JEFFREY CRAMER (NYSBN 2621779)
ANDREW MAST (CABN 284070)
PARADI JAVANDEL (CABN 295841)
CONOR BRADLEY (NJBN 373722021)
United States Department of Justice
Antitrust Division
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 941092
Tel: 415.934.5300 / Fax: 415.934.5399
andrew.mast@usdoj.gov

SUE FAHAMI
Acting United States Attorney
Nevada Bar Number 5634
RICHARD ANTHONY LOPEZ
Assistant United States Attorney
501 Las Vegas Boulevard South, Suite 1100
Las Vegas, Nevada 89101
Tel: 702.388.6551 / Fax: 702.388.6418
tony.lopez@usdoj.gov
Attorneys for the United States

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. EDUARDO RUBEN LOPEZ, a/k/a "Edward Lopez" Defendant.	Case No. 2:23-CR-00055-CDS-DJA **UNITED STATES' OMNIBUS OPPOSITION TO DEFENDANT'S MOTIONS *IN LIMINE* [DKT. No. 503]**

CERTIFICATION: This response is timely filed in accordance with this Court's Scheduling Order (Dkt. No. 302).

I. INTRODUCTION

The United States opposes Defendant's *in limine* motions. Pursuant to the Court's Standing Order Regarding Chambers Practices III.A., the government also informs the

Court that a junior member of the litigation team will be handling oral arguments on the government's motions *in limine* and its opposition to Defendant's motions *in limine*.

II. OPPOSITION TO DEFENDANT'S MOTIONS *IN LIMINE*

Government's Opposition to Defendant's Motion *in Limine* No. 1 to Admit Evidence of Select Excerpts of October 2016 Antitrust Guidance on Wage-Fixing Agreements

Defendant's motion to admit the Antitrust Guidance for Human Resource Professionals ("Guidance")[1] should be denied. The Guidance is inadmissible hearsay, is irrelevant under Federal Rules of Evidence 401 and 402, and should be excluded as prejudicial under Rule 403.

As a threshold matter, the Guidance is inadmissible hearsay because it is not a statement by a party-opponent. It is not a "formal, signed statement[]" made in a "plea agreement [or] sentencing memoranda" of the type the Ninth Circuit found to be an admission in *United States v. Mirabal*, 98 F.4th 981, 986 (9th Cir. 2024). Moreover, while the government has cited portions of the Guidance in other cases, Defendant cannot bootstrap the filings in those cases to render the entirety of the Guidance an adopted party admission here. *See Lear Auto. Dearborn, Inc. v. Johnson Controls, Inc.*, 789 F. Supp. 2d 777, 781 (E.D. Mich. 2011) (party did not adopt entire dataset where it did not "[make] use of, [rely] upon, or otherwise vouch[] for the truth of the *specific aspect[s]*" of the data sought to be admitted (emphasis in original); *United States v. Johnson*, 280 F. Supp. 3d 772, 773 (D. Md. 2017) (defendant's post of a video on his Instagram account did not manifest his intent to "adopt[] the video as a whole").

[1] The Guidance was jointly issued by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") in October 2016.

And, even if this Court determines that the portions of the Guidance cited in prior cases are not hearsay, those statements (and the Guidance as a whole) are irrelevant.[2] The prior statements Defendant identifies relate to the government's discussions of the illegality of labor allocation ("no-poach") agreements.[3] Defendant is charged with participating in a conspiracy to fix wages, not a no-poach conspiracy. In his motion, Defendant intentionally conflates no-poach conspiracies (the subject of the prior statements) and wage-fixing (the crime with which Defendant is charged). But, as each of the cited prior statements made clear, the government explained that *no-poach* agreements would be criminally prosecuted for the first time following the issuance of the Guidance.[4] The government's prior statements do not address the criminality of wage fixing.

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[2] It appears that Defendant only seeks to admit the Guidance, not the statements to which he cites, (*see* Def.'s Omnibus Mot. *in Limine*, Dkt. No. 503, at 6 (citing filings)), and that his citation to those statements is only intended to support his argument that the Guidance has been adopted as a party admission. But, if Defendant seeks to introduce the statements themselves, in addition to the underlying Guidance, the government's argument regarding admissibility, relevance, and prejudice apply equally to exclude those statements.

