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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **WESTERN DIVISION**
13

14 UNITED STATES OF AMERICA,
15 Plaintiff,
16 v.
17 JOSE LUIS HUIZAR, *et al.*,
18 Defendants.

Case No. 20-CR-0326-JFW

**NOTICE OF MOTION AND
MOTION TO SUPPRESS
INFORMATION OBTAINED
PURSUANT TO PROFFER
AGREEMENT; DECLARATION OF
VICKI PODBERESKY IN
SUPPORT; EXHIBITS**

Hearing Date: January 31, 2021
Time: 8:00 a.m.
Courtroom: 7 A - Hon. John F. Walter

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23 TO: ACTING UNITED STATES ATTORNEY AND HER COUNSEL OF
24 RECORD: PLEASE TAKE NOTICE THAT, on January 31, 2021 at 8:00 a.m., or as
25 soon thereafter as counsel may be heard, in the courtroom of the Honorable John F.
26 Walter, United States District Judge, Defendant José Luis Huizar will move to suppress
27 any information obtained pursuant to the parties' December 13, 2018 Proffer Agreement:
28

MOTION TO SUPRESS

1
2 Defendant José Luis Huizar, hereby moves this Honorable Court for an order
3 suppressing all information provided to the government pursuant to the parties'
4 December 13, 2018 Proffer Agreement. The Proffer Agreement is a binding contract that
5 by its terms expressly prohibits the government from using information obtained
6 pursuant to that agreement against Mr. Huizar in its case-in-chief and in connection with
7 any sentencing proceeding with certain exceptions.

8 This motion is based on the Fifth Amendment to the United States Constitution,
9 the attached Memorandum of Points and Authorities, the declaration of Vicki I.
10 Podberesky, all files and records in this case, and any further evidence as may be adduced
11 at the hearing on this motion.

12
13
14 Respectfully submitted,
15 CUAUHTEMOC ORTEGA
16 Federal Public Defender

17 Dated: November 15, 2021

/s/ Carel Alé

18

Carel Alé
19 Charles J. Snyder
20 Adam Olin
21 Deputy Federal Public Defenders
22 Attorneys for Jose Luis Huizar
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On December 18, 2019, José Luis Huizar and the government executed a Proffer
4 Agreement. Through the agreement, Huizar agreed to provide information to the
5 government and answer its questions. The government, in turn, agreed that, with limited
6 exceptions, it would not use Mr. Huizar’s statements against him either in its case-in-
7 chief or offer in evidence in connection with any sentencing proceeding for the purpose
8 of determining an appropriate sentence, any statements made by Mr. Huizar. The
9 agreement also explained that “any information provided by [counsel] on behalf of [Mr.
10 Huizar] is covered by [the Proffer Agreement] as if it had been provided by” Mr. Huizar.

11 Mr. Huizar initially met with the government on December 18, 2018, January 3,
12 2019, and April 10, 2019.

13 On December 13, 2019, Assistant United States Attorneys Mack Jenkins and
14 Veronica Dragalin called Mr. Huizar’s then-counsel. AUSA Jenkins advised her that the
15 government believed and had evidence that Mr. Huizar lied at the April 10, 2019 proffer.
16 In other words, the government alleged that Huizar breached the Proffer Agreement’s
17 condition to be completely truthful and candid with the government. AUSA Jenkins
18 explained that he believed Mr. Huizar lied in connection with the alleged “the 940 Hill
19 Scheme.” Huizar’s counsel told the government that they would like an opportunity to
20 rectify any perceived misstatements and continue to cooperate with the government.

21 That is exactly what the parties did. After that December phone call, Huizar,
22 through counsel proffered several more times with the government and provided an
23 image of his cellphone, the physical phone, and the password to that phone all pursuant
24 to the Proffer Agreement.

25 In response to additional proffers and evidence, AUSA Jenkins told Huizar’s
26 counsel that the attorney proffers were “productive,” that the government “was much
27 more convinced,” “would call that significant progress,” told counsel that Huizar should
28 “continue” to be “encouraged.”

1 AUSA Jenkins’ statements and requests to Huizar following the December 13,
2 2019 phone call clearly indicated that the parties were still acting pursuant to the Proffer
3 Agreement and that the parties’ were still bound to their obligations in the Proffer
4 Agreement. The government, like all contracting parties, has a duty of good faith and fair
5 dealing. Here, it did not merely stand aside while Huizar continued providing information
6 and evidence—it plainly acted affirmatively in requesting and accepting that information.

7 Both the government’s explicit statements to Huizar’s counsel and its conduct
8 evince that Huizar reasonably understood that any alleged breach of the Proffer
9 Agreement could be and was cured. The government is bound to its obligations under the
10 Proffer Agreement. The Court should hold the government to the terms of the Proffer
11 Agreement and grant the order suppressing any information obtained pursuant to the
12 Proffer Agreement.

13 II. STATEMENT OF FACTS

14 A. Proffer Agreement

15 On December 13, 2018, Assistant United States Attorney Mack E. Jenkins
16 (“AUSA Jenkins”) emailed Mr. Huizar’s counsel, Vicki I. Podberesky and Mary
17 Andruess, a proffer letter agreement (“Proffer Agreement”) related to the government’s
18 investigation of Mr. Huizar. Declaration of Vicki I. Podberesky (“Podberesky Decl.”),
19 Ex. A. The Proffer Agreement, which was addressed to Ms. Podberesky and Ms. Andrus,
20 set out the terms and conditions by which the United States Attorney’s Office (“USAO”)
21 would meet with Mr. Huizar “for the purpose of making a proffer in connection with the
22 above referenced matter,” which stated “Jose Huizar.” *Id.* at 1. The agreement explained
23 that it was “limited to the statements made by your client at the meeting to be held on
24 December 18, 2018 and at any future meetings with the government that expressly occur
25 under the terms of this proffer letter and does not apply to any statements made by your
26 client at any other time, whether oral, written or recorded[.]” *Id.* at ¶ (1)(c). It explained
27 that “*any information* provided by you on behalf of your client is covered by this
28 agreement as if it had been provided by your client[.]” *Id.* at ¶ (1)(d) (emphasis added).

