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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GERALD GREEN and PATRICIA GREEN, Defendants.	CR No. 08-59(B)-GW GOVERNMENT'S TRIAL MEMORANDUM; EXHIBIT Trial Date: 8/4/09 Trial Time: 9:00 a.m.

The United States, by and through its counsel of record, the United States Attorney for the Central District of California, and the Fraud Section, United States Department of Justice, Criminal Division, hereby submits its trial memorandum in the above-captioned case.

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I. STATUS OF THE CASE

A. Trial is scheduled to commence on August 4, 2009, at 9:00 a.m., before the Honorable George Wu, United States District Judge.

B. The government estimates that its case-in-chief will take approximately 13 days.

C. The government expects to call 25-30 witnesses in its case-in-chief, contingent on stipulations to admissibility and authenticity.

D. Trial by jury has not been waived.

E. The services of an interpreter will not be necessary; however, the government is arranging for translators to be available to translate documents from German and Thai to English in the event the parties do not stipulate to the necessary translations.

F. Defendants Patricia and Gerald Green are out on bond awaiting trial.

G. The Second Superseding Indictment ("SSI"), which was returned on March 11, 2009, charges 18 U.S.C. § 371: Conspiracy; 15 U.S.C. § 78dd-2(a)(1), (g)(2)(A): Foreign Corrupt Practices Act; 18 U.S.C. § 1956(a)(2)(A): Transportation Promotion Money Laundering; 18 U.S.C. § 1957(a): Transaction Money Laundering; 18 U.S.C. § 1519: Obstruction of Justice; 26 U.S.C. § 7206(1) False Subscription of a Tax Return; 18 U.S.C. § 2: Aiding and Abetting and Causing Acts To Be Done; 18 U.S.C. § 981(a)(1)(C), 21 U.S.C. § 853, and 28 U.S.C. § 2461(c): Criminal Forfeiture. An unconformed copy of the SSI is attached to this memorandum as Exhibit 1.

II. STATEMENT OF THE CHARGES

Defendants, who are U.S. citizens and residents, and who owned and operated several entertainment and advertising-related businesses in Beverly Hills, California, engaged in a conspiracy to offer and make corrupt payments to a foreign official and to money launder, in connection with approximately $1.8 million in payments between 2002 and 2006 to secure several lucrative Thai government contracts. The payments usually took place between defendants' businesses' Los Angeles-area bank accounts and overseas accounts in the name of the corrupt foreign official's daughter or friend.

After making bribe payments to the foreign official, which totaled a large proportion of their businesses' gross revenue, defendant Patricia Green falsely subscribed tax returns for those businesses that falsely described the payments as "commissions." Defendant Patricia Green also falsely stated on a tax return that a person other than defendants owned the company.

Following the search in this case of defendants' businesses pursuant to a federal warrant, defendant Gerald Green understood that the investigation regarded the payments for the foreign official, and soon engaged in an obstruction of justice to explain or substantiate the corrupt payments by reference to other projects he had pursued in Thailand. As part of this plan, defendant Gerald Green instructed subordinates to manufacture documents.

III. SUMMARY OF THE EVIDENCE

The government expects to prove the facts set forth below, among others, at trial.

A. Conspiracy, Bribery, and International Transfers of Funds To Promote Bribery

Defendants Gerald and Patricia Green routinely agreed to, and arranged, payments from a group of Beverly Hills businesses, which they owned and controlled,[1] for the benefit of Juthamas Siriwan ("Juthamas"), the Governor of the Tourism Authority of Thailand ("TAT"). The payments, which totaled approximately $1.8 million over more than four years were in connection with Juthamas' award of, and support for, TAT and TAT-related contracts for promotion of tourism that resulted in approximately $14 million in revenue to defendants' businesses.