[3] (Def. Omnibus Mot. Dkt. No. 503, at 6 (citing filings)); Statement of Interest of the United States, at 4, *In re: Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 2, 2019), Dkt. No. 158 ("Naked **no-poach agreements** are *per se* illegal." (emphasis added)); Corrected Statement of Interest of the United States of America, at 9-10, *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244-SAB (E.D. Wash. Mar. 8, 2019), Dkt. No. 34 ("Just as an agreement among competing sellers to allocate customers eliminates competition for these customers, **an agreement among competing employers to allocate employees** eliminates competition for those employees." (emphasis added)); Brief of Amicus United States of America in Support of Neither Party, at 25, *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, No. 20-55679 (9th Cir. Nov. 19, 2020), Dkt. No. 14 ("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**." (emphasis added)).

[4] Furthermore, in these statements, the government made clear that it would criminally prosecute no-poach agreements "that began before [October 2016] but continued after that announcement." Statement of Interest of the United States, at 9, *In re: Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 2, 2019), Dkt. No. 158. Defendant's conspiracy began in 2016 and continued until 2019—well after the issuance of the Guidance.

The Guidance did not change the DOJ's policy on wage-fixing conspiracies (and none of the cited Statements of Interest say otherwise). As the government explained in its Motion *in Limine* No. 1, wage fixing is and has been an illegal form of price fixing in the labor market proscribed by the Sherman Act. (Gov.'s Omnibus Mot. *in Limine*, Dkt. No. 495, at 11.)[5] The Guidance merely set forth the DOJ's prosecutorial priorities in identifying and bringing criminal charges against employers who criminally violate their workers' rights to free-market labor conditions—by wage fixing, no-poach agreements, or any other constraint.[6] Guidance, at 3. As such, the Guidance did not make any conduct illegal; indeed, it cannot, as agency guidance does not have the force and effect of law. *Christenson v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Interpretations . . . contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law.").

And, even it did, it would still be irrelevant. It does not matter whether Defendant was on notice that his conduct was a crime or that he knew he could be criminally

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[5] In 1926, the Supreme Court held that restraints of trade in the labor market were illegal under the Sherman Act. *Anderson v. Shipowners Ass'n of Pac. Coast*, 272 U.S. 359, 360-66 (1926) (conspiracy to restrict employment "is precisely what this language [Section One of the Sherman Act] condemns"; it is irrelevant that the product restrained is labor instead of goods). Subsequent courts have uniformly found naked wage fixing agreements to be an illegal *per se* restraint on the labor market. *See , e.g.*, *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1017 (10th Cir. 1998); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1213 (N.D. Cal. 2015) (wage suppression states a *per se* antitrust claim); *Carson-Merenda v. Det. Med. Ctr.*, 862 F. Supp. 2d 603, 624 (E.D. Mich. 2012) ("[A] conspiracy among competing hospitals to fix wages . . . would be subject to per se treatment."); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 157 (N.D.N.Y. 2010) ("Generally, price-fixing [or in this case wage-fixing] agreements are considered a per se violation of the Sherman Act." (alterations in original)); *Doe v. Ariz. Hosp. & Healthcare Ass'n*, No. CV 07-1292-PHX-SRB, 2009 WL 1423378, at *1, *3-4 (D. Ariz. Mar. 19, 2009) (suppression of nurses' wages alleges *per se* Sherman Act violation).

[6] The Guidance was "intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws" because "HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws" and can "implement safeguards" to prevent noncompliance. Guidance, at 1.

prosecuted. (Gov.'s Omnibus Mot. *in Limine*, Dkt. No. 495, at 10-12); *see also United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1210 (9th Cir. 1992) (jury instructions in a price-fixing case properly stated that it does "not matter" whether defendants "thought what they are doing legal"). Nor does Defendant even claim that he or any of his co-conspirators were aware of the Guidance, of the state of law prior to the Guidance, or that the Guidance or lack thereof affected their conduct.