1 The Proffer Agreement required Mr. Huizar to “respond truthfully and completely
2 to any and all questions . . . at the meeting,” *id.* at ¶ (2), and, with noted exceptions, bound
3 the government from “offer[ing] in evidence in its case-in-chief, or offer in evidence in
4 connection with any sentencing proceeding for the purpose of determining an appropriate
5 sentence, any statements made by your client at the meeting,” *id.* at ¶ (3). It also clarified
6 that:

7 Your client’s complete truthfulness and candor are express
8 material conditions to the undertakings of this Office set forth
9 in this letter. Therefore, if this Office should ever conclude that
10 your client has knowingly withheld material information from
11 this Office or otherwise not been completely truthful and
candid, this Office may use against you for any purpose . . . any
statements made or other information provided by your client
during the meeting. If this Office so concludes, it will notify
you before making any use of such statements or other
information.

12 *Id.* at ¶ 6 (emphasis omitted).¹

13 **B. Proffers**

14 On December 18, 2018, Huizar, along with his counsel, Podberesky and Andreus
15 executed the Proffer Agreement at the beginning of a proffer with the government. The
16 Proffer Agreement was signed by Huizar, Huizar’s counsel, and AUSA Jenkins.

17 On January 3, 2019, and again on April 10, 2019, Huizar, his counsel and the
18 government met for proffer sessions.

19 On December 13, 2019, AUSAs Jenkins and Dragalin called Huizar’s counsel
20 about this matter. Podberesky Decl. at ¶ 8. AUSA Jenkins told Huizar’s counsel that the
21 government believed Huizar lied about his involvement in the alleged 940 Hill Scheme
22 during the April 10, 2019 proffer. *Id.* at ¶ 8. Further, AUSA Jenkins to Huizar’s counsel
23

24 ¹ The other exceptions applied to “information derived directly or indirectly from
25 the meeting for the purpose of obtaining and pursuing leads to other evidence, which may
26 be used for any purpose including any prosecution of your client”; “statements made by
27 you or your client at the meeting and all evidence obtained directly or indirectly from
28 those statements for the purpose of cross-examination should your client testify, or to
refute or counter at any stage of the proceedings (including this Office’s case-in-chief at
trial) any evidence, argument, statement or representation offered by or on behalf of your
client in connection with any proceeding”; “the right to use any statements or information
provided . . . in any prosecution for false statements, obstruction of justice, or perjury[.]”
Podberesky Decl., Ex. A at ¶ (4) & (5).

1 that it believed he had not been forthcoming in connection with the alleged 940 Hill
2 Scheme because Huizar did not raise the topic until the government listed it for discussion
3 at the April 10, 2019 proffer. *Id.*

4 On January 22, 2020, Huizar’s counsel spoke with AUSAs Jenkins and Dragalin
5 on the phone. *Id.* at ¶ 10. The government identified four individuals about whom they
6 wanted Mr. Huizar to provide information. *Id.*

7 On March 18, 2020, Huizar’s counsel spoke with AUSAs Jenkins and Dragalin
8 and followed up on their conversation the next day. Podberesky Decl., Ex. B. Huizar’s
9 counsel explained that they were “in the process of speaking with our client about the
10 subject matters you identified for us” and discussed the parties’ negotiations over the
11 production of Huizar’s cellphone. *Id.*

12 AUSA Jenkins replied later that day. *Id.* He stated that,

13 As we have maintained, we remain very interested in hearing
14 whether your client is willing to accept responsibility regarding
15 the three schemes we have repeatedly outlined, and whether we
16 can expect an **attorney proffer** regarding the four additional
17 names we initially provided in our January 22, 2020, phone call
18 and again yesterday. Can you please let us know by 6 p.m.
19 today what information, if any, your client is willing to provide
20 regarding those names and what facts he willing to admit
21 regarding the schemes? For example, now that there has been
22 a public filing and guilty plea related to the Justin Kim scheme,
23 is your client finally ready to come clean on this scheme? (If
24 he still needs a factual basis for it, we direct you to the
25 Information connected to Kim’s plea.)

26 *Id.* (original emphasis omitted; emphasis added).

27 The following day, on March 20, 2020, Huizar’s counsel spoke with AUSAs
28 Jenkins and Dragalin. *Id.* at ¶ 13. On that call, Huizar’s counsel provided the government
with the information the government requested regarding the 940 Hill Scheme and the
four additional individuals. *Id.* In response to the attorney proffer, AUSA Jenkins stated
that the government was “much more convinced” and “would call that significant
progress.” *Id.* at ¶ 14. AUSA Jenkins said he would “continue you to be encouraged.” *Id.*

On March 24, 2020, Huizar’s counsel made another attorney proffer to the
government. *Id.*, Ex. C. AUSA Dragalin followed up that call with an email. *Id.* AUSA

1 Dragalin explained that the government “wanted to provide some additional specific facts
2 to help jog your client’s memory.” *Id.* AUSA Dragalin provided details about an alleged
3 September 28, 2018 meeting between Executive M and Huizar, a text message exchange
4 between Morrie Goldman and Executive M, and text messages between Huizar and
5 George Chiang regarding “the Paradigm scheme” (related to Luxe Hotel Scheme). *Id.* at
6 ¶ 16. AUSA Dragalin instructed Huizar’s counsel to “[p]lease have [Huizar] review his
7 phone for these messages and let us know if that jogged his memory.” *Id.*

8 In May 2020, Huizar voluntarily provided an image of his cellphone, his actual
9 cellphone, as well as the cellphone password to the government pursuant to the Proffer
10 Agreement. *Id.* at ¶ 17.

11 On May 15, 2020, Huizar’s counsel reached out to the government about the status
12 of the parties’ negotiations. *Id.*, Ex. D. AUSA Jenkins replied that the parties had last left
13 off their discussions after having “some **productive attorney proffers**” and that the
14 government had “then asked some follow up questions for which [the government] was
15 still awaiting answers” and “are still interested in those answers.” *Id.* (emphasis added).