The corrupt payments took place by transfers into the overseas bank accounts of Juthamas' daughter, Jittisopa Siriwan ("Jittisopa"), aka "Jib," Juthamas' friend, Kitti Chambundabongse ("Kitti"), and occasionally by cash delivery to Juthamas in person. Defendants owed Juthamas these corrupt payments as a variable percentage of revenue on TAT-related contracts and subcontracts including, but not limited to, the Bangkok International Film Festival ("BKKIFF"), the Thai

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[1] Defendants' businesses included: Film Festival Management, Inc. ("FFM"); SASO Entertainment ("SASO"); Artist Design Corp. ("Artist Design"); International Fashion Consultant, Inc. ("IFC"); Flying Pen, Inc. ("Flying Pen"); and entities doing business as "Creative Ignition," "Ignition," and "International Festival Consultants." The "Green Businesses" also included Festival of Festivals ("FOF"), a business entity belonging to an associate of defendants, but in the name of which defendants did business and received and transferred funds.

Privilege Card, calendars, a book, a website, public relations consulting, a video, and a logo.

Defendant Gerald Green held the relationship with Juthamas and negotiated with her the budgets and other details of the various TAT contracts, including contracts where defendants' businesses took the role of "subcontractor" to other companies that formally held the contract with TAT. Defendants inflated the budgets of these budgets to allow for the payments to Juthamas, the official approving and promoting these same contracts.

Defendant Patricia Green, the wife and co-owner, was in charge of day-to-day operations of defendants' businesses and implemented defendant Gerald Green's plans to make the corrupt payments.

In planning and making the bribe payments for the benefit of Juthamas, defendants referred to them in discussions as "commission" payments. When defendant Gerald Green instructed that it was time to make a "commission" payment, defendant Patricia Green and another employee, Susan Shore ("Shore"), would look to see which of the businesses had the money available for any given payment. Defendant Patricia Green made all the 40 or more wire transfers and cashiers check transactions at the bank herself, and she planned and tracked these payments. These payments for Juthamas often followed promptly upon the receipt into the Green Businesses of TAT or TAT-related revenues.

Defendants' planning and budgeting for the corrupt payments for Juthamas was documented extensively in their handwritten

notes and memoranda, budget drafts, and internal documents prepared by defendants, Shore, and other employees and close associates. The actual payments for Juthamas themselves were reflected in the Green Businesses' bank records and other accounting records, as well as in handwritten notes and schedules tracking amounts paid and still owing.

Both defendants, as well as their co-conspirators Juthamas and Jittisopa, engaged in various patterns of deception to hide the bribery from others, including the Thai government and later the United States government. The conspirators hid the amount of business Juthamas was corruptly directing to defendants, and evaded Thai government fiscal controls meant to check Juthamas' authority to approve TAT payments by splitting up the performance of large contracts for the BKKIFF among different Green Businesses. Defendants gave the misleading appearance of there being separate and distinct businesses, among other things, by use of dummy addresses, telephone numbers, and nominee "directors" and "presidents" for use in communications with other TAT officials. In reality, all companies operated out of the same business offices with the same personnel.

To hide the extent of business Juthamas was corruptly directing to defendants, the conspirators also recruited different prime contractors of their choosing, and then arranged referral fees from the prime contractors to the Green Businesses -- part of which was to be paid over to Juthamas. The conspirators then attempted to keep secret from other Thai authorities defendants' subcontracting arrangement on the project. In still other cases, defendants and Juthamas arranged

for a third-party company to act as a mere pass-through billing conduit for funds intended for defendants' businesses.

Juthamas secretly controlled several overseas nominee bank accounts into which defendants transferred the bribes, located in the United Kingdom, the Isle of Jersey, and Singapore. From some of these accounts, defendants' money then flowed to accounts in Switzerland also held in Jittisopa's name but controlled by Juthamas.

Neither Jittisopa nor Kitti had done any work as employees or contractors of defendants' businesses on the TAT contracts that would explain why accounts in their names had received $1.8 million in defendants' funds, which they concealed on their income taxes.

Once Juthamas stepped down as Governor of the TAT in late 2006, defendants stopped getting new TAT contracts and had difficulty collecting amounts they claimed to be owed for the 2007 BKKIFF. Juthamas, acting as an "advisor" to the TAT, assisted in a plan to have TAT officials pay off defendants' claim through a phony third-party transaction with a Thai company that acted as a pass-through for funds going to defendants.

