

1 CUAUHTEMOC ORTEGA (Bar No. 257443)
Federal Public Defender
2 REBECCA M. ABEL (Bar No. 298604)
(E-Mail: Rebecca_Abel@fd.org)
3 Deputy Federal Public Defender
321 East 2nd Street
4 Los Angeles, California 90012-4202
Telephone: (213) 894-2854
5 Facsimile: (213) 894-0081

6 Attorneys for Defendant
CHARLES LYNCH
7

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 CHARLES LYNCH,
16 Defendant.

Case No. CR 07-689-GW

**DEFENDANT CHARLES LYNCH'S
OPPOSITION TO THE
GOVERNMENT'S EX PARTE
APPLICATION TO TAKE
HEARING OFF CALENDAR**

**Hearing Date: January 22, 2024 at
9:30 a.m.**

17
18 Defendant Charles Lynch, through his counsel of record, Deputy Federal Public
19 Defenders Rebecca M. Abel, hereby submits his opposition to the government's ex
20 parte application to take the hearing set for Monday, January 22, 2024 off calendar.

21 //

22 //

23 //

24

25

26

27

28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 Yesterday, on January 18, 2024, the Court issued an 8-page order stating that
3 “the evidentiary hearing is on calendar for January 22, 2024 at 9:30 a.m. (as it was set
4 by the Court on June 28, 2023 at the Government’s request), and *it will proceed as*
5 *scheduled.*” (Dkt. No. 562 at 1.) Two hours later, the government filed its second ex
6 parte in as many days, asking the Court to take the evidentiary hearing off calendar.
7 (Dkt. No. 563.) The government’s desperation to avoid the consequences of its
8 abandonment of its duty in this case is plain. The hearing must proceed, and the
9 government must be held accountable for its “pattern of nonfeasance.” (Dkt. No. 562
10 at 7 n.6.)

11 First, the government’s position is untenable. It claims that it “incorrectly
12 assumed that all prior dates regarding the motion to enjoin would not go forward,
13 including the recent status conference on January 8, 2023.” (*Id.* ¶ 3.) But, the status
14 conference did go forward. As the Court noted in yesterday’s order, “While
15 Defendant’s counsel was present, no one from the Government made any appearance
16 despite repeated attempts by the Court to contact government counsel.” (Dkt. No. 562
17 at 7.) In its written minutes from that status conference, at which government counsel
18 failed to appear, the Court stated that the hearing on the motion to enjoin spending
19 would go forward on January 22, 2024 at 9:30 a.m. (Dkt. No. 559.) Therefore, the
20 government’s “mistaken understanding” is belied by the Court’s orders, which were
21 plain for the government to review prior to filing is first error-ridden ex parte
22 application. (Dkt. No. 563 ¶ 3.) The government had an opportunity to request that the
23 Court take the hearing on the motion to enjoin spending off calendar in its first ex parte,
24 it did not do so, and again, as waived its opportunity to make such a request.

25 //

26 //

27 //

28

1 Second, the government misses the point. The defense’s reply to the motion to
2 enjoin spending (Dkt. No. 554) and the defense's motion to dismiss (Dkt. No. 447) are
3 premised on the same argument: the government has waived its opportunity to raise any
4 arguments in opposition. While the reminder is likely unnecessary for the Court, it
5 feels worth repeating. The government failed to file a single document in seven
6 months; it missed three court-ordered deadlines; it failed to appear at a noticed and
7 scheduled hearing. Despite being explicitly warned by the Court, it has yet to offer a
8 single explanation for its abandonment of its duty to its client—the unlimitedly
9 resourced federal government, or to Mr. Lynch—the defendant prosecuted for 16 years.
10 (*See* Dkt. No. 562 at 7 n.6 (“The Government does not offer any satisfactory
11 explanation for its repeated failures to meet deadlines or appear.”). It has waived its
12 opportunity to oppose the motion to enjoin spending ever, no matter what the claimed
13 excuse now. *See Salcedo v. Nissan N. Am., Inc.*, No. CV 22-4152-GW-MARX, 2023
14 WL 332761, at *8 (C.D. Cal. Jan. 18, 2023) (“[F]ailure to substantively oppose a
15 motion to dismiss can be construed as a waiver or abandonment of those issues.”
16 (internal quotation omitted)); *Westerfield v. Ethicon, Inc.*, No. CV 20-4803-GW-ASX,
17 2020 WL 11421251, at *1 (C.D. Cal. Nov. 16, 2020) (holding that by not filing an
18 opposition to the motion, “[t]his Court considers that failure to constitute a waiver or
19 forfeiture of any defense to the arguments Defendants raised in their motion.”).
20 Because of that waiver, the motion to enjoin should be granted on January 22, 2024,
21 without further delay.

22 The government had seven months “to provide the Court with an estimate of the
23 time necessary for a proper response” to the motion to enjoin spending. (Dkt. No. 563
24 ¶ 4.) As the Court already noted, its most recent ex parte application “repeat[ed] many
25 of the same reasons previously given when seeking a continuance” back in August
26 2022 (Dkt. No. 550), January 2023 (Dkt. No. 552), and July 2023 (Dkt. No. 555). It
27 appears that the government has done almost no work on this case in the 18 months
28

1 since the defense filed its motion to enjoin spending. Unlike defense counsel,
2 government counsel has prosecuted this case since 2007, is intimately familiar with the
3 record, and drafted every single document filed in the district and appellate court.
4 Given this familiarity, 18 months is more than enough time to respond, or at the very
5 least to offer a single, reasonable explanation for its failure to do so. Moreover, Mr.
6 Lynch’s opponent is the federal government. If the assigned prosecutor is unable to
7 complete the necessary work—so busy that he cannot even request more time from this
8 Court at any point in seven months—than another prosecutor should have been
9 assigned months ago. The government’s dereliction of its duty should not be borne by
10 Mr. Lynch.

11 Contrary to its claim, the government will have no trouble going forward with
12 the evidentiary hearing on January 22, 2024. The defendant’s extensive evidence
13 offered in support of the motion is undisputed. Such evidence is more than sufficient to
14 withstand the defense’s burden on the motion. Having offered no evidence, the
15 government cannot offer any for the first time at the hearing. It must do at the hearing
16 what it did for the last seven months—nothing.

17 A hearing on the motion to enjoin should go forward on January 22, 2024 and
18 the government’s non-opposition should be taken for what it is: a waiver of the
19 opportunity to offer any substantive arguments in response.¹ *See United States v.*
20 *Hoffman*, No. 2:12-CR-00309-JAM, 2015 WL 5604419, at *1 (E.D. Cal. Sept. 23,
21 2015) (granting motions to enjoin government spending after the government “filed no
22 oppositions and no motion or stipulation for an extension of time” and claimed that “the
23 failure to file ‘was based upon [the prosecutor’s] other responsibilities’ and that it was
24 not ‘aware of the extensive briefing that would be filed by the defendants’” because the
25 government’s conduct “is unreasonable and below the standard this Court expects from
26

27
28 ¹ Should the Court grant the motion to enjoin spending, the defense intends to withdraw its
motion to dismiss, as any further spending by the government to oppose that motion would be barred.

1 prosecutors representing the United States.”). The government’s second ex parte
2 application to take the hearing off calendar should be denied.

3 Respectfully submitted,

4 CUAUHTEMOC ORTEGA
5 Federal Public Defender

6
7 DATED: January 19, 2024

By /s/ Rebecca Abel

8 REBECCA ABEL
9 Deputy Federal Public Defender
10 Attorney for CHARLES LYNCH
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28