PILLSBURY WINTHROP SHAW
PITTMAN LLP (pro hac vice)
MARK L. KROTOSKI (pro hac vice)
California Bar No. 138549
2550 Hanover Street
Palo Alto, CA 94304-1115
Telephone: (650) 233-4500
Email: mark.krotoski@pillsburylaw.com

PILLSBURY WINTHROP SHAW
PITTMAN LLP (pro hac vice)
RICHARD P. DONOGHUE (pro hac vice)
New York Bar No. 2511236
31 W 52nd Street
New York, NY 10019
Telephone: (212) 858-1000
Email: richard.donoghue@pillsburylaw.com

CLARK HILL PLLC
PAOLA M. ARMENI
Nevada Bar No. 8357
1700 South Pavilion Center Drive, Suite 500
Las Vegas, Nevada 89135
Telephone: (702) 862-8300
Email: parmeni@clarkhill.com

ANDERSON KILL, P.C. (pro hac vice)
SAMUEL M. BRAVERMAN (pro hac vice)
New York Bar No. 2553808
1251 Avenue of the Americas, 42nd Floor
New York, NY 10020
Telephone: (212) 278-1008
Email: SBraverman@AndersonKill.com

Attorneys for Defendant, Eduardo Lopez

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDUARDO RUBEN LOPEZ,

Defendant.

Case No. 2:23-cr-00055-CDS-DJA

DEFENDANT LOPEZ'S MOTIONS *IN LIMINE*

Trial Date: March 24, 2024
Courtroom: Courtroom 6B
Hon. Cristina D. Silva

MEMORANDUM OF POINTS AND AUTHORITIES

I. MOTION *IN LIMINE* NO. 1: TO ADMIT EVIDENCE OF SELECT EXCERPTS OF OCTOBER 2016 DOJ ANTITRUST GUIDANCE ON WAGE-FIXING AGREEMENTS[1]

A. BACKGROUND

The government alleges that beginning no later than March 2016, Eduardo Ruben Lopez ("Mr. Lopez") and "his co-conspirators" "entered into and engaged in a conspiracy to suppress and eliminate competition for the services of nurses employed by the co-conspirator companies by agreeing to fix the wages of those nurses." Superseding Indictment ¶ 17 [ECF No. 49.]

In an attempt to support this allegation, the government relies on communications and evidence before October 20, 2016, when the Antitrust Division announced a new policy to bring criminal cases based on wage-fixing. *See* Exhibit A (Antitrust Division press releases (Oct. 20, 2024)).

While the government focuses on purported conduct beginning in March 2016 and statements from March and September 2016, Department of Justice ("DOJ") had not considered such alleged conduct to be criminal prior to October 2016. The government admits as much, stating in its Antitrust Guidance for Human Resource Professionals, Department of Justice Antitrust Division, Federal Trade Commission, dated October 2016 ("October 2016 DOJ Antitrust Guidance"):

> Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. . . . Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or no poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.

See **Exhibit B**.

[1] Prior to filing this omnibus motion *in limine,* counsel for the parties met and conferred on February 20 and 23, 2025, on their respective motions *in limine*.

As explained in more detail, below, DOJ's statements on naked wage-fixing and no-poaching agreements in the October 20, 2016 DOJ Antitrust Guidance are admissible as statements of a party opponent on two independent bases: (1) the statements were made by DOJ in an individual or representative capacity of the Government under Fed. R. Evid. 801(d)(2)(A); and (2) the Government manifested that it adopted or believed the statements to be true under Fed. R. Evid. 801(d)(2)(B). Thus, the Court should admit the statements contained in the October 2016 DOJ Antitrust Guidance as evidence of the Government's position that the conduct alleged against Mr. Lopez prior to October 2016 should be enforced as a civil case, and not prosecuted as a criminal case.

Additionally, the policy is admissible for a separate reason as the Law360 article referred to in Paragraph 33 of the Superseding Indictment, also notes:

> "The DOJ and Federal Trade Commission first warned in October 2016 that so-called no-poach arrangements, as well as agreements that fix wages, can result in criminal antitrust charges when they're not tied to some broader, legitimate collaboration. Enforcers had previously handled those types of labor market cases as civil matters."

Exhibit C (Law360 Article). The government has already made this Law360 article part of this case by referencing it in the Superseding Indictment. The article will be shown to the witness referenced in Paragraph 33 during the trial. The defense merely requests that the jury receive and consider the policy that is referenced in the article.

B. ARGUMENT

Hearsay is an out-of-court statement offered by a party to prove the truth of the matter asserted in that statement, Fed. R. Evid. 801(c), and is not admissible unless provided by federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court. Fed. R. Evid. 802. A statement, however, is not hearsay where the statement is offered against an opposing party and was either made by the party in an individual or representative capacity *or* is a statement the party manifested that it adopted or believed to be true. Fed. R. Evid. 801(d)(2)(A)-(B). Here, the Department of Justice, as the relevant and competent section of the United States Government for issuing guidance regarding prosecutions, issued the October 2016 DOJ Antitrust

Guidance in its official capacity. And, it is axiomatic in the Ninth Circuit that the Federal Government is a party-opponent of the defendant in criminal cases. Therefore, the 2016 DOJ Antitrust Guidance is admissible as an opposing party statement pursuant to Fed. R. Evid. 801(d)(2)(D) (the October 2016 DOJ Antitrust Guidance contains statements by DOJ made in its capacity as a representative of the Government and the Government manifested that it adopted or believed the statements at issue to be true).

1. The October 20, 2016 DOJ Antitrust Guidance Statements Were Made in the Representative Capacity of the United States.

The statements in the 2016 DOJ Antitrust Guidance are admissible because they were made by DOJ (and the Federal Trade Commission) in its capacity as an agency that enforces U.S. antitrust laws. *See* Exhibit B, at 1 ("The Department of Justice Antitrust Division . . . and Federal Trade Commission . . . jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees"); Fed. R. Evid. 801(d)(2)(A). "The United States enforces the federal antitrust law and has a strong interest in promoting competition and seeing that the Sherman Acts' prohibitions… are fully and correctly applied to all markets…" *See Curtis Markson v. CRST Int'l., Inc*., No.5:17-cv-01261-SB (SPx) (C.D.Cali. Aug.5, 2022), Statement of Interest of United States at ECF 637. In this capacity, DOJ is a Government actor, the statements of which are admissible against the Government as a party opponent. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government."); *United States v. Holmes*, 573 F.Supp.3d 1391, 1394 (N.D. Cal. Dec. 2, 2021) (stating that DOJ is a "government actor" and that its role in litigation distinguishes it from other federal agencies); *see also Taebel v. Department of Justice*, No. CV 18-06697-PA (JDE), 2018 WL 3807816, at *2 (C.D. Cal. Aug. 8, 2018) (describing DOJ as "an arm of the Federal Government"); Office of the Attorney General, www.justice.gov/ag (the "Department of Justice as an executive department of the government of the United States").