Defendants understood that their bribery of Juthamas was unlawful in a variety of ways. Defendants knew that, by agreeing to pay bribes amounting to a large percentage of the revenue from the contracts Juthamas negotiated and approved for the expenditure of public funds, defendants were assisting Juthamas in secretly taking state funds for her own purposes. As set forth above, defendants attempted to cover the bribery up

at the time of these contracts with secretive and fraudulent behavior. Defendants in some instances prepared sham invoices to explain the flow of money to them, part of which was flowing back to Juthamas. Defendants, through their review of contractual language relating to the FCPA and other documents, also had specific notice that payments to a Thai official in connection with a contract would be corrupt and unlawful. Defendant Patricia Green lied about the nature of these payments during an IRS audit of one of the tax returns they filed deducting the payments as "commissions." Finally, defendants immediately sought to cover up the payments after the government's investigation in this case became known to them, as discussed further below.

B. Transfer of $19,800 In Criminally-Derived Property

Defendants' course of criminal conduct included reinvesting some of the proceeds from their illegally-obtained contracts into a Bangkok-based business venture called "Consultasia, Ltd." in which defendant Gerald Green was a partner. The funds for the 2004 wire transfer of $19,800 charged in this case came from defendants' subcontract with a United States-based public relations firm, for whom defendants had corruptly obtained -- through Juthamas -- a prime contract with TAT.

C. False Subscription of Tax Returns

Defendant Patricia Green participated in the preparation of corporate tax returns that took unlawful tax deductions for the bribes by calling them "commissions." In this manner, defendants reduced corporate tax liabilities, used tax-free income to pay the bribes to the Governor, obtained tax refunds,

and thus increased their profits from their businesses.

Two of the businesses owned and operated by defendants that made such payments were Film Festival Management, Inc. ("FFM") and SASO Entertainment ("SASO"). Defendant Patricia Green falsely subscribed SASO's federal income tax return for the tax year 2004 claiming that $303,074 in "commissions" were deductible from SASO's gross income. In addition, defendant Patricia Green signed FFM's federal income tax return for the tax year 2004, which deducted $140,503 in false "commission" claims. Defendant Patricia Green subscribed that return not by using her own name but forging the name "Eli Boyer." The return also falsely claimed that Eli Boyer was the sole owner of FFM.

From her familiarity with the inner workings of the Green Businesses, defendant Patricia Green understood that the payments for Juthamas were not for real "commissions," such as monies that are paid to third parties for obtaining business on behalf of their companies, but were instead amounts paid to the very same official awarding the contract. Despite this knowledge, defendant Patricia Green lied about the nature of the payments for Juthamas during a 2007 IRS audit of the income tax return SASO had filed for 2004, characterizing them as expenses in Thailand that SASO incurred for providing the services contracted for by the TAT.

D. Obstruction of Justice

As set forth more fully in the government's application to the Court to make a crime/fraud exception determination, also filed today, defendant Gerald Green attempted to coordinate a false exculpatory story to explain the corrupt payments for

Juthamas. Grasping that the bribe payments for Juthamas were the reason for the FBI search of his business offices, defendant Gerald Green attempted to substantiate the payments by attributing them to work Jittisopa and Kitti had done on other, non-TAT projects that defendant Gerald Green had pursued in Thailand. Defendant Patricia Green assisted her husband in launching this plan. This obstructive plan soon resulted, among other things, in defendant Gerald Green's alteration of film budgets by requesting that they be re-dated to 2005 and 2006, which corresponded with the dates of payments for Juthamas.

IV. PERTINENT LAW

A. 18 U.S.C. § 371: Conspiracy

1. Essential Elements

To prove a violation of 18 U.S.C. § 371, the following elements must be proved beyond a reasonable doubt:

> First, beginning in or around 2002, and ending in or around 2007, there was an agreement between two or more persons to commit at least one crime as charged in the second superseding indictment; and
>
> Second, the defendants became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and
>
> Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all [jurors] agreeing on a particular overt act that you find was committed.