Because the cited statements and the Guidance are irrelevant, *United States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989) provides no support for Defendant's argument. In *Van Griffin*, the Ninth Circuit found that a Department of Transportation manual regarding the proper procedures for administering a field sobriety test was admissible as a statement of a party opponent in a prosecution for driving under the influence because the manual was relevant "to show the measures that are necessary to be taken in order to have a reliable [field sobriety] test[,]" where the defendant argued those steps were not followed. *Id.* at 638. But, here, the Guidance has no relevance. The DOJ's prosecutorial decision-making policies do not make any fact of consequence more or less probable or support any defense.

Finally, introduction of the Guidance would be unduly prejudicial. Introduction of the government's statements regarding no-poach agreements in prior cases would mislead the jury and confuse the issues because it would introduce the concept of a completely different anti-competitive agreement than the one with which Defendant is charged. Similarly, introduction of the wage-fixing portions of the Guidance would mislead the jury into believing that it needs to determine whether the Guidance is law, whether it was illegal to fix wages prior to the issuance of the Guidance, whether it matters if it was illegal to fix wages prior to the Guidance, or that it needs to consider the DOJ's prosecutorial decision-making policies at the time of the offense. None of that is the jury's responsibility, and all of

it would be confusing and a waste of time. *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005) ("[I]t is the duty of juries in criminal cases to take the law from the court, and apply it to the facts as they find them to be from the evidence." (quoting *Sparf v. United States*, 156 U.S. 51, 102 (1895)). As such, the Guidance and the government's prior statements should be excluded under Rule 403.

Government's Opposition to Defendant's Motion *in Limine* No. 2 to Exclude Lay Testimony Regarding Intent, Knowledge or State of Mind

This Court should also deny Defendant's motion to exclude lay testimony regarding intent, knowledge, or state of mind. For one, Defendant misstates the intent requirement for the Sherman Act count when he asserts that the government must prove both "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." (Def.'s Omnibus Mot. *in Limine*, Dkt. No. 503, at 8.) As the government has explained more fully elsewhere, (Gov.'s Omnibus Mot. *in Limine*, Dkt. No. 495, at 8-10), because Defendant is charged with a *per se* violation of the Sherman Act, the government need not prove he had the specific intent to achieve an anti-competitive effect. "Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the *per se* rule is designed to avoid."[7] *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991) (quoting *United States v. Koppers Co.,* 652 F.2d 290, 296 n.6 (2d Cir. 1981)).

The cases cited by Defendant regarding the intent requirement are inapposite. The Supreme Court's decision in *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978) was not a *per se* case but rather dealt with an information exchange among competitors. *See Brown*, 936 F.2d at 1046 (rejecting *Gypsum*'s applicability in a *per se* case);

[7] Defendant similarly attempts to shoehorn a specific intent requirement into his Proposed Jury Instructions on the Sherman Act count. (*See* Def.'s Proposed Jury Instructions, Dkt. No. 500, at 8 (stating that the government must prove that Defendant "intend[ed] to unreasonably restrain competition").) The government intends to object to that proposed instruction on the same basis.

see also United States v. Gillen, 599 F.2d 541, 545 (3d Cir. 1979). And *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980) did not address an antitrust conspiracy at all.

Nevertheless, the testimony offered by law enforcement agents and other lay witnesses will not improperly address Defendant's intent, knowledge, or state of mind. Under Rules 602 and 701, a witness may testify to any matter within the witness's personal knowledge—that is, "the witness's personal observations, experiences, and perceptions"—as long as such testimony is "not based on scientific, technical, or other specialized knowledge." *Doe v. Rose*, No. CV-15-07503, 2016 WL 9107136, at *4 (C.D. Cal. Sept. 22, 2016) (citing Fed. R. Evid. 602 & 701).

Here, the witness testimony will be consistent with Rules 602 and 701. The witnesses will testify to matters within their personal knowledge—namely, their first-hand observations of Defendant during their interactions with him. *See United States v. Lopez*, 762 F.3d 852, 863 (9th Cir. 2014) ("Personal knowledge means knowledge produced by direct involvement of the senses."). And, to the extent these witnesses offer lay opinion testimony, it will be proper because the testimony will be based on those witnesses' "personal observation[s of Defendant] and recollection of concrete facts" rather than any specialized knowledge. *See United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005) (internal quotation marks omitted).