The Ninth Circuit has held that a government publication is an admissible party admission under Fed. R. Evid. 801(d)(2) against the Government. *United States v. Van Griffin*, 874 F.2d 634 (9thCir. 1989); *accord United States v. Morgan*, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978) ("the

Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases."). In *Van Griffin*, 874 F.2d 634, the Court of Appeals for the Ninth Circuit considered whether a government manual, setting out a correct procedure to follow for a variety of sobriety tests, could be offered as an admission against the government. Because the government department charged with the development for highway safety rules was the relevant and competent section of the government, its pamphlet on sobriety testing was an admissible party admission. *Id*. More recently, the Ninth Circuit revisited their decision in *Van Griffin* and reclarified that in *Van Griffin*, "[the government manual] had been written by the relevant and competent section of the government, and was thus the admissible statement of the Government as a party opponent." See *United States v. Mirabal*, 98 F.4th 981, 982 (9th Cir.2024). The Ninth Circuit restated that "[t]here is no question that… the Federal Rules clearly contemplate that the Federal government is a party-opponent of the defendant in criminal cases." *Mirabal*, 98 F.4th at 986 (citation omitted). The Ninth Circuit explicitly held that "in criminal cases, the Justice Department certainly should be considered a party opponent of criminal defendants." *Id.* at 986-87 (citation and quotation marks omitted). In re-clarifying their holding in *Van Griffin*, the Ninth Circuit in *Mirabal* stated that "as the Department of Transportation in *Van Griffin* was the 'relevant and competent section of the Government' when it came to highway safety, so is the Department of Justice with respect to criminal prosecutions." *Id*. at 986.

The *Van Griffin* Court's rationale applies here. Here, the Department of Justice is the relevant competent section of the United States Government with respect to criminal prosecutions. As is clear in the Ninth Circuit, the Federal Government is a party opponent of criminal defendants. In this role, the Department of Justice issued guidance regarding the potential future criminality of so-called naked wage fixing. There is no question that the Department of Justice is the competent authority to publish and enforce such guidance. As a party opponent to the defendant in the case at bar, this guidance is a statement of an opposing party and admissible under Fed. R. Evid.801(d)(2)(D). (The DOJ Antitrust Division is the government department charged with enforcing U.S. antitrust laws, **Exhibit A**, at 1 ("The Department of Justice Antitrust Division . . . and Federal Trade Commission . . . jointly enforce the U.S. antitrust

laws, which apply to competition among firms to hire employees"), which DOJ alleges were violated by Mr. Lopez. *See generally* Superseding Indictment ¶¶ 17, 19 [ECF No. 49.] The DOJ Antitrust Division also issued the 2016 DOJ Antitrust Guidance on October 20, 2016, reflecting its intention to begin prosecuting criminally naked wage-fixing or no-poaching agreements *after* that date. The government's press releases on this case refer to it as a wage-fixing case. *See* Exhibit B (press releases). Consequently, the 2016 DOJ Antitrust Guidance should be admissible against the government as an opposing party's statement to show that DOJ did not consider allegations of naked wage-fixing and no-poaching agreements as subject to criminal prosecution prior to October 2016.

2. The Government Manifested That It Believed The Statements in the October 2016 DOJ Antitrust Guidance to be True.

The statements in the 2016 DOJ Antitrust Guidance are also admissible on the separate and independent basis that the government manifested that it believed naked wage-fixing and no-poach agreements were not subject to criminal prosecution prior to October 2016. *See* Fed. R. Evid. 801(d)(2)(B); *United States v. Kattar*, 840 F.2d 118 (1st Cir. 1988).

In *Kattar*, 840 F.2d at 122, the defendant was charged with attempting to defraud a church. At trial, the defendant sought to admit as admissions of his party opponent under Fed. R. Evid. 801(d)(2)(D) two briefs filed in separate cases by the United States that were critical of alleged illegal activities of high-level church members. *Id.* at 131. The First Circuit held that the statements in the briefs were admissible under Fed. R. Evid. 801(d)(2)(D), "as statements of which the party-opponent 'has manifested an adoption or belief in its truth.'" *Id.* In support of its conclusion, the *Kattar* Court reasoned that DOJ had "as clearly as possible, manifested its belief in the substance of the contested documents" because it "submitted them to other federal courts to show the truth of the matter contained therein." *Id.* In doing so, the Government "establish[ed] the position of the United States and not merely the views of its agents who participate therein." *Id.* (citing *United States v. Powers*, 467 F.2d 1089, 1097 n.1 (7th Cir. 1972) (Stevens, J., dissenting)).

As with *Katter*, the Government here manifested an adoption or belief of the statements contained in the 2016 DOJ Antitrust Guidance, which reflect that alleged naked wage-fixing and

no-poaching agreements were not conduct subject to criminal prosecution prior to October 2016. The Government has filed at least three briefs in federal court citing to the 2016 DOJ Antitrust Guidance to show the truth of the matter contained therein. *See* Exhibits D, E and F. In *In re: Railway Industry Employee No-Poach Antitrust Litigation*, Case No. 2:18-MC-00798-JFC (W.D. Penn.), the Government filed with the court its Statement of Interest of the United States on February 8, 2019, reiterating its position that "[t]he Antitrust Division has announced that it would prosecute these cases criminally for 'agreements that began after the date of that announcement [in October 2016], or that began before but continued after that announcement.'" Statement of Interest of the United States (ECF No. 158), 9, *In re: Railway Industry Employee No-Poach Antitrust Litigation*, Case No. 2:18-MC-00798-JFC (W.D. Penn.). Similarly, in *Stigar v. Dough Dough, Inc.*, Case No. 2:18-cv-00244-SAB (E.D. Wa.), the Government filed with the court on March 8, 2019, its Corrected Statement of Interest of the United States of America, generally citing to the 2016 DOJ Antitrust Guidance in support for its position that agreements among competing employers to allocate employees eliminates competition for those employees. Corrected Statement of Interest of the United States of America (ECF No. 45), 15, *Stigar v. Dough Dough, Inc.*, Case No. 2:18-cv-00244-SAB (E.D. Wa.). Finally, in Aya Healthcare Services Inc. v. AMN Healthcare, Inc., et al, No. 2:17-cv-205 No. 20-55679 (9th Cir.2020), the Government, in their 'Brief of Amicus United States of America in Support of Neither Party', cited to the 2016 DOJ Antitrust Guidance for the proposition that "[t]he United States was not defining no-poach agreements in general… the United States uses the label 'no-poach agreement'… to identify a particular type of labor market allocation: an agreement among employers that includes any or all of the commitments not to solicit, hire, or otherwise compete for certain employees." See *Id*. at ECF 14. P.25.