16 III. LEGAL ANALYSIS

17 A. Applicable Law

18 1. Proffer Agreements Are Analyzed under Contract Law, But With 19 Added Solicitude for the Constitutional Rights of the Defendant

20 Proffer agreements, like plea agreements, are analyzed under contract law. *United*
21 *States v. Carrillo*, 709 F.2d 35, 36 (9th Cir. 1983) (“A cooperation agreement is
22 analogous to a plea bargain agreement. Thus, like a plea agreement, an agreement to
23 cooperate may be analyzed in terms of contract law standards.”) (citing *United States v.*
24 *Garcia*, 519 F.2d 1343, 1345 n. 2 (9th Cir. 1980)); *see also United States v. Clark*, 218
25 F.3d 1092, 1095 (9th Cir. 2000) (“In construing the terms of an agreement and the
26 parties’ obligations under it, the courts generally employ traditional contract
27 principles.”) (citing G. Nicholas Herman, *Plea Bargaining*, § 10:04, at 190 (1997)).
28 Accordingly, courts “apply contract principles to the interpretation of a proffer

1 agreement.” *United States v. Chiu*, 109 F.3d 624, 625 (9th Cir. 1997); *United States v.*
2 *\$87,118.00 in U.S. Currency*, 95 F.3d 511, 516 (7th Cir. 1996) (“As a general
3 proposition, pre-trial agreements such as cooperation and proffer agreements are
4 interpreted according to principles of contract law.”).

5 With regards to proffer agreements, courts are mindful to “remember[] that the
6 contract is part of an ongoing criminal proceeding.” *\$87,118.00 in U.S. Currency*, 95
7 F.3d at 516–17. “[P]roffer agreements that are a part of ongoing criminal proceedings are
8 ‘unique contracts and the ordinary contract principles are supplemented with a concern
9 that the bargaining process not violate the defendant’s rights to fundamental fairness
10 under the Due Process Clause.” *United States v. Farmer*, 543 F.3d 363, 374 (7th Cir.
11 2008).

12 In construing an agreement between the government and a criminal defendant, the
13 Ninth Circuit has explained that courts “proceed in three steps: First, we ask whether ‘the
14 terms of the plea agreement on their face have a clear and unambiguous meaning.’ If they
15 do, then we ‘will not look to extrinsic evidence to determine their meaning.’ If not, then
16 we turn to ‘the facts of the case to determine what the parties reasonably understood to
17 be the terms of the agreement. Finally, if ambiguities still remain, we construe those
18 ambiguities against the government.” *United States v. Plascencia–Orozco*, 852 F.3d 910,
19 919 (9th Cir. 2017) (citing *Clark*, 218 F.3d at 1095).

20 **2. The Government Is Held to Meticulous Standards of Promise and**
21 **Performance and Ambiguities in Agreements are Construed**
22 **Against the Government**

23 “In the context of plea bargains,” and necessarily proffer agreements, “traditional
24 black letter rules applicable to commercial contracts between private parties often yield,
25 as they must, to substantive and procedural requirements, including federal or state rules
26 of criminal procedure, that protect the various rights of the accused.” *Breazeale v. Victim*
27 *Services, Inc.*, 878 F.3d 759, 769 (9th Cir. 2017). The Ninth Circuit has explained that
28 this relationship between contract law principles and criminal procedure is unique:

1 First, the defendant's underlying "contract" right is
2 constitutionally based and therefore reflects concerns that
3 differ fundamentally from and run wider than those of
4 commercial contract law. Second, with respect to federal
5 prosecutions, the courts' concerns run even wider than
6 protection of the defendant's individual constitutional rights-to
7 concerns for the "honor of the government, public confidence
8 in the fair administration of justice, and the effective
9 administration of justice in a federal scheme of government."
10 This means that both constitutional and supervisory concerns
11 require holding the Government to a greater degree of
12 responsibility than the defendant (or possibly than would be
13 either of the parties to commercial contracts) for imprecisions
14 or ambiguities in plea agreements. This is particularly
15 appropriate where, as would usually be the case, the
16 Government has proffered the terms or prepared a written
17 agreement-for the same reason that dictate that approach in
18 interpreting private contracts.

19 *Clark*, 218 F.3d at 1095 (citing 5 Wayne R. Lafave, Jerold H. Israel & Nancy J. King,
20 Criminal Procedure, § 21.2(d), at 57 (2d ed.1999) (quoting *United States v. Harvey*, 791
21 F.2d 294 (4th Cir. 1986) (alterations omitted)). See *United States v. Thompson*, 403 F.3d
22 1037, 1039 (8th Cir. 2005) (agreeing with the Fourth Circuit "that 'with respect to federal
23 prosecutions, the courts' concerns run even wider than protection of the defendant's
24 individual constitutional rights-to concerns for the honor of the government, public
25 confidence in the fair administration of justice, and the effective administration of justice
26 in a federal scheme of government.'") (citing *Harvey*, 791 F.2d at 300).

27 Accordingly, and because a defendant obtains an agreement only at the expense of
28 his constitutional rights, prosecutors are held to meticulous standards of both promise
and performance. See *United States v. Rivera-Rodriguez*, 489 F.3d 48, 57 (1st Cir. 2007)
("Because defendants must ultimately waive fundamental rights as a result of entering
into any plea agreement, we hold prosecutors engaging in plea bargaining to the most
meticulous standards of both promise and performance.") (citation omitted); *United*
States v. Vaval, 404 F.3d 144, 153 (2d Cir. 2005) ("[W]e construe plea agreements
strictly against the government and do not hesitate to scrutinize the government's conduct
to ensure that it comports with the highest standard of fairness."); *United States v.*
Moncivais, 492 F.3d 652, 662 (6th Cir. 2007) ("Because a defendant obtains a plea
agreement only at the expense of his constitutional rights, prosecutors are held to

1 meticulous standards of performance.”) (citing *Vaval*, 404 F.3d at 152-53); *Farmer*, 543
2 F.3d at 374 (“We hold the government to ‘the literal terms’ of the agreement, as well as
3 the ‘most meticulous standards of both promise and performance’ to insure the integrity
4 of the bargaining process involved in proffers.”); *United States v. Atkinson*, 259 F.3d
5 648, 654 (7th Cir. 2001) (“[T]o insure the integrity of the plea bargaining process, the
6 most meticulous standards of both promise and performance must be met by the
7 government.”) (citation omitted).