Specifically, with respect to the conversations Defendant had with Federal Bureau of Investigation ("FBI") agents during his interview on October 30, 2019, the agents will not testify that Defendant was or was not under the influence of medication. Instead, they will testify, as they did at a pretrial suppression hearing, (*see, e.g.*, Hrg. Tr., Dkt. No. at 250, at 26:11-18), that *he did not appear to be* under the influence based on their first-hand observations of him. This testimony is proper lay opinion testimony under Rule 701. *See,*

e.g., *United States v. Robinson*, No. 16-98 (CKK), 2017 WL 11496730, at *1 (D.D.C. June 30, 2017) ("[I]t is permissible under Rule 701 for a lay witness to opine that an individual *appeared* to be under the influence." (emphasis in original)); *United States v. Horn*, 185 F. Supp. 2d 530, 561 (D. Md. 2002) ("There is near universal agreement that lay opinion testimony about whether someone was intoxicated is admissible." (citing cases)).

For similar reasons, Defendant's argument that "[a]gents should . . . not be allowed to invade the province of the jury in determining the intent issues" is unavailing. (*See* Def.'s Omnibus Mot. *in Limine*, Dkt. No. 503, at 12.) Although it is unclear what "intent issues" refers to—Defendant does not explain—the agents will not testify to *any* issues related to intent. They will not testify that Defendant intended to enter an anti-competitive agreement. They will not testify that Defendant had a specific intent to defraud. Rather, they will testify to their personal observations that Defendant did not appear to be under the influence and did not appear to be on drugs, and they will testify as to the specific statements Defendant made to them during his consensual interview. Those facts do not go to Defendant's "intent" to commit any of the crimes charged in the Superseding Indictment.

Finally, the agents' testimony is not prejudicial under Rule 403. To the extent Defendant intends to argue that he was intoxicated during his interview with the FBI agents, as he has throughout this case, the agents' testimony that he did not appear to be intoxicated will be highly relevant "to determining a fact in issue." Fed. R. Evid. 701(b). Moreover, as explained more fully below, (*see infra* Government's Opposition to Defendant's Motion *in Limine* No. 3), the fact is only at issue because Defendant continues to put it at issue; the agents are entitled to testify how he appeared to them in order to counter this defense. And the probative value of this testimony will not be substantially outweighed by the danger of unfair prejudice. Indeed, beyond identifying the Rule 403

standard, Defendant does not offer any argument to explain why lay testimony by agents and other witnesses would be unfairly prejudicial. As such, Defendant's motion to exclude lay opinion testimony should be denied.

Government's Opposition to Defendant's Motion *in Limine* No. 3 to Exclude Financial Circumstances Evidence and Argument

This Court should also deny Defendant's motion to exclude financial circumstances evidence and argument. Evidence of a defendant's financial circumstances is admissible where, as here, it relates to the charges. *See United States v. Miller*, 172 F.3d 1104, 1109 (9th Cir. 1999); *see also United States v. Ebonka*, No. 2:22-cr-00156-CDS-NJK, 2025 WL 326911, at *3 (D. Nev. Jan. 29, 2025).

Defendant's financial circumstances and luxury purchases are relevant motive evidence, in part, because Defendant's purchase of a high-end, luxury vehicle was the fruit of his fraudulent wire fraud scheme. In December 2021, just hours after receiving a $10.5 million wire from Solace, Defendant purchased a Bentley 2022 Continental GT Speed for a total cost of $363,683.88. Defendant intended this purchase to be his reward for the fraudulent scheme; he received the purchase agreement and wire instructions from the car dealership one day *before* Solace sent him the money.[8]

As the fruit of Defendant's scheme, the Bentley purchase is admissible to prove Defendant's motive and his intent to defraud. *United States v. Bradshaw*, 690 F.2d 704, 708 (9th Cir. 1982) ("Motive is evidence of the commission of any crime."); *United States v. Naranjo*, 634 F.3d 1198, 1207 (11th Cir. 2011) ("Evidence that a defendant personally