Further, in *United States v. Patel*, No.3:21-cr-220 (VAB), 2022 WL 12358443 (D. Conn. 2022) ("Patel"), in considering whether to disclose the Grand Jury minutes, defense counsel argued that the Government's changing position regarding whether only some no poach agreements or all no poach agreements constitute naked horizontal market allocation such that they are subject to the per se rule is grounds for disclosure of the instructions given to the grand jury. *See Id*., at *7. In support of the defense's argument, the *Patel* Court pointed out that the Government has made public

statements that it intended to proceed criminally against naked wage-fixing or no-poaching agreements, but not agreements that are reasonably necessary to a larger legitimate collaboration. *Id*. at *8. The Patel Court, citing the 2016 DOJ Antitrust Guidelines, found that "in light of the 'in flux' law concerning the criminality of no-poach agreements, the Government's general stance on no-poach agreements as well as specific statements in recent no-poach prosecutions, and the 'fine distinctions' the grand jury needed to make 'in deciding to indict,' … [d]efendants have met the particularized need standard." *Id*. at *9.

Further support can be found by the Federal Trade Commission's numerous references to the 2016 DOJ Antitrust Guidelines. On October 29, 2019, Noah Joshua Philips, then-commissioner of the Federal Trade Commission, speaking before the subcommittee on Antitrust, Commercial and Administrative Law Judiciary Committee in the U.S. House of Representatives, commented on the 2016 DOJ Antitrust Guidelines and stated that: "[i]n 2016, the FTC and DOJ released Antitrust Guidance for Human Resource Professionals, which addressed concerns like no-poach agreements and put firms on notice that they may face criminal or civil liability. The FTC has continued its work in this area, last year going after two small home health agencies in Texas that tried but failed to set wages. We will remain vigilant. The Department of Justice's Antitrust Division is doing important work in this area, bringing cases and warning employers that they will be prosecuted for per se violations criminally." Prepared Statement of Federal Trade Commission Commissioner Noah Joshua Phillips, On Antitrust And Economic Opportunity: Competition In Labor Markets, Before the Subcommittee on Antitrust, Commercial and Administrative Law, House Judiciary Committee (Oct. 29, 2019), https://www.ftc.gov/system/files/documents/public_statements/1552269/phillips_testimony_re_house_judiciary_antitrust_subcommittee_10-29-19.pdf. Further, on February 2, 2021, then-commissioner Rohit Chopra release a statement stating, in pertinent part that:

> [t]he Commission has historically taken a lax approach to worker abuse, entering no-consequences settlements even in naked wage-fixing matters that are criminal in nature. Despite broad pronouncements about a commitment to policing markets for anticompetitive conduct that harms workers the FTC has done little. I hope that today's action turns the page on this era of inaction.

See Statement of Rohit Chopra, 'Regarding the Deception of Delivery Drivers by Amazon.com', 2012 WL 489843, at *2 (citing Press Release, Fed. Trade Comm'n, FTC and DOJ Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), https://www.ftc.gov/news-events/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how).

Consistent with *Katter*, the Court should find that by filing these documents in federal court and the numerous comments on the 2016 DOJ Antitrust Guidelines by the DOJ and the Federal Trade Commission, the Government "establish[ed] the position of the United States," rendering the 2016 DOJ Antitrust Guidance admissible. *Kattar*, 840 F.2d at 131 (citing *Powers*, 467 F.2d at 1097 n.1 (Stevens, J., dissenting)). For the foregoing reasons, this motion should be granted.

II. MOTION *IN LIMINE* NO. 2: TO EXCLUDE LAY TESTIMONY REGARDING INTENT, KNOWLEDGE OR STATE OF MIND

A. INTRODUCTION

Central issues in this case for the jury to determine involve intent. The jury as the fact-finder will determine intent based on the evidence. However, the government's cooperating witnesses and the agents should not make these conclusions for the jury, including about their beliefs or opinions about Mr. Lopez's state of mind, knowledge, understanding, motivations, or especially his intent. This type of testimony is not only speculative, it is foreclosed by the Ninth Circuit, Fed. R. Evid. 602, 701 and 403, invades the province of the jury, and is unfairly prejudicial. The Court should exclude this type of speculative testimony and improper lay opinion regarding Mr. Lopez's state of mind, knowledge and intent.

B. ARGUMENT

Intent is required for all counts. For example, on the conspiracy count, the jury must decide whether the government will meet its burden to establish what the Supreme Court has described as "two different types of intent" in an antitrust case including "the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy." *United States v. United States Gypsum Co.*, 438

U.S. 422, 443 n.20 (1978); *see also United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980) ("[I]t is clear that mere association with members of a conspiracy, the existence of an opportunity to join a conspiracy, or simple knowledge, approval of, or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator.").

The wire fraud counts require proof beyond a reasonable doubt that the defendant acted with the intent to defraud, that is, the intent to deceive and cheat. As the Ninth Circuit has explained, to act with the intent to defraud means to act knowingly and with the specific intent to deceive, for the purposes of causing some financial or property loss to another. *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020) (citations and quotation marks omitted). Specifically, "a defendant must act with the intent not only to make false statements or utilize other forms of deception, but also to deprive a victim of money or property by means of those deceptions." *Id*.

1. Testimony regarding Mr. Lopez's state of mind, knowledge, and intent must be excluded for lack of personal knowledge.

Rule 701(a) requires that lay opinion testimony must be "rationally based on the witness's perception" and "helpful to clearly understanding the witness's testimony rationally based on the witness's perception." The Ninth Circuit has held that lay opinion should be excluded where this requirement is not met. *See, e.g.*, *United States v. Henke*, 222 F.3d 633, 642 (9th Cir. 2000) (excluding lay opinion testimony that the defendants charged with a conspiracy to make false statement to the SEC "must have known" of the alleged revenue scheme as "the jury was in the best position to determine" the defendants' knowledge); *United States v. Cox*, 633 F.2d 871, 875 (9th Cir. 1980).

More specifically, "Witnesses are not permitted to speculate, guess, or voice suspicions." *United States v. Whittemore*, 776 F.3d 1074, 1082 (9th Cir. 2015) (citation and internal quotation marks omitted). Under Federal Rule of Evidence 602, "[a] witness may testify to a matter *only if* evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." (emphasis added). This "familiar requirement of firsthand knowledge or

observation" applies even when the testimony is couched as an opinion. Fed. R. Evid. 701 Advisory Committee's Note on 1972 Proposed Rules.

The cooperating witnesses should not be allowed to invade the province of the jury on this evidence. Rule 701 excludes "testimony where the witness is no better suited than the jury to make the judgment at issue, providing assurance against the admission of opinions [that] merely tell the jury what result to reach." *United States v. Brooks*, 736 F.3d 921, 931 n.2 (10th Cir. 2013).