8 “Satisfying this obligation requires more than lip service on a prosecutor’s part.
9 The *Santobello* rule ‘proscribes not only explicit repudiation of the government’s
10 assurances, but must in the interests of fairness be read to forbid end-runs around them.’”
11 *United States v. Saxena*, 229 F.3d 1, 6 (1st Cir. 2000) (citing *Santobello v. New York*,
12 404 U.S. 257, 261-262 (1971)). Because of this, courts construe agreements in criminal
13 cases strictly against the government. *See United States v. Lutchman*, 910 F.3d 33, 37
14 (2d Cir. 2018) (“courts construe plea agreements strictly against the Government, which
15 is usually the party that drafts the agreement and ordinarily has certain awesome
16 advantages in bargaining power”) (citations omitted). As such, and “[a]s is the case with
17 other contracts, ambiguities in a plea agreement are construed against the government as
18 its drafter.” *United States v. Under Seal*, 902 F.3d 412, 417–18 (4th Cir. 2018) (citation
19 omitted). *See Perez-Gonzalez v. Lashbrook*, 904 F.3d 557, 564 (7th Cir. 2018) (“When
20 language in a plea agreement is ambiguous, . . . we look to the parties’ reasonable
21 expectations and construe ambiguities against the government as the drafter.”) (citations
22 omitted).

23 **3. Basic Principles of Contract Law Allow a Party to Cure a Breach**

24 “The need to give a breaching party notice of the breach and an adequate
25 opportunity to cure it is basic to contract law.” *United States v. Packwood*, 687 F. Supp.
26
27
28

1 471, 475 (N.D. Cal. 1987) (citing § 241(d), Restatement of Contracts (Second)).²
 2 Particularly “[w]here the government is seeking to deprive the defendant of a liberty
 3 interest based upon a perceived breach of an ambiguous agreement, lack of notice or an
 4 opportunity to cure results in a fundamental denial of due process.” *Id.*

5 “In contract law, although a breach is a breach, if it causes no harm then all that
 6 the other party is entitled to by way of remedy is nominal damages, which means, as a
 7 practical matter, no relief.” *United States v. Diaz-Jimenez*, 622 F.3d 692, 694 (7th Cir.
 8 2010) (Posner, J.) (citing *Habitat Educ. Center v. U.S. Forest Serv.*, 607 F.3d 453, 460–
 9 61 (7th Cir. 2010)) (holding that the government committed a “serious breach” of the
 10 plea agreement and remanding for resentencing). “The breach must be material or
 11 substantial, not merely technical.” *Hartjes v. Endicott*, 456 F.3d 786, 790 (7th Cir. 2006)
 12 (citing *United States v. Brown*, 425 F.3d 681, 682 (9th Cir. 2005)).

13 When there is a breach, “[i]t is well established that breaches of contract can
 14 generally be waived by the injured party.” *United States v. Under Seal*, 902 F.3d 412,
 15 418–19 (4th Cir. 2018). *See also United States v. Hallahan*, 756 F.3d 962, 973 (7th Cir.
 16 2014) (“[T]he rule is that where one party commits a material breach, the non-breaching
 17 party may elect to terminate the entire agreement or seek to enforce the remainder of the
 18 contract.”) (citing 23 Williston on Contracts § 63:8 (4th ed.)). “[T]he general rule is that
 19 a contracting party who, with knowledge of a breach by the other party, receives and
 20 accepts payment or other performance of the contract will be held to have waived the
 21 breach.” § 63:9. Waiver of or estoppel to assert breach, 23 Williston on Contracts § 63:9
 22 (4th ed.). *See Under Seal*, 902 F.3d at 418–19 (“Thus, even though [Defendant-
 23]Appellant’s failure to testify truthfully and completely could have amounted to a breach
 24 of his duties under the plea agreement, the government, as with any other injured party,
 25 had the right to waive that breach.”).

27
 28 ² “Cure, . . . is the removal of legal defect or correction of legal error; that is,
 performance of the contract.” *United States v. Purser*, 747 F.3d 284, 294 (5th Cir. 2014)
 (citing Black’s Law Dictionary 439 (9th ed. 2009)).

1 **4. Parties Have a Duty of Good Faith and Fair Dealing**

2 It is a general principle of contract law that, “every contract imposes upon each
3 party a duty of good faith and fair dealing in its performance and its enforcement.”
4 Restatement (Second) of Contracts § 90(1) (Am. L. Inst. 1981). Agreements between the
5 government and criminal defendants are no different—“[t]he bargained-for promises are
6 bolstered by an implied obligation of good faith and fair dealing.” *United States v. Henry*,
7 758 F.3d 427, 431 (D.C.C. 2014).

8 **5. Equitable Estoppel is Applicable Against the Government**

9 “Estoppel is an equitable doctrine invoked to avoid injustice in particular cases,”
10 *Heckler v. Cty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 59 (1984), and is
11 recognized as part of federal common law. *Sulit v. Schiltgen*, 213 F.3d 449, 453 (9th Cir.
12 2000) (“equitable estoppel is an element of federal common law”). In the Ninth Circuit,
13 equitable estoppel contains four elements: “(1) The party to be estopped must know the
14 facts; (2) he must intend that his conduct shall be acted on or must so act that the party
15 asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant
16 of the true facts; and (4) he must rely on the former’s conduct to his injury.” *United States*
17 *v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970) (citing *Hampton v. Paramount*
18 *Pictures Corp.*, 279 F.2d 100, 104, 84 A.L.R.2d 454 (9th Cir. 1960)). *See United States*
19 *v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007) (“To establish grounds for
20 estoppel against the government, appellees must first demonstrate that the four traditional
21 elements of equitable estoppel are met.”).