[8] Defendant states that the car was "purchase[d]" by his partner, Mr. Andrew Edrosa. (Def.'s Omnibus Mot. *in Limine*, Dkt. No. 503, at 13.) This is false. Mr. Edrosa was listed as the buyer in the purchase agreement, but the evidence indicates that the funds sent by Solace were used to purchase the car. For example, on December 23, 2021, Defendant's banker sent him an email (without including Mr. Edrosa), told him that the wire from Solace had been received, and stated "I can't wait to see your new toy." Only hours later, the same banker emailed Defendant and a representative from the car dealership (again, without including Mr. Edrosa) and confirmed that the wire payment for the car had been sent to the dealership. It is irrelevant how title in the car is held; it was purchased by Defendant with the fruits of his fraud.

profited from a fraud may provide circumstantial evidence of an intent to participate in that fraud."). For example, in *United States v. Reyes*, 660 F.3d 454, 464 (9th Cir. 2011), the Ninth Circuit held that evidence of the amount of money the defendant made as a result of a fraud scheme was relevant because it showed the defendant's "motivation for his involvement" in the scheme and allowed the jury to draw a "reasonable inference that he knew what he was doing, and how the scheme operated to his benefit." That holding is axiomatic. *See, e.g.*, *United States v. Bell*, 112 F.4th 1318, 1341-42 (11th Cir. 2024) (holding that the defendant's "lifestyle expenditures . . . were admissible to prove his motive for fraud"); *United States v. Betro*, 115 F.4th 429, 449 (6th Cir. 2024) (explaining that evidence of the defendant's spending was relevant to show his motive for participating in a conspiracy to defraud Medicare).[9] Defendant's Bentley purchase shows how he profited from his fraudulent scheme, and is relevant.

Defendant's statements to FBI agents regarding his high-end luxury Maserati (then parked in his driveway) are also relevant because Defendant has put those statements at issue. Defendant has argued that any statements he made in his October 30, 2019 interview with FBI agents were involuntary because, he alleges, he was under the influence of medication during the interview. Defendant moved to suppress his statements in a pretrial suppression hearing. (Def.'s Mot. to Suppress Interview Statements, Dkt. No. 168.) The Magistrate Judge denied his motion and found that Defendant's statements were voluntary. (Report and Recommendation, Dkt. No. 269, at 1.) Despite that ruling, Defendant has made clear that he intends to continue to argue at trial that he was under the effects of

[9] *See also United States v. Hill*, 643 F.3d 807, 843 (11th Cir. 2011) ("[W]ith financial crimes, the more money, the more motive."); *United States v. Peake*, 143 F. Supp. 3d 1, 18 (D.P.R. 2013) (holding that evidence of the defendant's compensation was relevant "to establish a motive for why [the defendant] allegedly participated in [a price-fixing] conspiracy").

medication during that interview; in Defendant's Expert Disclosures he noticed the expert testimony of a medical doctor who intends to testify about the effect of the medications Defendant alleges to have taken the day before his FBI interview. (Def.'s Expert Disclosure, Dkt. No. 502.)

Since Defendant apparently intends to assert that he was not cognitively capable of consent during his FBI interview, he has put his state of mind at issue. Defendant's statements to the FBI agents about his Maserati are therefore relevant to contradict his contention that he was impaired by drugs. After the FBI interviewed Defendant on October 30, 2019, the agents took steps to image Defendant's phone. While his phone was being imaged by the Computer Analysis Response Team ("CART") agent, the FBI agents made small talk with Defendant. That small talk included a conversation about the Maserati in his driveway. (Hrg. Tr., Dkt. No. 250, at 112:18-23.) Defendant told the agents, for example, that he was leasing the Maserati and another car because leasing two vehicles kept "the mileage down." (*Id.*)

The conversation and Defendant's statements, in which Defendant was able to clearly articulate the reason he leased two cars, rebuts Defendant's argument he was cognitively impaired and, therefore, unable to consent to the interview. Those statements are relevant and admissible to contradict any proffered defense of involuntariness. *See United States v. Kessi*, 868 F.2d 1097, 1107 (9th Cir. 1989) (evidence is relevant and admissible where it rebuts defendant's proffered defense).[10] The conversation additionally

[10] The government does not intend to elicit testimony regarding the Maserati unless Defendant puts the voluntariness of his interview at issue, questions agent's memory of the interview on cross-examination, or otherwise puts the Maserati at issue through his defenses or cross-examination.

corroborates the testifying FBI agent's testimony because it shows that he remembers specific details of the day of the interview.