Additionally, the FBI agents should not be permitted to provide lay opinion testimony about Mr. Lopez's state of mind including their interactions with him on October 30, 2019. The agents testified under oath at the suppression hearing that they lacked any means to assess internal or cognitive impairment. The agents conceded they had no training or experience concerning how the medications impacted memory or cognitive function. For example, the agents were asked:

> Q. Okay. And so fair to say that you have no experiential training as to how benzodiazepine is uploaded into the brain, correct?[2]
> A. No, I (unintelligible). *See* ECF No. 250 at 66:20-23.
> Q. And is a benzodiazepine a central nervous stimulant or central nervous depressant?
> A. Sorry. I'm not familiar with the medication. *See* ECF No. 250 at 115:19-21.
> Q. You have no personal knowledge of the drug effects of Versed, correct.
> A. Correct. *See* ECF No. 250 at 131:7-9.

This testimony confirms the agents lack any rational basis to provide lay opinion testimony about Mr. Lopez's state of mind.[3] *See, e.g.*, *United States v. Moore*, 651 F. 3d 30, 60 (D.C. Cir. 2011) (FBI agent was "improper in offering his non-expert opinions about the charged conspiracy and appellants, vouching for the reliability of the investigation and of the cooperating co-conspirator witnesses ..., and discussing evidence that had yet to be introduced"). Any such testimony by the agents should be excluded.

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[2] Versed and Alprazolam are benzodiazepines. *See* ECF No. 168 (Ex. C); ECF No. 168 (Ex. D); *see also* Dr. Odell Expert Report at 3, 5; ECF No. 250 at 202:20-203:15, 206:14-207:6.

[3] An objection was made to this lay opinion testimony at the suppression hearing. ECF No. 250, at 22-23. However, the agent was permitted to testify on these issues. In part, the Federal Rules of Evidence do not apply at suppression hearings. *See generally United States v. Matlock*, 415 U.S. 164, 172-73 (1974). However, the Ninth Circuit and other court have held this type of lay opinion testimony from an agent is impermissible at trial where the jury must determine these facts.

Any agent testimony based on their "specialized training and experience" – such as alcohol or drug intoxication – is also improper lay opinion under Rule 701. *See United States v. Haynes*, 729 F.3d 178, 195 (2d Cir. 2013) ("Officer Rabideau's testimony was improperly admitted over the defendant's objection because his opinion was based on specialized training and experience. Officer Rabideau did more than simply describe what he found in the gas tank and what he perceived. He described how the float on the outside of the gas tank worked and why the gas gauge would have registered zero to empty while the drugs were in the gas tank."). Thus, to the extent the agents base their opinions on their training or years of experience – as they did at the suppression hearing, this is impermissible lay opinion.

The courts also recognize that lay persons cannot testify about medicine or its impact on an individual since this requires "scientific, technical, or other specialized knowledge within the scope of Rule 702." *Ayobi v. Romero*, No. 119CV00964SABPC, 2021 WL 63275, at *5 (E.D. Cal. Jan. 7, 2021), report and recommendation adopted, No. 119CV00964AWISABPC, 2021 WL 2443817 (E.D. Cal. June 15, 2021) ("Although Ms. Meyer declares that she was previously employed as a registered nurse, she has not been qualified as a medical expert pursuant to Federal Rule of Evidence 702. . . . Therefore, she may not offer medical testimony regarding Plaintiff's medical status, diagnosis or medication side effects.") (emphasis added).

Because the central question here can be framed as whether the medications significantly impaired Lopez, we can argue that the government cannot rely on the agents' opinions which are tantamount to arguments that the medications did not impact Lopez's mental state. *See also James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011) ("A lay witness, such as Plaintiff, may not 'express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness. Whether Plaintiff suffered a traumatic brain injury requires the special skill and knowledge of an expert witness."); *Ragland by & through Mitchell v. Shelby Cnty., Tennessee*, No. 2:22-CV-2862-SHL-ATC, 2024 WL 3928913, at *8 (W.D. Tenn. Aug. 23, 2024) ("However, it would be inappropriate for his mother, a lay witness and family member, to offer expert conclusions relating to his mental state. Though she may have personal knowledge of his condition and can

testify as to her interactions with him, she has not been tendered as an expert capable of offering testimony regarding her son's medical conditions.").

For good reason, courts are also concerned that juries may be influenced by the "aura of expertise and authority" from lay opinions from. *See, e.g.*, *United States v. Haines*, 803 F.3d 713, 734 (5th Cir. 2015) ("Furthermore, Lockhart was presented to the jury 'with an aura of expertise and authority,' which arose not only from his status as the case agent but also because of his extensive experience in investigating other drug crimes, increasing the risk that his testimony would improperly sway the jury."). This should be part of our argument—agent testimony on Lopez's mental function should be closely scrutinized because of the presumption of truth it may have with a jury.

Agents should also not be allowed to invade the province of the jury in determining the intent issues. *See Id.* at 734 ("This testimony was admitted in error because it went beyond Lockhart's expertise and personal knowledge of the investigation and instead ventured into speculation, usurping the jury's function, which is to draw its own inferences from the evidence presented."); *United States v. Grinage*, 390 F.3d 746, 751 (2d Cir. 2004) ("In sum, the agent's testimony as to his interpretations of the calls went beyond permissible lay opinion testimony under Rule 701(b) because, rather than being helpful to the jury, it usurped the jury's function.").

Mr. Lopez moves to exclude all lay opinion testimony from cooperators, agents and other witnesses that do not meet the requirements of the rules of evidence as set forth above.

2. Testimony regarding Mr. Lopez's state of mind, knowledge, and intent must be excluded as tantamount to telling the jury what to decide.

As an independent basis, any speculative and conclusory testimony about Mr. Lopez's state of mind, knowledge, and intent should be excluded for "tell[ing] the jury what result to reach." Fed. R. Evid. 704 Advisory Committee's Note on 1972 Proposed Rules; *see also* Fed. R. Evid. 701(b) (Lay opinion testimony "is limited to one that is . . . helpful to clearly understanding the witness's testimony or to determining a fact in issue."); *United States v. Allen*, 10 F.3d 405, 414 (7th Cir. 1993) ("The closer the subject of the opinion gets to critical issues the likelier the judge is to require the witness to be more concrete.") (citation omitted). This type of testimony

"amount[s] to little more than choosing up sides," and "should be excluded for lack of helpfulness." *United States v. Gadson*, 763 F.3d 1189, 1208 (9th Cir. 2014) (citation and internal quotation marks omitted).