22 Two additional elements must be satisfied beyond those required for traditional
23 estoppel when a party seeks to estop the government. “First, a party seeking to raise
24 estoppel against the government must establish affirmative misconduct going beyond
25 mere negligence; even then, estoppel will only apply where the government’s wrongful
26 act will cause a serious injustice, and the public’s interest will not suffer undue damage
27 by imposition of the liability.” *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989)

28

1 (alterations omitted) (citing *Wagner v. Dir., Fed. Emergency Mgmt. Agency*, 847 F.2d
2 515, 519 (9th Cir. 1988)).

3 “There is no single test for detecting the presence of affirmative misconduct; each
4 case must be decided on its own particular facts and circumstances. Affirmative
5 misconduct does require an affirmative misrepresentation or affirmative concealment of
6 a material fact by the government, although it does not require that the government intend
7 to mislead a party.” *Watkins*, 875 F.2d at 707 (citations omitted). *See id.* at 708 (finding
8 affirmative misconduct where “the Army did not [merely] stand aside while Watkins
9 reenlisted or accepted a promotion; it plainly acted affirmatively in admitting,
10 reclassifying, reenlisting, retaining, and promoting” and involved “ongoing active
11 misrepresentations”). Whether the government’s conduct will result in a serious injustice
12 and that the public interest will not be damaged, “involves a balancing of interests in
13 individual cases. *Id.*

14 **B. The Alleged Breach was Cured and the Government Is Bound to the**
15 **Terms of the Proffer Agreement**

16 The Proffer Agreement is silent as to what process a party must undertake when
17 declaring a breach and silent as to either party’s rights when a breach has occurred or
18 been declared. *See generally* Podberesky Decl., Ex. A. Reviewing the extrinsic evidence,
19 as this Court must when an agreement is ambiguous, *United States v. De la Fuente*, 8
20 F.3d 1333, 1337 (9th Cir. 1993), it is clear that Huizar (and the government) reasonably
21 understood that basic contract law governing breaches applied to the Proffer Agreement,
22 *see also United States v. Packwood*, 687 F. Supp. 471, 474 (N.D. Cal. 1987) (“It is surely
23 not defense counsel’s burden in such negotiations to spell out the government’s remedies
24 in the event of a breach. The responsibility for failing to do that—and any resulting
25 ambiguity—must be laid at the government’s door.”).³

26
27 ³ Had the government intended to preclude a breaching defendant from curing an
28 alleged breach, it certainly knows how to incorporate such preclusive language in an

1 **1. Extrinsic Evidence Establishes Huizar Reasonably Understood**
2 **the Proffer Agreement to Follow Basic Contract Law and that**
3 **Huizar Cured Any Alleged Breach**

4 The extrinsic evidence demonstrates that consistent with basic contract law,
5 Huizar (and the government) understood that breaches could be cured and intended to
6 allow and did allow for the alleged breach to be cured. *See United States v. De la Fuente*,
7 8 F.3d 1333, 1337 (9th Cir. 1993) (“the court must determine what the defendant
8 reasonably understood to be the terms of the agreement”).

9 On December 13, 2019, AUSA Jenkins told Huizar’s counsel that he believed
10 Huizar lied to the government during the April 10, 2019 proffer in violation of the Proffer
11 Agreement. Podberesky Decl. at ¶ 8. During that call, Huizar’s counsel told the
12 government that it would like to see if Huizar could rectify any perceived misstatements
13 and continue to provide information to the government. *Id.* at ¶ 8. By at least January 22,
14 2020, the government spoke to Huizar’s counsel to request additional information about
15 four individuals. *Id.* at ¶ 10. To the extent there remained ambiguity in the parties’ prior
16 communications, AUSA Jenkins March 20, 2020 email unequivocally invited Huizar to
17 cure the alleged breach and requested that he continue performing pursuant to the Proffer
18 Agreement. AUSA Jenkins reiterated,

19 we remain very interested in hearing whether your client is
20 willing to accept responsibility . . . and whether we can expect
21 an attorney proffer regarding the four additional names we
22 initially provided in our January 22, 2020 phone call and again
23 yesterday. Can you please let us know by **6 p.m. today** what
24 information, if any, your client is willing to provide regarding

25
26 _____ agreement. *See, e.g., United States v. Branam*, 231 F.3d 931, 932–33 (5th Cir. 2000)
27 (reviewing a “plea agreement [that] included a section setting out specific procedures for
28 determining whether the plea agreement had been breached” that provided a “reasonable
 opportunity to explain or cure”); *see also United States v. Garcia*, 956 F.2d 41, 45 (4th
 Cir. 1992) (finding a plea agreement ambiguous where “[t]he government knows the
 word ‘voluntary,’ and could have avoided any ambiguity by using it”).

1 those names and what facts he [is] willing to admit regarding
2 the three schemes?

3 *Id.*, Ex. B (emphasis in the original). The government then specifically referenced the
4 “Justin Kim” scheme, the scheme the government alleged Huizar lied about at the April
5 10, 2019 proffer, and invited Huizar to cure his prior statement. “[N]ow that there has
6 been a public filing and guilty plea related to the Justin Kim bribery scheme, is your
7 client finally ready to come clean on this scheme?” *Id.*

8 On March 20, 2020, Huizar, through counsel, provided the requested information
9 and cured the alleged breach. *See* Ex. A at ¶ (1)(d) (“any information provided by you on
10 behalf of your client is covered by this agreement as if it had been provided by your
11 client”). That the alleged breach was in fact cured is evidenced by the government’s
12 statements to Huizar’s counsel on the March 20, 2020 call. *See* Podberesky Decl. at ¶ 14.
13 *See also Diaz-Jimenez*, 622 F.3d at 696 (“a corrective statement would be analogous to
14 a contract party’s curing his breach before it did any harm to the other party”).
15 Importantly, Huizar’s cure of the alleged breach is also evidenced by the government’s
16 conduct and statements after the March 20, 2020 call.

