23 exculpatory evidence in those emails. Likewise, the government
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27 ⁵ Indeed, there is no logical reason for agents to delete or destroy
28 messages that were sent to, and presumably remained in the possession of, the
defendants themselves.

1 has produced dozens of incoming text messages that the
2 defendants sent to the undercover agent, and yet defendants
3 point to nothing in those messages suggesting that the
4 undercover agent's texts that were part of the very same
5 exchanges were somehow exculpatory. If the sent messages from
6 the undercover agent supported defendants' entrapment claim,
7 that same information would likely be reflected in the emails
8 and incoming text messages, but it is simply not there. The
9 absence of such emails or incoming texts belies the defendants'
10 claim that the missing outgoing texts were exculpatory, much
11 less that they were so exculpatory that an agent would recognize
12 that fact on the face of the messages.
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15 In an effort to support their claim that the text messages
16 would be exculpatory, the defendants speculate that the messages
17 from the undercover would reflect the "agent's humiliating and
18 manipulative statements" toward defendants. See Defs. Br. at 4.
19 However, defendants point to none of the many emails or texts
20 that have been produced to support their allegation. Indeed,
21 the communications show that the opposite is true.
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23 For example, defendant Revereza, only a few days after
24 meeting the undercover agent for the first time, sent the
25 undercover agent six text messages on May 17, 2012, relating to
26 his demands to increase the bribe from \$4000 to \$8,400 before
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1 Revereza would permit the container of weapons to clear
2 Philippine customs. See Doc. No. 90 at p. 13. Thus, rather
3 than being cowed and intimidated by the undercover agent through
4 frightening or abusive text messages, the evidence demonstrates
5 that the tenor of the undercover agent's interactions with the
6 defendants was wholly different, such that defendant Revereza
7 felt comfortable demanding additional bribes from the agent.
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9 Similarly, on May 18, 2011, defendant Syjuco sent, among
10 others, the following texts messages to the undercover:

- 11 • Did evrythng go alright w/shipment? (USA 4246)
- 12 • What car do u drive n the US? (USA 4204)
- 13 • Ur old school nd conservatve..no way would u
14 put mney n a car (USA 4190)

15 Exhibit 9. In short, the incoming text messages demonstrate the
16 tenor of the undercover agent's interactions with the defendants
17 are wholly inconsistent with defendants' claims and provide no
18 reason to believe the sent messages would be any different.

19 D. The Evidence is Available Through Other Means.

20 Finally, the very information that defendants seek is
21 available through other means. First, the defendants themselves
22 were the recipients of those texts, and thus they have
23 information about what those messages contained. Moreover, the
24 government does not believe it seized the cellular telephones
25 that the defendants used to communicate with the undercover
26 agent, and thus the messages sent by the undercover agent should
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1 be available on the defendants' own cellular phones. This is
2 not a case in which the government had sole access to a set of
3 evidence or information, and kept that information from the
4 defense. Instead, the defendants were themselves the recipients
5 of the messages, and they owned the devices on which those
6 messages were stored.
7

8 **III. CONCLUSION**

9 For the foregoing reasons, the defendants' motion to
10 dismiss the indictment due to the alleged destruction of
11 evidence should be denied.
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13 Dated: October 24, 2012

14 Respectfully submitted,

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