3. Testimony regarding Mr. Lopez's state of mind, knowledge, and intent must be excluded as prejudicial.

As another independent basis, any testimony about Mr. Lopez's state of mind, knowledge, and intent should be excluded under Federal Rule of Evidence 403 because the danger of unfair prejudice substantially outweighs the evidence's non-existent probative value. *See, e.g.*, *United States v. Rea*, 958 F. 2d 1206, 1216 (2nd Cir. 1992) ("[E]ven those lay opinions that pass Rule 701's dual test of admissibility may be excluded by the court under Fed. R. Evid. 403 if the court determines that the admission of the opinion will be cumulative or a waste of time, or that its helpfulness is substantially outweighed by the danger of unfair prejudice to the party opposing admission of the evidence.").

4. Lay opinion testimony cannot be used to provide expert testimony.

Under Fed. R. Evid. 701, a distinction is made between lay opinions and expert opinions "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Lay testimony cannot provide expert testimony. The rule was amended twenty-five years ago to prevent the use of lay witnesses to offer expert opinions. According to the Advisory Committee Notes:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson. See Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure , 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). *See also United States v. Figueroa-Lopez*,

> 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16 (a)(1)(E)").

Fed. R. Evid. 702 Advisory Committee's Note on 2000 Proposed Rules. Expert testimony should not be allowed as an alternative to overcome the prohibition against lay testimony. No agent or witness should be allowed to offer expert testimony without complying with the requirements of Rule 702.

C. CONCLUSION

Accordingly, pursuant to Federal Rules of Evidence 602, 701, and 403, the government must be precluded from eliciting any speculation and improper lay opinion regarding both Mr. Lopez's and Mr. Lopez's state of mind, knowledge, and intent, from any witnesses. For the foregoing reasons, the Court should grant Mr. Lopez's motion in limine.

III. MOTION *IN LIMINE* NO. 3: TO EXCLUDE FINANCIAL CIRCUMSTANCES EVIDENCE AND ARGUMENT.

A. BACKGROUND

The government alleges that beginning no later than March 2016, Edward Ruben Lopez ("Mr. Lopez") and "his co-conspirators," "entered into and engaged in a conspiracy to suppress and eliminate competition for the services of nurses employed by the co-conspirator companies by agreeing to fix the wages of those nurses." (*See* ECF No. 1, Indictment ¶ 16.) Subsequently, in its Superseding Indictment, the Government charges the defendant with five counts of wire fraud related to the sale of Company F to Company G in December 2021, in violation of 18 U.S.C. §1343 (the "Wire Fraud Counts"). (*See* ECF No. 49, Superseding Indictment.)

In support of these allegations, Government witnesses have raised details relating to Mr. Lopez's lease of a high-end car or the purchase of a high-end car by his partner. For example, at the suppression hearing, the FBI agent testified about a particular high-end, leased car. *See* ECF No. 250, at 112:18-23. The prosecutor then made other references to the car during questioning at the hearing. *See* ECF No. 250, at 171:9-9, 173:12-13, 174:1-3. The type of car an accused leases is not probative of any elements of the offenses charged in this case.

The Government's Exhibit List includes the purchase of another high-end car *by Mr. Lopez's partner*. *See* Gov't Exh. 240 (Retail Installment Sale Contract) (ECF No. 240). The types of cars driven by others associated with an accused has zero probative value, under Fed. R. Evid. 401, and is unfairly prejudicial, under Fed. R. Evid. 403, and the Due Process Clause.

The defense brings this motion to ensure that these and any other related transactions are properly excluded from trial evidence and arguments so the jury is not unduly influenced or inflamed to rely on perceptions of excessive wealth, especially because personal wealth and Mr. Lopez's financial circumstances are irrelevant to the specific crimes charged, under Fed. R. Evid. 401, Fed. R. Evid. 403, and the Due Process Clause. The government should never be allowed to introduce evidence concerning an accused's financial circumstance or to unfairly prejudice the jury. Due process concerns are separately raised by the use of the evidence on disparate counts years apart.

Accordingly, the government and its witnesses should be precluded from referring to specific purchases, indicia of wealth, financial circumstances, or otherwise indicating that any personal wealth or lifestyle is somehow linked to the alleged crimes at issue.

B. ARGUMENT

Mr. Lopez's financial circumstances, and especially his specific choices of purchases or bank account balances, are irrelevant to whether his conduct constituted the crimes of wire fraud or wage-fixing for which he is charged. As the Supreme Court has noted, "appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940). The Supreme Court's distinction between "class prejudice" evidence and "corporate power" evidence provides a useful framework to easily discern that any financial circumstances or status of Mr. Lopez, as an individual, is irrelevant to the elements of the separate and distinct offenses. The spillover effect of this evidence on the disparate charges is further prejudicial. Even generalized and non-specific references to a defendant's financial status are considered irrelevant. *See United States v. Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at *4 (N.D. Cal. May 22, 2021) ("Nonetheless, evidence of an individual's lavish spending habits, without a connection to an individual's

participation in criminal activity, is irrelevant."). As the Supreme Court has noted, "Unfair prejudice," under Rule 403, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Fed. R. Evid. 403 Advisory Committee's Notes).

Other courts have noted lack of any relevance under Fed. R. Evid. 401. For example, in *Holmes*, the court characterized the Government's arguments that wealth was "the fruit of Holmes's fraudulent scheme" and "motivated her to 'continue and conceal her fraud'" as "close to the impermissible use of evidence to show Holmes was wealthy and wished to become wealthier. On its face, this does not appear to have the requisite connection to the alleged conduct required under case law." *Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at *5 (N.D. Cal. May 22, 2021). Whatever a defendant's financial circumstances are, they simply "do not prove much, because almost everyone, poor or not, has a motive to get more money. And most people, rich or poor, do not steal to get it." *United States v. Mitchell*, 172 F.3d 1104, 1109 (9th Cir. 1999).

Mitchell prohibited the introduction of financial circumstances evidence to cases where that evidence establishes an "inclination" towards the specific crime, such as an "abrupt change of circumstances … [that] amounts to circumstantial evidence of the crime," or evidence of financial circumstances that put pressure on the individual to commit the specific crime. *United States v. Mitchell*, 172 F.3d 1104, 1109 (9th Cir. 1999) ("There is a distinction between an interest, in the sense that it is in anyone's interest to be richer rather than poorer, and an inclination. A mere interest, unconnected with inclination, desperation, or other evidence that the person was likely to commit the crime does not add much, in most cases, to the probability that the defendant committed a crime.").

In this case, the fact that Mr. Lopez may have leased high-end cars has little to do with his overall financial circumstances. He may lease the cars in question, or he may spend more of his budget on cars where others might spend more on other items. These types of choices are offered by the government to inflame the jury and have no probative value. *See United States v. Hatfield*, 685 F. Supp. 2d 320, 326 (E.D.N.Y. 2010) ("[I]t is irrelevant whether Mr. Brooks spent his fortune on lavish parties, instead of donating it to starving Malawian orphans. … Thus, it is entirely

speculative whether Mr. Brooks' funding for his 'lavish' personal spending came from the alleged scheme or from his sizable pre-existing fortune."). The connection between a fancy car and a motive to fix the wages of nurses is non-existent, especially when the only connection between the car Mr. Lopez drives and his overall finances would be a juror's bias about the kind of person who drives such a car. As the Ninth Circuit long ago noted, "Jurors' feelings about a man who lives that way have no legitimate bearing on whether he should be convicted." *United States v. Mitchell*, 172 F.3d 1104, 1110 (9th Cir. 1999).