Finally, Rule 403 does not bar evidence of Defendant's purchase of the Bentley or Defendant's conversation with law enforcement. Rule 403 is "an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence." *United States v. Patterson*, 819 F.2d 1495, 1505 (9th Cir. 1987) (internal quotation marks omitted). "Under the terms of the rule, the danger of prejudice must not merely outweigh the probative value of the evidence, but *substantially* outweigh it." *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995).

For one, the Ninth Circuit has held that "[i]nfrequent references to wealth are not prejudicial." *Kessi*, 868 F.2d at 1107. Furthermore, here, even if the Court considers the financial circumstances evidence slightly prejudicial, Defendant cannot meet the high bar of showing that this prejudice substantially outweighs the highly probative nature of the evidence. *See id.* at 1106-07 (holding that the district court did not abuse its discretion in admitting "relevant and discrete" evidence of the defendant's wealth); *United States v. Whiting*, 471 F.3d 792, 801 (7th Cir. 2006) (explaining that evidence was properly admitted where it was "highly probative of [the defendant's] intent to defraud" and its "prejudicial effect . . . was not great").

Moreover, Defendant's argument that the financial circumstances evidence regarding the wire fraud counts will prejudice the jury as to the Sherman Act count is unavailing. "[J]urors are asked to compartmentalize the evidence in every case where a defendant is charged with more than one offense." *United States v. Knight*, No. 3:19-cr-00038, 2020 WL 2525773, at *2 (D. Nev. May 18, 2020). In such cases, "instructions may cure any 'spillover' evidence and render such evidence non-prejudicial." *Id.* at *2; *see also United*

States v. Johnson, 297 F.3d 845, 856-60 (9th Cir. 2002). Defendant does not explain why the prejudice resulting from the financial circumstances evidence cannot be cured with a limiting instruction to the jury. Indeed, this Court has already rejected Defendant's argument that he will be prejudiced by "spillover" evidence between the charges in this case. (Order, Dkt. No. 330 (affirming the Magistrate Judge's order denying Defendant's motion to sever, which was based, in part, on the potential prejudice from "spillover" evidence).) Thus, Defendant's motion to preclude financial circumstances evidence and argument should be denied.

Government's Opposition to Defendant's Motion *in Limine* No. 4 to Preclude References to "Victim" During Trial

Defendant's motion to preclude the government from using the term "victim" during trial should also be denied. Defendant does not include an argument in his Motion *in Limine* No. 4 to preclude references to "victim"; instead, the body of the motion is a cut-and-paste of Defendant's Motion *in Limine* No. 3 to exclude financial circumstances evidence and argument. (*Compare* Def.'s Omnibus Mot. *in Limine*, Dkt. No. 503, at 19-23, *with id.* at 14-19.) None of those repeated arguments provide any support for precluding the use of the term "victim." Defendant's motion should be denied on that basis alone. LCR 47-3 ("The failure of a moving party to include points and authorities in support of [its] motion constitutes a consent to denying the motion."); *United States v. Palafox*, No. 2:16-cr-00265-GMN-CWH, 2019 WL 2079748, at *1 n.2 (D. Nev. May 10, 2019) (applying LCR 47-3 to strike the defendant's motion for joinder). Nevertheless, the government submits this response.