See Ninth Circuit Criminal Jury Instruction No. 8.16 (2003).

2. Proof of Agreement

The essence of the crime of conspiracy is the agreement. United States v. Falcone, 311 U.S. 205, 210 (1940). The government need not prove direct contact between co-conspirators or the existence of a formal agreement. United States v. Boone,

951 F.2d 1526, 1543 (9th Cir. 1992). Instead, an agreement constituting a conspiracy may be inferred from the acts of the parties and other circumstantial evidence indicating concert of action for accomplishment of a common purpose. United States v. Becker, 720 F.2d 1033, 1035 (9th Cir. 1983); United States v. Penagos, 823 F.2d 346, 348 (9th Cir. 1987); United States v. Abushi, 682 F.2d 1289, 1293 (9th Cir. 1982).

There must be at least two persons involved in the conspiracy. Becker, 720 F.2d at 1035; United States v. Sangmeister, 685 F.2d 1124, 1126 (9th Cir. 1982). It makes no difference whether the other person is another defendant or even named in the indictment. Rogers v. United States, 340 U.S. 367, 375 (1951) ("identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown").

3. Knowledge

In order to establish a defendant's membership in a conspiracy, the government must prove that the defendant knew of the conspiracy and that he intended to join it and to accomplish the object of the conspiracy. See United States v. Esparza, 876 F.2d 1390, 1392 (9th Cir. 1989). A defendant may become a member of a conspiracy without knowing all of the details of the unlawful scheme and without knowing all of the members. Blumenthal v. United States, 332 U.S. 539, 557 (1947). The government must show that the defendant knew of his connection to the charged conspiracy. United States v. Federico, 658 F.2d 1337, 1344 (9th Cir. 1981), overruled on other grounds, United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir. 1984) (en

banc); United States v. Smith, 609 F.2d 1294, 1299 (9th Cir. 1979).

A defendant's knowledge of a conspiracy need not be proved by direct evidence; circumstantial evidence is sufficient. United States v. Hayes, 190 F.3d 939, 946 (9th Cir. 1999), aff'd en banc, 231 F.3d 663, 667 n.1 (9th Cir. 2000), cert. denied, 121 S.Ct. 1388 (2001). Generally, this knowledge can be inferred from the defendant's own acts and statements. United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990).

4. Participation in the Conspiracy

The government has the burden of proving beyond a reasonable doubt that a conspiracy did exist and that each defendant was a member of the conspiracy charged. United States v. Friedman, 593 F.2d 109, 115 (9th Cir. 1979); United States v. Peterson, 549 F.2d 654, 657 (9th Cir. 1977). The government need not prove that all the persons alleged to have been members of the conspiracy actually participated in the conspiracy. United States v. Reese, 775 F.2d 1066, 1071 (9th Cir. 1985). The general test is whether there was one overall agreement to perform various functions to achieve the objectives of the conspiracy. See United States v. Arbelaez, 719 F.2d 1453, 1457 (9th Cir. 1983).

Once the existence of a conspiracy is shown, evidence establishing beyond a reasonable doubt a defendant's connection with the conspiracy -- even if the connection is slight -- is sufficient to convict him of knowing participation in the conspiracy. United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1991); United States v. Stauffer, 922 F.2d 508, 514-15 (9th

Cir. 1990); United States v. Ramirez, 710 F.2d 535, 548 (9th Cir. 1983).

The government need not prove that each coconspirator knew the identities or roles of all other participants. The government must show that each defendant knew, or had reason to know, the scope of the criminal enterprise and that each defendant knew, or had reason to know, that the benefits to be derived from the operation were probably dependent upon the success of the entire venture. Abushi, 682 F.2d at 1293; United States v. Perry, 550 F.2d 524, 528-29 (9th 1977).