17 On March 24, 2020, Huizar’s counsel had another call with AUSAs Jenkins and
18 Dragalin. *Id.* at ¶ 15. Following that call, AUSA Dragalin emailed Huizar’s counsel. *Id.*
19 at ¶ 16, Ex. C. In that email, the government did not further press Huizar about the 940
20 Hill scheme or suggest that the information provided on March 20th had not been wholly
21 truthful. Instead, the government requested more and new information about other
22 schemes. AUSA Dragalin asked about communications between Huizar and Executive
23 M (the alleged Project M scheme) and Huizar’s communications about the “Paradigm
24 scheme,” which is related to the alleged Luxe Hotel scheme. *Id.* The government
25 requested that Huizar review his text messages to help “jog his memory.” *Id.*

26 In May 2020, Huizar then provided an image of his cellphone, his actual cellphone,
27 and the password to his cellphone voluntarily pursuant to the Proffer Agreement. In a
28

1 May 15, 2020 email, AUSA Jenkins confirmed the “productive” nature of the prior
2 “attorney proffers.” Ex. D.⁴

3 The government’s statements, correspondence, acceptance of Huizar’s cellphone
4 and passwords, and continued requests for Huizar’s performance make clear that Huizar
5 reasonably understood, and indeed that the parties understood, the Proffer Agreement
6 followed basic contract law with regards to alleged breaches.

7 Moreover, the government’s conduct is an explicit acknowledgment that the
8 government was still inuring benefit from Huizar’s cooperation. *See, e.g., United States*
9 *v. Guyton*, 37 F. Supp. 3d 840, 857 (E.D. La. 2014) (explaining that “[w]hile the
10 Government may have experienced a slight delay in realizing these benefits, it was
11 certainly not wholly deprived,” since “at the end of the Government’s case-in-chief, [the
12 prosecutor] contends he asked [defense counsel] whether [defendant] was ‘willing’ to
13 testify” “demonstrate[ing] the Government still believed it could benefit from the
14 cooperation” and as such “the breach was not so substantial as to be considered
15 material”). Not only did the government get Huizar’s cellphone pursuant to the Proffer
16 Agreement, it received information about other individuals and alleged schemes as well.
17 *See* Ex. D. “The government has received the substance of the reasonably expected
18 benefit of its bargain.” *Packwood*, 687 F. Supp. at 475. “[D]ue respect for the integrity
19 of plea bargains demands that once a defendant has carried out his part of the bargain the
20 Government must fulfill its part.” *United States v. Hallam*, 472 F.2d 168, 169 (9th Cir.
21 1973) (per curiam). *See also Diaz-Jimenez*, 622 F.3d at 694 (explaining that “when the
22 breach of a plea agreement is, in the court’s view, insubstantial, immaterial, technical—
23 in short, minor—or cured on the spot,” it is “in either case undeserving of substantial
24 relief”).

25
26
27 ⁴ Even if Huizar had not cured the alleged breach, the government waived the
28 breach. “[T]he general rule is that a contracting party who, with knowledge of a breach
by the other party, receives and accepts payment or other performance of the contract
will be held to have waived the breach.” § 63:9. Waiver of or estoppel to assert breach,
23 Williston on Contracts § 63:9 (4th ed.).

1 At a minimum, even if the government’s explicit statements—that it was “much
2 more convinced,” found the information in the attorney proffer to constitute “significant
3 progress,” and considered the attorney proffers “productive”—could be deemed
4 equivocal, the government’s request for and acceptance of Huizar’s continued
5 performance *after* the cure is not. *See* 23 Williston on Contracts § 63:9 (4th ed.) (“An
6 express *or implied* waiver excuses the failure to perform a condition.”) (emphasis added);
7 *cf. Campbell v. Smith*, 770 F.3d 540, 547–48 (7th Cir. 2014) (finding that despite
8 prosecutor’s initial breach of the plea agreement’s sentencing recommendation, “the
9 prosecutor’s silence when defense counsel discussed the plea bargain can be understood
10 as tacit agreement with it, and that tacit agreement effected a cure”); *United States v.*
11 *Brown*, 5 F.4th 913, 916 (8th Cir. 2021) (looking to the government’s “conduct even
12 aside from the sentencing memorandum” to determine breach).

13 Not only is permitting breaching parties to cure basic contract law, but it furthers
14 the policy interests underlying agreements in criminal cases. In *Purser*, for example, the
15 Fifth Circuit found that the government breached the express terms of the plea agreement
16 by advocating for a higher offense level in its position paper than that agreed to in the
17 plea agreement. 747 F.3d at 290-91. In finding the government breached, the Fifth Circuit
18 rejected the government’s arguments that the government did not breach the agreement
19 because the breach occurred prior to the sentencing hearing and that the breach should
20 be reviewed pursuant to a harmlessness analysis. *Id.* at 291-93. The Fifth Circuit found,
21 however, that the government had cured the breach by withdrawing its position. *Id.* at
22 293-94. It explained that with “a cure of breach, the breaching party abides by the
23 agreement.” *Id.* at 294. “Allowing the government to cure a plea agreement breach
24 vindicates the ‘policy interest in establishing the trust between defendants and
25 prosecutors that is necessary to sustain plea bargaining.’” *Id.* (citing *Puckett v. United*
26 *States*, 556 U.S. 129, 141 (2009)). *See Puckett*, 556 U.S. at 141 (“a cure promotes the
27 policy interest that are an essential . . . part of the criminal process”). Similarly here,
28 where the government continued to request information from Huizar after the alleged

1 breach was cured, the policy interests of retaining the trust between defendants and
2 prosecutors in this district weigh heavily in favor of the government’s continued
3 performance pursuant to the Proffer Agreement.