Introducing specific evidence of wealth would risk unfair prejudice that would substantially outweigh any scant probative value the Government may attempt to articulate. Fed. R. Evid. 403. Courts routinely exclude evidence of overt displays of money or status, such as describing of a defendant with a fur coat and large wad of cash. "The prosecution needlessly risks leading the court into an abuse of discretion when it offers evidence with minimal probative value that could cause jurors to decide the case on legally irrelevant grounds. On retrial, evidence regarding the fur coat and wads of bills should not be offered unless clearly connected to specific conspiracy counts or particular loan transactions." *United States v. Unruh*, 855 F.2d 1363, 1377 (9th Cir. 1987). The risk of unfair prejudice was realized in *Unruh*, where a juror was discharged midtrial because he stated that "as far as he was concerned [the defendants] were buried" after he heard evidence about the fur coat and money. *Id.* at 1376. Similarly, "references to specific purchases or details reflecting branding of clothing, hotels, or other personal items is not relevant, and the prejudicial effect of that evidence outweighs any probative value." *United States v. Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at *5 (N.D. Cal. May 22, 2021).

Rather than risking the need to discharge a juror or an abuse of discretion, irrelevant evidence of Mr. Lopez's possessions and finances should simply be excluded in the first place. "A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value." *United States v. Mitchell*, 172 F.3d 1104, 1108-09 (9th Cir. 1999); *see also Garcia v. Sam Tanksley Trucking, Inc.*, 708 F.2d 519, 522 (10th Cir. 1983) ("Reference to the wealth or poverty of either party, or reflection on financial disparity, is clearly improper argument.") (collecting cases);

Whittenburg v. Werner Enterprises Inc., 561 F. 3d 1122, 1130 n.1 (10th Cir. 2009) ("Comments on the wealth of a party have repeatedly and unequivocally been held highly prejudicial, and often alone have warranted reversal."); *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980) (reversing conviction based on "the prosecutor's trial strategy" which was "designed to equate wealth with wrongdoing and to appeal to the potential bias of not-so-wealthy jurors against a very wealthy real estate entrepreneur.").

Apart from being unfairly prejudicial, any evidence of financial circumstances will cause undue delay, confuse the jury and waste the Court's time, under Fed. R. Evid. 403. The door will be opened or the defense to rebut any unfair inference and to introduce evidence concerning the circumstances and lack of any connection to the charges. Because this is exactly the type of evidence and argument the courts have long held is unfair, the Court should exclude all evidence and argument to the financial circumstances of Mr. Lopez.

Finally, the financial circumstances evidence and argument will cause substantial prejudice on the other counts years apart. If a transaction the government focuses is offered on the wire fraud counts, for example, heightened unfair prejudice concerns are raised by concerning the evidence on the Sherman Act Count. This is the type of evidence that the jury will be unable to disregard or "unhear" or "unsee" on distinct and separate charges. For example, the fact that Mr. Lopez's partner purchased a high-end car in 2021 undermines a fair trial on the Sherman Act count years earlier, during 2016 to 2019. As has been recognized, "the naive assumption that prejudicial effects can be overcome by instructions to jury" becomes more clearly than ever "unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). These concerns separately impact Mr. Lopez's Sixth Amendment right to a fair trial, including the right to an impartial jury capable of adjudicating each count independently, and his right to Due Process under the Fifth Amendment.

C. CONCLUSION

Accordingly, pursuant to Rule 401 and 403, the Due Process Clause, and right to a fair trial under the Sixth Amendment, any government evidence concerning the financial circumstances of Mr. Lopez should be excluded. For the foregoing reasons, the Court should

grant the Defendant's motions in limine.

IV. MOTION *IN LIMINE* NO. 4: TO PRECLUDE REFERENCES TO "VICTIM" DURING TRIAL.

A. BACKGROUND

The government alleges that beginning no later than March 2016, Edward Ruben Lopez ("Mr. Lopez") and "his co-conspirators," "entered into and engaged in a conspiracy to suppress and eliminate competition for the services of nurses employed by the co-conspirator companies by agreeing to fix the wages of those nurses." (See ECF No. 1, Indictment ¶ 16.) Subsequently, in its Superseding Indictment, the Government charges the defendant with five counts of wire fraud related to the sale of Company F to Company G in December 2021, in violation of 18 U.S.C. §1343 (the "Wire Fraud Counts"). (See ECF No. 49, Superseding Indictment.)

In support of these allegations, Government witnesses have raised details relating to Mr. Lopez's lease of a high-end car or the purchase of a high-end car by his partner. For example, at the suppression hearing, the FBI agent testified about a particular high-end, leased car. See ECF No. 250, at 112:18-23. The prosecutor then made other references to the car during questioning at the hearing. See ECF No. 250, at 171:9-9, 173:12-13, 174:1-3. The type of car an accused leases is not probative of any elements of the offenses charged in this case.

The Government's Exhibit List includes the purchase of another high-end car by Mr. Lopez's partner. See Gov't Exh. 240 (Retail Installment Sale Contract) (ECF No. 240). The types of cars driven by others associated with an accused has zero probative value, under Fed. R. Evid. 401, and is unfairly prejudicial, under Fed. R. Evid. 403, and the Due Process Clause.

The defense brings this motion to ensure that these and any other related transactions are properly excluded from trial evidence and arguments so the jury is not unduly influenced or inflamed to rely on perceptions of excessive wealth, especially because personal wealth and Mr. Lopez's financial circumstances are irrelevant to the specific crimes charged, under Fed. R. Evid. 401, Fed. R. Evid. 403, and the Due Process Clause. The government should never be allowed to introduce evidence concerning an accused's financial circumstance or to unfairly prejudice the jury. Due process concerns are separately raised by the use of the evidence on disparate counts

years apart.

Accordingly, the government and its witnesses should be precluded from referring to specific purchases, indicia of wealth, financial circumstances, or otherwise indicating that any personal wealth or lifestyle is somehow linked to the alleged crimes at issue.