B. 15 U.S.C. § 78dd2(a): Bribery of a Foreign Official

1. Statutory Language

Section 78dd-2(a) of Title 15 of the United States Code (Foreign Corrupt Practices Act or "FCPA"), prohibits making use of the mails or any means or instrumentality of interstate commerce willfully and corruptly in furtherance of a payment - or offer, promise or authorization of payment - or offer, gift, promise to give, authorization of the giving of anything of value - to any foreign official for the purpose of:

> (A)(i) influencing any act or decision of such foreign official in her official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (B) inducing such foreign official to use her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist [the person or company making the payment] in obtaining or retaining business for or with, or directing business to, any person.

2. Corruptly and Willfully

A person acts "corruptly" as required for a criminal violation of the FCPA if he or she acts voluntarily and intentionally, with an improper motive of accomplishing either an unlawful result, or a lawful result by some unlawful method or means. The term "corruptly" is intended to connote that the offer, payment, and promise was intended to influence an official to misuse her official position. A person acts "willfully" as required for a criminal violation of the FCPA if he or she acts deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law. A defendant need not be aware of the specific law and rule that his or her conduct may be violating. But he or she must act with the intent to do something that the law forbids. Overall, it is only necessary that a defendant intends those wrongful actions, and that the actions are not the product of accident or mistake. United States v. Bryan, 524 U.S. at 184, 191-92 (1998); United States v. Tarallo, 380 F.3d 1174, 1188 (9th Cir. 2004); United States v. Kay, 513 F.3d 432 (5th Cir. 2007) see 15 U.S.C. § 78dd-2(a)(1), 78ff(a).

C. 18 U.S.C. § 1956(a)(2)(A): International Transportation Promotion Money Laundering

To prove a violation of 18 U.S.C. § 1956(a)(2)(A), the following elements must be proved beyond a reasonable doubt:

> First, the defendants transported money from a place in the United States, namely, Los Angeles County, to places outside the United States; and

Second, the defendants acted with the intent to promote the carrying on of unlawful activity, that is, bribery of a foreign official in violation of the FCPA.

See Ninth Circuit Model Jury Instructions No. 8.122 (2003) [Transporting Funds to Promote Unlawful Activity].

D. 18 U.S.C. § 1957(a): Transactions In Criminally-Derived Property

Title 18, United States Code, Section 1957(a) provides in pertinent part:

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity,

[is guilty of an offense against the laws of the United States].

(d) The circumstances referred to in subsection (a) are-
(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title: United States national, permanent resident, any person within the United States, a sole proprietorship composed of nationals or permanent resident aliens, a corporation organized under the laws of the United States).

E. 26 U.S.C. 7206(1): False Subscription of a Tax Return

To prove a violation of 26 U.S.C. 7206(1), the following elements must be proved beyond a reasonable doubt:

First, the defendant made and signed a tax return for the year 2004 that she knew contained false information as to a material matter;

Second, the return contained a written declaration that it was being signed subject to the penalties of perjury; and

Third, in filing the false tax return, the defendant acted willfully.

See Ninth Circuit Model Jury Instructions No. 9.37 (2003) [Filing False Tax Return].

F. 18 U.S.C. § 1519: Creating False Entry In a Document In a Federal Investigation

Title 18, United States Code, Section 1519 provides in part:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

V. EVIDENTIARY ISSUES

A. Summary Charts

The government will elicit summary testimony from witnesses, including but not limited to Susan Shore, IRS-CI Special Agent Steven Berryman, and FBI Special Agent Elizabeth Rivas, who have reviewed accounting records, bank records, hotel records, and other evidence in this case.

Federal Rule of Evidence 1006 provides that:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by the parties at reasonable time and place. The court may order that they be produced in court.