4 “[A] mistake is not a bell, and usually can be corrected.” *Diaz-Jimenez*, 622 F.3d
5 at 696. And in this case, any alleged mistake was corrected. The extrinsic evidence shows
6 that Huizar (and the government) reasonably understood the Proffer Agreement was
7 subject to the basic principles of contract law that allow a breaching party to cure an
8 alleged breach: the government invited “attorney proffers,” Huizar’s counsel proffered
9 multiple times to the stated satisfaction of the government, the government accepted
10 Huizar’s cellphone and password, and the government continued requesting performance
11 pursuant to the Proffer Agreement. *See De la Fuente*, 8 F.3d at 1340 (“De la Fuente could
12 not have reasonably understood the terms of the plea agreement to offer nothing in
13 exchange for his cooperation; neither, we hope, could the government have entertained
14 such an understanding.”). Permitting the government to renege on its obligations under
15 the Proffer Agreement after its benefits would be an unfair “end-run[] around” its
16 obligations. *Saxena*, 229 F.3d at 6 (citation omitted). In any case, any ambiguity as to the
17 parties’ understanding of the Proffer Agreement is resolved against the government and
18 the government is bound by the terms of the Proffer Agreement.

19 **C. The Government Violated Huizar’s Due Process Rights and Its Duty of**
20 **Good Faith and Fair Dealing by Continuing to Request Performance**
21 **Pursuant to the Proffer Agreement**

22 Even if Huizar’s understanding of the validity of the Proffer Agreement
23 government was not reasonable, the government violated Huizar’s Due Process Rights
24 and at a minimum, its own duty of good faith and fair dealing by inducing additional
25 cooperation pursuant to the Proffer Agreement. The Court should require the government
26 to fulfill its obligations pursuant to the agreement. *See United States v. Partida-Parra*,
27 859 F.2d 629, 633 (9th Cir. 1988) (“Where the government breaches a plea bargain, it
28 may be appropriate for the court to order ‘specific performance’ of the bargain.”); *id.*

1 (“When the breach was a failure by the prosecutor to carry out a promise which was
2 fulfillable, then certainly the defendant’s request for specific performance should be
3 honored.”) (quoting 2 W. Lafave & J. Israel, *Criminal Procedure*, § 20.2, at 599 (1984).

4 “[P]roffer agreements that are a part of ongoing criminal proceedings,” must not
5 only abide by contract principles but “are supplemented with a concern that the
6 bargaining process not violate the defendant’s rights to fundamental fairness under the
7 Due Process Clause.” *Farmer*, 543 F.3d at 374. *See Packwood*, 687 F. Supp. at 475
8 (“contract principles, when viewed in the light of the demands of due process, would
9 seem to require” that in a case where the defendant does not know his action, inaction,
10 or statements are a breach, “the government give him timely notice and an opportunity
11 to cure”). As such, prosecutors are held to “meticulous” standards in executing their
12 duties of promise and performance in criminal agreements. *See Farmer*, 543 F.3d at 374
13 (explaining that courts hold “the government to the literal terms of the agreement, as well
14 as the most meticulous standards of both promise and performance to insure the integrity
15 of the bargaining process involved in proffers”). “The bargained-for promises are
16 bolstered by an implied obligation of good faith and fair dealing.” *Henry*, 758 F.3d at
17 431. *See United States v. Jones*, 58 F.3d 688, 692 (D.C.C. 1995) (explaining that “while
18 the plea agreement did not guarantee [the defendant] a section 5K1.1 motion, we believe
19 it did guarantee fair dealing”).

20 The government failed to meet those exacting standards in this case. After telling
21 Huizar’s counsel that they believed Huizar lied during the April 10, 2019 proffer, the
22 government invited Huizar to cure the alleged breach and induced and requested
23 continued performance pursuant to the Proffer Agreement. Huizar, through counsel,
24 proffered several additional times to the government’s expressed satisfaction. Perhaps
25 most tellingly, Huizar voluntarily gave and the government accepted an image of his
26 cellphone, the physical phone, and the password to his phone.

27 Nevertheless, after it received the benefits of Huizar’s additional performance, the
28 government reneged on its promise to not use information received pursuant to the

1 Proffer Agreement. *See* Ex. D (AUSA Jenkins describing the additional attorney proffers
2 as “productive”). The government’s conduct violated Huizar’s Due Process rights by
3 inducing him to further waive his Fifth Amendment right to remain silent and produce
4 evidence to his detriment, in other words, continue performing pursuant to the Proffer
5 Agreement for no benefit at all. Such conduct breaches the government’s duty of good
6 faith and fair dealing. *See De la Fuente*, 8 F.3d at 1340 (“We are unwilling to impute to
7 the government the level of cynicism and bad faith implicit in negotiating an agreement
8 under which it persuaded a defendant to help convict his relative by offering what
9 appeared to be a reduced sentence but in fact offered him no benefit.”). Inducing
10 performance in this manner is constitutionally unfair. *See id.*; *United States v. Packwood*,
11 848 F.2d 1009, 1011 (9th Cir. 1988) (“Plea agreements implicate important due process
12 rights, however, and so the process must be fair.”); *Jones*, 58 F.3d at 692 (defendant was
13 entitled to an “honest” 5K determination).

14 While the Proffer Agreement did not promise Huizar any particular benefit in the
15 resolution of the case, Huizar was at a minimum entitled to the government’s good faith
16 and fair dealing. Without an explicit clause prohibiting curing a breach, Huizar
17 reasonably relied on the basic contract principle allowing a breaching party to cure as
18 well as the government’s statements and conduct in believing that the parties were still
19 bound by the Proffer Agreement. *See* Restatement (Second) of Contracts § 90(1) (Am.
20 L. Inst. 1981) (stating “[a] promise which the promisor should reasonably expect to
21 induce action or forbearance on the part of the promisee or a third person and which does
22 induce such action or forbearance is binding if injustice can be avoided only by
23 enforcement of the promise.”). Had the government not made those overtures and
24 representations, no rational defendant would have agreed to continue providing
25 information *and physical evidence* to the government—at their detriment—and further
26 waive their constitutional rights. Accordingly, the government’s current attempts to treat
27 the alleged lie as an uncured breach are a breach of the government’s own duty of good
28

1 faith and fair dealing, and the Court countenancing them would violate Huizar’s Due
2 Process Rights.