Here, the victims of Defendant's crimes are the nurses (the victims of his wage-fixing conspiracy) and Solace (the victim of his fraud). Allowing the government to refer to those victims as "victims" is simply "[a] fair comment on the evidence." *United States v. Gibson*, 690 F.2d 697, 703 (9th Cir. 1982). The term victim "is mild and non-prejudicial, and is commonly used at trial in a neutral manner to describe the events in question." *Tollefson v. Stephens,* Nos. SA:14-CV-144-DAE, SA:14-CV-171-DAE, 2014 WL 7339119, at *18 (W.D. Tex. Dec. 23, 2014); *see also United States v. Gasperini*, No. 16-CR-441 (NGG), 2017 WL 3140366, at *7 (E.D.N.Y. Jul. 21, 2017) (government's use of "victim" and "victimized" was not prejudicial); *United States v. Hyunh*, No. 4-CR-14-275, 2016 WL 7411529, at *7 (M.D. Pa. Dec. 22, 2016) ("Simply because a person or entity involved in this case is

accurately referred to as a 'victim,' in no way furthers the government[']s burden to prove [the defendant guilty] beyond a reasonable doubt[.]").[11]

Moreover, any unfair prejudice resulting from the use of the term can be mitigated at trial. The government will refrain from excessive use of the term victim. It will refer to the victims in opening and closing, but will most often refer to its witnesses by their surname, including during their testimony. *See United States v. Moffit*, 588 F. Supp. 3d 1106, 1117 (D. Idaho 2022) (explaining that "the manner, context, and frequency," in which the term "victim" is used may determine its prejudicial effect).

[11] *Cf. Gibson*, 690 F.2d at 703 (use of "victim" not improper vouching"); *United States v. Yazzie*, 558 F. App'x 766, 767 (9th Cir. 2014) (Mem.) (use of "victim" rather than "alleged victim" in jury instruction was not prejudicial because the court "correctly instructed the jury regarding the presumption of innocence").

Government's Opposition to Defendant's Motion *in Limine* No. 5 to Compel a Grant of Immunity

The Court should deny Defendant's motion to compel the government to immunize three unidentified witnesses. Judicial compulsion of immunity is an extraordinary remedy; Defendant presents no extraordinary circumstances. Indeed, Defendant presents no circumstances. He does not identify the witnesses he seeks to force the government to immunize; specify their testimony; explain how their testimony directly contradicts that of a government witness; or identify any due process violations arising from the perceived failure of the government to provide immunity. All Defendant does is aver generally that he would like the witnesses to testify for him and he believes vaguely that their testimony would be helpful to his defense. In short, Defendant does not come close to meeting the requisite legal standard and his motion fails.

The Constitution does not "confer[] on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute"; to interpret it as doing so "would unacceptably alter the historic role of the Executive Branch in criminal prosecutions." *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976). The only limited, and extremely rare, exception to this fundamental principle arises when a defendant demonstrates that:

> (1) the defense witness's testimony was relevant; and (2) either (a) the prosecution intentionally caused the defense witness to invoke the Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding process [the "purpose test"]; 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 [the "effects test"].

United States v. Straub, 538 F.3d 1147, 1162 (9th Cir. 2008). Defendant fails to establish any element of either test.

Defendant's motion does not meet the threshold relevance requirement. "[S]atisfaction of the relevance prong requires the defendant to offer ***proof*** of the substance of a defense witness's testimony ***beyond the defendant's or defense counsel's unsupported assertions.***" *United States v. Williams*, 384 F.3d 567, 600 n.13 (9th Cir. 2004) (emphasis added); *see also United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991). And for good reason: if "unsupported assertions" by a defendant satisfied the compelled immunity test, then "trial courts would be required to grant immunity simply on the basis of unsupported allegations by criminal defendants that immunity is required by due process." *Prantil v. State of Cal.*, 843 F.2d 314, 318 (9th Cir. 1988).

That is exactly the case here. Defendant offers no proof. He does not even identify the witnesses.[12] He does not specify their testimony, much less present evidence thereof. He just claims, generally, that unidentified "employees" of conspiring companies would deny the wage fixing allegations in the Superseding Indictment. (Def.'s Omnibus Mot. *in*

[12] During a meet-and-confer with the government, Defendant identified three witnesses that could be the subject of this motion. One of them he referred to by first name only and said he did not know her last name; the government does not know who she is. He also stated that there could be other witnesses for which he would seek immunity.

Moreover, in his motion, in addition to referring to three unidentified employees of two conspiring companies, Defendant references the testimony of a "Mr. Lee." (Def.'s Omnibus Mot. *in Limine*, Dkt. No. 503, at 25 ("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").) The government is unaware of any "Mr. Lee" in this case. It has not met with a "Mr. Lee." None of the conspiring companies employed a "Mr. Lee" in any relevant capacity. The government has not refused to immunize a "Mr. Lee." The government cannot address any allegations about the relevance of "Mr. Lee's" testimony without further information.