A chart or summary may be admitted as evidence where the proponent establishes that the underlying documents are voluminous, admissible, and available for inspection. See United States v. Meyers, 847 F.2d 1408, 1411-12 (9th Cir. 1988); United States v. Johnson, 594 F.2d 1253, 1255-57 (9th Cir. 1979). While the underlying documents must be admissible, they need not be admitted. See Meyers, 847 F.2d at 1412; Johnson, 594 F.2d at 1257 n.6. Summary charts need not contain the defendant's version of the evidence and may be given to the jury while a government witness testifies concerning them. See United States v. Radseck, 718 F.2d 233, 239 (7th Cir. 1983); Barsky v. United States, 339 F.2d 180, 181 (9th Cir. 1964).

Charts may be referred to during opening statement. The purpose of an opening statement is to acquaint the jury with the substance and theory of the case and to outline the forthcoming proof so that the jurors may more intelligently follow the testimony. See, e.g., United States v. Zielie, 734 F.2d 1447, 1455 (11th Cir. 1984) (relying on United States v. Dinitz, 424 U.S. 600, 612 (1976)). A summary witness may rely on the analysis of others where she has sufficient experience to judge another person's work and incorporate it as her own. The use of other persons in the preparation of summary evidence goes to the its weight, not its admissibility. United States v. Soulard, 730 F.2d 1292, 1299 (9th Cir. 1984); see Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co., 466 F.2d 722, 727 (7th Cir. 1972) ("It is not necessary . . . that every person who assisted in the preparation of the original records or the summaries be brought to the witness stand").

The government will produce to the defense draft summary charts that are anticipated to be the basis of some of its witnesses' testimony. The government will also seek the admission into evidence of some of those summary charts. Additionally, the government has produced to the defense the underlying bank, accounting, hotel, and other records used to prepare the summary charts, tables and spreadsheets.

The introduction of summary witness testimony and summary schedules has been approved by the Ninth Circuit in tax cases, United States v. Marchini, 797 F.2d 759, 756-766 (9th Cir. 1986); United States v. Greene, 698 F.2d 1364, 1367 (9th Cir. 1983); Barsky v. United States, 339 F.2d 180 (9th Cir. 1964). A summary witness may be used to help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses. See United States v. Baker, 10 F.3d 1374, 1411 (9th Cir. 1983).

B. Evidence of the Routine Practices

Evidence of the habit or routine practice, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that the conduct on a particular occasion was in conformity with that habit or routine practice. Fed. R. Evid. 406. In this case, the existence of bribery-related activities on a routine basis is probative of the conspiracy.

C. Chain of Custody

The test of admissibility of physical objects connected with the commission of a crime requires a showing that the object is in substantially the same condition as when the crime was

committed (or the object seized). Factors to be considered are the nature of the article, the circumstances surrounding its preservation and custody and the likelihood of intermeddlers tampering with it. There is, however, a presumption of regularity in the handling of exhibits by public officials. United States v. Kaiser, 660 F.2d 724, 733 (9th Cir. 1981), cert. denied, 455 U.S. 956 (1982), overruled on other grounds, United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc).

If the trial judge finds that there is a reasonable possibility that the piece of evidence has not changed in a material way, he has discretion to admit the evidence. Kaiser, 660 F.2d at 733.

The government is not required, in establishing chain of custody, to call all persons who may have come into contact with the piece of evidence. Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960).

D. Authentication and Identification

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a).

Rule 901(a) only requires the government to make a prima facie showing of authenticity or identification "so that a reasonable juror could find in favor of authenticity or identification." United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991), cert. denied, 511 U.S. 1035 (1994); See also United States v. Blackwood, 878 F.2d 1200, 1202 (9th Cir.

1989); United States v. Black, 767 F.2d 1334, 1342 (9th Cir.), cert. denied, 474 U.S. 1022 (1985).

Once the government meets this burden, "[t]he credibility or probative force of the evidence offered is, ultimately, an issue for the jury." Black, 767 F.2d at 1342.

E. Certified Public Records

At trial, the government intends to introduce certified public records into evidence, including immigration records. These records are self-authenticating. F.R.E. 902(4). Moreover, such public records are not hearsay. F.R.E. 803(8).