3 **D. The Government is Estopped from Rescinding the Proffer Agreement**

4 The Ninth Circuit “has held that where justice and fair play require it, estoppel will
5 be applied against the government.” *Watkins*, 875 F.2d at 706. Justice and fair play
6 require that here.

7 The government’s conduct and words confirmed that the Proffer Agreement
8 followed basic contract law and that Huizar could and did cure the alleged breach and
9 that the parties were still bound to perform pursuant to the Proffer Agreement. There is
10 no question that by at least December 13, 2019, the government knew the facts
11 underlying the alleged breach. Podberesky Decl. at ¶ 8. *See United States v. Georgia-*
12 *Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970) (“party to be estopped must know the facts”).
13 Nor can there be any doubt that the government intended that Huizar act upon its
14 statements and conduct. *Id.* AUSA Jenkins emailed Huizar’s counsel offering Huizar an
15 opportunity to “come clean” and *requesting* an “attorney proffer.” Podberesky Decl., Ex.
16 B. From this offer and request, Huizar would have no reason to believe and did not know
17 that the government did not in fact intend to remain bound by the Proffer Agreement. *See*
18 *Georgia-Pacific Co.*, 421 F.2d at 96. Further, Huizar was justified in relying on the
19 government’s representations and Huizar did rely on those representations when he cured
20 the alleged breach to the government’s stated and implied satisfaction and *continued* to
21 provide information about other individuals and alleged schemes. *See id.*

22 The government’s statements and actions establish misconduct beyond mere
23 negligence. *See Watkins*, 875 F.2d at 707. After the government knew of the alleged
24 breach, AUSA Jenkins affirmatively requested that Huizar “come clean” and provide an
25 “attorney proffer” about specific people and subject matters. Podberesky Decl., Ex. B.
26 On March 20, 2020, and on several other occasions, Huizar provided that information.
27 *Id.* Huizar then in May 2020 voluntarily provided his cellphone and password pursuant
28 to the Proffer Agreement. *Id.* at ¶ 17. Once Huizar provided that information and

1 evidence AUSA Jenkins expressed satisfaction with the information and the “productive”
2 attorney proffers and requested *more* information. *Id.* at ¶ 15; Ex. C; Ex. D. *See United*
3 *States v. Gamboa-Cardenas*, 508 F.3d 491, 504 (9th Cir. 2007) (finding “that the
4 government’s abrupt change of position regarding safety valve relief in this case goes
5 beyond ‘mere negligence’ and would cause a ‘serious injustice’” where defendant had
6 relied on that representation in waiving his right to testify at trial); *United States v. Wang*,
7 404 F.Supp.2d 1159, 1163 (N.D. Cal. 2005) (explaining that “a finding of affirmative
8 misconduct, [] requires that the Government ‘either intentionally or recklessly mislead[
9] the claimant’”) (citing *Michigan Express, Inc., v. United States*, 374 F.3d 424, 427 (6th
10 Cir. 2004)). AUSA Jenkins’ statements and requests to Huizar’s counsel either recklessly
11 or intentionally mislead Huizar to believe that he had cured the alleged breach, that his
12 continued cooperation was pursuant to the Proffer Agreement, and that the parties’ were
13 still bound to their obligations in the Proffer Agreement. The government did not merely
14 “stand aside while” Huizar continued providing them information and evidence, “it
15 plainly acted affirmatively” in requesting and accepting that information. *Watkins*, 875
16 F.2d at 708.

17 The government’s conduct here causes a serious injustice and equitably estopping
18 the government from using information obtained pursuant to the Proffer Agreement not
19 only does no damage to the public interest but in fact strengthens it. Here, the government
20 caused a serious injustice when it continued to coax Huizar into waiving his right to
21 remain silent and persuaded him to provide information and his cellphone and password
22 after it knew of the alleged breach. It is exactly because a defendant waives his
23 constitutional rights that the government’s conduct in inducing that waiver here is a
24 serious injustice. *See Rivera-Rodriguez*, 489 F.3d at 57 (“Because defendants must
25 ultimately waive fundamental rights as a result of entering into any plea agreement, we
26 hold prosecutors engaging in plea bargaining to the most meticulous standards of both
27 promise and performance.”).

1 Holding the government to its obligations in the Proffer Agreement will not harm
2 the public’s interest in holding criminal defendants accountable. The case against Huizar
3 will no doubt continue and the amount of information the government would be
4 precluded from utilizing is limited (certainly a fraction of that acquired throughout the
5 government’s years-long investigation). Instead, it is the public’s interest in ensuring
6 confidence in the fair administration of justice that will be fortified when the Court
7 ensures that prosecutors in this district are in fact held to the highest standards of
8 performance and promise. *Id. See Clark*, 218 F.3d at 1095 (“the courts’ concerns run
9 even wider than protection of the defendant’s individual constitutional rights-to concerns
10 for the honor of the government, public confidence in the fair administration of justice,
11 and the effective administration of justice in a federal scheme of government.”) (citation
12 omitted). Residents of the Central District of California and the criminal defendants who
13 are prosecuted in it, should be confident that if a criminal defendant waives his
14 constitutional rights and proffers with the government, the government will engage with
15 him fairly and in good faith and not mislead or take advantage of the defendant’s perilous
16 position to his own detriment.

17 Accordingly, the government should be equitably estopped from using any
18 information obtained pursuant to the Proffer Agreement and should be bound to perform
19 pursuant to the parties’ agreement. § 63:9. Waiver of or estoppel to assert breach, 23
20 Williston on Contracts § 63:9 (4th ed.) (“the general rule is that a contracting party who,
21 with knowledge of a breach by the other party, receives and accepts payment or other
22 performance of the contract will be held to have waived the breach.”). *See* Restatement
23 (First) of Contracts § 309 (1932).

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IV.CONCLUSION

For the reasons stated above, the Court should hold that the government must perform pursuant to the parties' Proffer Agreement and suppress any information obtained pursuant to that agreement.

Respectfully submitted,
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/s/ Carel Alé

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