B. ARGUMENT

Mr. Lopez's financial circumstances, and especially his specific choices of purchases or bank account balances, are irrelevant to whether his conduct constituted the crimes of wire fraud or wage-fixing for which he is charged. As the Supreme Court has noted, "appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940). The Supreme Court's distinction between "class prejudice" evidence and "corporate power" evidence provides a useful framework to easily discern that any financial circumstances or status of Mr. Lopez, as an individual, is irrelevant to the elements of the separate and distinct offenses. The spillover effect of this evidence on the disparate charges is further prejudicial. Even generalized and non-specific references to a defendant's financial status are considered irrelevant. *See United States v. Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at *4 (N.D. Cal. May 22, 2021) ("Nonetheless, evidence of an individual's lavish spending habits, without a connection to an individual's participation in criminal activity, is irrelevant."). As the Supreme Court has noted, "Unfair prejudice," under Rule 403, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Fed. R. Evid. 403 Advisory Committee's Notes).

Other courts have noted lack of any relevance under Fed. R. Evid. 401. For example, in *Holmes*, the court characterized the Government's arguments that wealth was "the fruit of Holmes's fraudulent scheme" and "motivated her to 'continue and conceal her fraud'" as "close to the impermissible use of evidence to show Holmes was wealthy and wished to become wealthier. On its face, this does not appear to have the requisite connection to the alleged conduct required under case law." *Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at *5 (N.D. Cal. May 22, 2021). Whatever a defendant's financial circumstances are, they simply "do not prove much, because

almost everyone, poor or not, has a motive to get more money. And most people, rich or poor, do not steal to get it." *United States v. Mitchell*, 172 F.3d 1104, 1109 (9th Cir. 1999).

Mitchell prohibited the introduction of financial circumstances evidence to cases where that evidence establishes an "inclination" towards the specific crime, such as an "abrupt change of circumstances … [that] amounts to circumstantial evidence of the crime," or evidence of financial circumstances that put pressure on the individual to commit the specific crime. *United States v. Mitchell*, 172 F.3d 1104, 1109 (9th Cir. 1999) ("There is a distinction between an interest, in the sense that it is in anyone's interest to be richer rather than poorer, and an inclination. A mere interest, unconnected with inclination, desperation, or other evidence that the person was likely to commit the crime does not add much, in most cases, to the probability that the defendant committed a crime.").

In this case, the fact that Mr. Lopez may have leased high-end cars has little to do with his overall financial circumstances. He may lease the cars in question, or he may spend more of his budget on cars where others might spend more on other items. These types of choices are offered by the government to inflame the jury and have no probative value. *See United States v. Hatfield*, 685 F. Supp. 2d 320, 326 (E.D.N.Y. 2010) ("[I]t is irrelevant whether Mr. Brooks spent his fortune on lavish parties, instead of donating it to starving Malawian orphans. … Thus, it is entirely speculative whether Mr. Brooks' funding for his 'lavish' personal spending came from the alleged scheme or from his sizable pre-existing fortune."). The connection between a fancy car and a motive to fix the wages of nurses is non-existent, especially when the only connection between the car Mr. Lopez drives and his overall finances would be a juror's bias about the kind of person who drives such a car. As the Ninth Circuit long ago noted, "Jurors' feelings about a man who lives that way have no legitimate bearing on whether he should be convicted." *United States v. Mitchell*, 172 F.3d 1104, 1110 (9th Cir. 1999).

Introducing specific evidence of wealth would risk unfair prejudice that would substantially outweigh any scant probative value the Government may attempt to articulate. Fed. R. Evid. 403. Courts routinely exclude evidence of overt displays of money or status, such as describing of a defendant with a fur coat and large wad of cash. "The prosecution needlessly risks leading the court

into an abuse of discretion when it offers evidence with minimal probative value that could cause jurors to decide the case on legally irrelevant grounds. On retrial, evidence regarding the fur coat and wads of bills should not be offered unless clearly connected to specific conspiracy counts or particular loan transactions." *United States v. Unruh*, 855 F.2d 1363, 1377 (9th Cir. 1987). The risk of unfair prejudice was realized in *Unruh*, where a juror was discharged midtrial because he stated that "as far as he was concerned [the defendants] were buried" after he heard evidence about the fur coat and money. *Id.* at 1376. Similarly, "references to specific purchases or details reflecting branding of clothing, hotels, or other personal items is not relevant, and the prejudicial effect of that evidence outweighs any probative value." *United States v. Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at *5 (N.D. Cal. May 22, 2021).

Rather than risking the need to discharge a juror or an abuse of discretion, irrelevant evidence of Mr. Lopez's possessions and finances should simply be excluded in the first place. "A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value." *United States v. Mitchell*, 172 F.3d 1104, 1108-09 (9th Cir. 1999); *see also Garcia v. Sam Tanksley Trucking, Inc.*, 708 F.2d 519, 522 (10th Cir. 1983) ("Reference to the wealth or poverty of either party, or reflection on financial disparity, is clearly improper argument.") (collecting cases); *Whittenburg v. Werner Enterprises Inc.*, 561 F. 3d 1122, 1130 n.1 (10th Cir. 2009) ("Comments on the wealth of a party have repeatedly and unequivocally been held highly prejudicial, and often alone have warranted reversal."); *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980) (reversing conviction based on "the prosecutor's trial strategy" which was "designed to equate wealth with wrongdoing and to appeal to the potential bias of not-so-wealthy jurors against a very wealthy real estate entrepreneur.").

Apart from being unfairly prejudicial, any evidence of financial circumstances will cause undue delay, confuse the jury and waste the Court's time, under Fed. R. Evid. 403. The door will be opened or the defense to rebut any unfair inference and to introduce evidence concerning the circumstances and lack of any connection to the charges. Because this is exactly the type of

evidence and argument the courts have long held is unfair, the Court should exclude all evidence and argument to the financial circumstances of Mr. Lopez.

Finally, the financial circumstances evidence and argument will cause substantial prejudice on the other counts years apart. If a transaction the government focuses is offered on the wire fraud counts, for example, heightened unfair prejudice concerns are raised by concerning the evidence on the Sherman Act Count. This is the type of evidence that the jury will be unable to disregard or "unhear" or "unsee" on distinct and separate charges. For example, the fact that Mr. Lopez's partner purchased a high-end car in 2021 undermines a fair trial on the Sherman Act count years earlier, during 2016 to 2019. As has been recognized, "the naive assumption that prejudicial effects can be overcome by instructions to jury" becomes more clearly than ever "unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). These concerns separately impact Mr. Lopez's Sixth Amendment right to a fair trial, including the right to an impartial jury capable of adjudicating each count independently, and his right to Due Process under the Fifth Amendment.

C. CONCLUSION

Accordingly, under Rule 401 and 403, the Due Process Clause, and right to a fair trial under the Sixth Amendment, any government evidence concerning the financial circumstances of Mr. Lopez should be excluded. For the foregoing reasons, the Court should grant the Defendant's motions in limine.

V. MOTION *IN LIMINE* NO. 5: TO COMPEL A GRANT OF IMMUNITY

At least three witnesses can establish that there was no agreement to fix wages as alleged. These witnesses refuse to testify in the absence of immunity.