Limine, Dkt. No. 503, at 25.) These general, self-serving statements are insufficient to meet the threshold relevancy requirement for compelled immunity.

Nor does the witnesses' testimony specifically contradict a government witness's testimony, as required under the second prong of the effects test. The *Straub* court cautioned that "in the majority of cases where a defendant seeks to compel immunity for a witness, that witness's testimony *will not be* 'directly contradictory' to that of the prosecution's witness," 538 F.3d at 1161 (emphasis added); that warning is certainly true here. It is impossible to discern from Defendant's motion about what, specifically, the unidentified witnesses would testify. Defendant refers vaguely to "meetings," but does not specify which meetings, what testimony the unidentified witnesses would specifically contradict, or which government witnesses they would contradict.

In *United States v. Galecki*, 89 F.4th 713, 734 (2023), the Ninth Circuit upheld the district court's refusal to compel the government to grant immunity under similar circumstance, because:

> Defendants are not entitled to insist on immunity for any witness that might provide additional testimony that, from Defendants' point of view, might helpfully contribute to the overall assessment of the circumstantial evidence. They [are] required, under *Straub*, ***to show a direct contradiction in testimony that resulted in a fundamentally unfair distortion of the fact-finding process***.

(emphasis added); *see also United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004) (defense witness's proposed testimony about defendant's participation in drug operations did not directly contradict government witness testimony). By contrast, in *Straub*, "the defense witness sought to be immunized would have given directly contradictory testimony concerning the critical content of ***a specific conversation*** that occurred at a ***particular place*** and ***during a particular timeframe***." *Id.* (emphasis added). Defendant has made no such showing of a direct contradiction here. For this reason, his motion fails.

Defendant also has not, and cannot, demonstrate that there has been *any* distortion of the fact-finding process; much less a "fundamentally unfair distortion" meriting compelled immunity. Defendant alleges generally that three unidentified witnesses would deny the existence of, or their participation in, the charged wage-fixing conspiracy. That is hardly a surprise; most conspirators deny participation in their criminal enterprise. But the government has ample evidence that Defendant and his coconspirators agreed to fix the wages of the home healthcare nurses they employed, and continued to do so for years. The government is not required to immunize witnesses who self-servingly deny their involvement in that crime and would commit perjury by testifying to that denial. The government acts "well within its discretion in declining an immunity deal that would have only facilitated such perjury." *United States v. Davis*, 845 F.3d 282, 292 (7th Cir. 2016); *see also United States v. Wright*, 634 F.3d 917, 921 (7th Cir. 2011) ("[A]voiding future violations of the law, such as potential perjury, is hardly an unjustifiable and illegitimate government objective.")

Finally, Defendant argues in a conclusory last paragraph that he is entitled to compelled immunity under the intent test because "based on the history of this case" the government caused his witnesses to invoke. (Def.'s Omnibus Mot. *in Limine*, Dkt. No. 503, at 26.) The government is hard pressed to know how best to respond to this allegation (if it is even an allegation). It does not know what Defendant means when he references the "history of this case." There has been no misconduct in this case. Defendant identifies no action he alleges to be misconduct, nor how that action somehow caused any of the unidentified witnesses to invoke the Fifth Amendment. Intentional distortion requires evidence of prosecutorial misconduct aimed at silencing defense witnesses. *See, e.g.*, *Straub*,

538 F.3d at 1157-58; *Williams*, 384 F.3d at 601-02. Defendant's vague insinuations are not evidence, and do not meet this standard.

Ambiguous references to the general, self-serving testimony of three unidentified witnesses is a far cry from the extraordinary circumstances meriting compelled immunity. Thus, Defendant's motion should be denied.

III. CONCLUSION

For the foregoing reasons, the United States requests that this Court deny Defendant's *in limine* requests.

Respectfully Submitted this 3rd day of March, 2025.

/s/ Conor Bradley
Conor Bradley
Trial Attorney
Antitrust Division – United States Department of Justice