In meeting and conferring with the government on this issue, the government refuses to provide immunity. The Ninth Circuit has established a process in which the Court can compel immunity. This process is needed her in order to present this evidence to establish the absence of an agreement as alleged.

A. LEGAL STANDARD

Although the executive branch has exclusive authority to grant immunity, this Court may compel a grant of immunity to a defense witness when the prosecution's refusal or failure to grant the defense witness immunity will result in the deprivation of the defendant's constitutional rights to due process and a fair trial. *United States v. Straub*, 538 F.3d 1147, 1157 (9th Cir. 2008).

Title 18, of the United States Code, Section 6003(b) provides that: "A United States attorney may…request an order under subsection (a) of this section when in his judgment –

> (1) The testimony or other information from such individual may be necessary to the public interest; and
>
> (2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

18 U.S.C. § 6003(a) provides that:

> "[i]n the case of any individual who has been or may be called to testify…in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

The Justice Manual, Title 9-23.214 – Granting Immunity to Compel Testimony on Behalf of a Defendant, provides that:

> As a matter of policy…except in extraordinary circumstances where the defendant plainly **would be deprived of a fair trial** without such testimony or other information. This policy is not intended to preclude compelling a defense witness to testify if the prosecutor believes that to do so is necessary to a successful prosecution. (emphasis added).

The Ninth Circuit has clarified that a defendant can establish a Fifth and Sixth Amendment violation by showing that: "(1) the defense witness's testimony was relevant; and (2) either (a) the prosecution intentionally caused the defense witness to invoke their Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding

process; or (b) the prosecution granted immunity to a government witness in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a **fundamentally fair trial**." *See United States v. Wilkes*, 744 F.3d 1101, 1105 (9th Cir.2014) ("*Wilkes*"). (emphasis added).

In reference to the first prong, the relevance requirement is described as minimal. *See e.g., United States v. Straub*, 538 F.3d 1147, 1157 (9th Cir.2008) ("*Straub*"). The defendant "need not show that the testimony sought was either exculpatory or essential to the defense." *See United States v. Westerdahl*, 954 F.2d 1083, 1086 (9th Cir.1991). The testimony need only be relevant. *See United States v. Whitehead*, 200 F.3d 634, 640 (9th Cir. 2000). Evidence is relevant if it simply tends to make the existence of a material fact more or less probable. Fed. R. Evid. 401. Evidence is relevant even if it simply "give[s] the defense some additional ammunition in attacking" a witness's credibility. *United States v. Straub*, 538 F.3d at 1157. So long as Mr. Lee's testimony tends to make a material fact at issue more or less likely to be true, his testimony is relevant, and this prong is met.

Here, two witnesses from Company E and one from Company D in the Superseding Indictment can directly show there was no alleged agreement. The Company E employees will establish that the wage decisions were made independently and were not based in any manner with communications with Company A or others. The Company D employee, originally was given immunity by the government, and attended the alleged meetings and can also establish that no wage-fixing agreement was made during any of these meetings or at any other time.

In reference to the second prong, the defendant shall first focus on the second alternative method: "the prosecution granted immunity to a government witness in order to obtain that witness's testimony but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness". *See Straub* 538 F.3d at 1158. "A showing that the selective denial of immunity had the effect of distorting the fact-finding process is sufficient." *See Straub* 538 F.3d at 1158. The Ninth Circuit cases make clear that the

"government witnesses who are granted favorable plea deals in return for their testimony are encompassed by *Straub* use of the term 'immunized'." *See Wilkes* 744 F.3d at FN1. In *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir.1991) ("*Westerdahl*"), the Ninth Circuit explained that: "[f]or the Government to grant immunity to a witness in order to obtain his testimony, while denying immunity to a defense witness whose testimony directly contradicts that of the government witness, is they type of fact-finding distortion we intended to prevent in [*United States v. Lord*, 711 F.2d 887 (9th Cir. 1983)]"; *See also United States v. Young*, 86 F.3d 944, 949 (9th Cir. 1996) ("Because Drake was the only government witness who could definitively identify defendants as his upper-level supplier of cocaine, impeachment of Drake's testimony was critical to the defense. Delf's testimony would not have been cumulative or non-exculpatory. It would have called into question the cornerstone of the Government's case. Its exclusion was not harmless error."); *Westerdahl*, 945 F.2d at 1087 ("observing that the prosecution had granted use immunity to two witnesses and dropped charges against a third witness, while denying immunity to a defense witness who could have contradicted one of the three prosecution witnesses."); *Straub* 538 F.3d at 1164 ("Of thirteen witnesses described all but one of the prosecution's twelve witnesses received either formal immunity, informal immunity or other substantial incentives such as cash compensation or a reduction of sentence in exchange for their testimony…we conclude that this exercise of discretion by the prosecution impermissibly distorted the fact-finding process, in violation of the Due Process Clause. A trial under these circumstances is not fundamentally fair.") "Thus, a witness directly contradicts another witness if their respective testimonies cannot simultaneously be true, although in this context the proffered defense testimony "need only support (as opposed to compel) a finding by the jury that it was 'directly contradictory'." *See Wilkes* 744 F.3d at 1106.

Finally, the alternative prong also applies. The Company E employees insist that they need immunity even though the alleged conduct is past the five year statute of limitations. Counsel has stated that there is risk of prosecution. Based on the history in this case, the government has caused the defense witnesses to invoke their Fifth Amendment right against self-incrimination. This will result in a distortion of the fact-finding process

B. CONCLUSION

For the foregoing reasons, Mr. Lopez respectfully requests that the Court grant immunity to the witnesses who can establish a complete defense to the conspiracy allegations. These witnesses are needed to ensure a fair trial and that the jury will hear this evidence.

Dated this 24th day of February, 2025. Respectfully Submitted,

PILLSBURY WINTHROP SHAW PITTMAN LLP (pro hac vice)

/s/
MARK L. KROTOSKI (pro hac vice)
2550 Hanover Street
Palo Alto, CA 94304-1115
Tel: (650) 233-4500

CLARK HILL PLLC

/s/
PAOLA M. ARMENI
Nevada Bar No. 8357
1700 South Pavilion Center Drive, Suite 500
Las Vegas, Nevada 89135
Tel: (702) 862-8300

PILLSBURY WINTHROP SHAW PITTMAN LLP (pro hac vice)

/s/
RICHARD P. DONOGHUE (pro hac vice)
31 W 52nd Street
New York, NY 10019
Tel: (212) 858-1000

ANDERSON KILL, P.C. (pro hac vice)

/s/
SAMUEL M. BRAVERMAN (pro hac vice)
BAR NO. 2553808
SBRAVERMAN@ANDERSONKILL.COM
1251 Avenue of the Americas, 42nd Floor
New York, NY 10020
Telephone: (212) 278-1008