F. Co-conspirator Statements

A statement is not hearsay if it is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

For Rule 801(d)(2)(E) to apply, it is not necessary that the declarant be charged with the crime of conspiracy; any "concert of action creates a conspiracy for purposes of the evidence rule." United States v. Portac, Inc., 869 F.2d 1288, 1294 (9th Cir. 1989), cert. denied, 498 U.S. 845 (1990).

A statement can be a co-conspirator declaration even if it is subject to alternative interpretations. Garlington v. O'Leary, 879 F.2d 277, 284 (7th Cir. 1989).

For a statement to be admissible under Rule 801(d)(2)(E), the offering party must establish that: (a) the statement was in furtherance of the conspiracy; (b) it was made during the life of the conspiracy; and (c) the defendant and declarant were members of the conspiracy. Bourjaily v. United States, 483 U.S. 171, 175 (1987); United States v. Smith, 893 F.2d at 1578.

The offering party has the burden of proving these foundational facts by a preponderance of the evidence. Bourjaily, 483 U.S. at 176; United States v. Schmit, 881 F.2d 608, 610 (9th Cir. 1989); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988).

Whether the offering party has met its burden is to be determined by the trial judge, and not the jury. United States v. Zavala-Serra, 853 F.2d 1512, 1514 (9th Cir. 1988).

The term "in furtherance of the conspiracy" is construed broadly to include statements made to "induce enlistment or further participation in the group's activities," to "prompt further action on the part of conspirators," to "reassure members of a conspiracy's continued existence," to "allay a coconspirator's fears," and to "keep coconspirators abreast of an ongoing conspiracy's activities." United States v. Yarbrough, 852 F.2d 1522, 1535-1536 (9th Cir.) (citing cases), cert. denied, 488 U.S. 866 (1988).

A co-conspirator declaration need not have been made exclusively, or even primarily, to further the conspiracy. Garlington v. O'Leary, 879 F.2d 277, 284 (7th Cir. 1989).

Statements made with the intent of furthering the conspiracy are admissible whether or not they actually result in any benefit to the conspiracy. United States v. Williams, 989 F.2d 1061, 1068 (9th Cir. 1993); United States v. Schmit, 881 F.2d at 612; United States v. Zavala-Serra, 853 F.2d 1512, 1516 (9th Cir. 1988).

It is not necessary that the defendant was present at the time the statement was made. Sendejas v. United States, 428

F.2d 1040, 1045 (9th Cir.), cert. denied, 400 U.S. 879 (1970).

Co-conspirator declarations need not be made to a member of the conspiracy to be admissible under Rule 810(d)(2)(E). United States v. Zavala-Serra, 853 F.2d at 1516.

Co-conspirator declarations can be made to government informants and undercover agents. Id. (statements to informants and undercover agents); United States v. Tille, 729 F.2d 615, 620 (9th Cir.) (statements to informants), cert. denied, 469 U.S. 845 (1984); United States v. Echeverry, 759 F.2d 1451, 1457 (9th Cir. 1985) (statements to undercover agent).

Once the existence of the conspiracy is established, only "slight evidence" is needed to connect the defendant and declarant to it. United States v. Crespo De Llano, 838 F.2d 1006, 1017 (9th Cir. 1987); United States v. Dixon, 562 F.2d 1138, 1141 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978).

The declaration itself, together with independent evidence, may constitute sufficient proof of the existence of the conspiracy and the involvement of the defendant and declarant in it. Bourjaily, 483 U.S. at 181; Zavala-Serra, 853 F.2d at 1515.

The foundation for the admission of a co-conspirator statement may be established before or after the admission of the statement. If a proper foundation has not yet been laid, the court may nevertheless admit the statement, but with an admonition that the testimony will be stricken should the conspiracy not be proved. United States v. Arbelaez, 719 F.2d 1453, 1469 (9th Cir.), cert. denied, 467 U.S. 1255 (1984); United States v. Kenny, 645 F.2d 1323, 1333-1334 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Spawr

Optical Research Inc., 685 F.2d 1076, 1083 (9th Cir. 1982), cert. denied, 461 U.S. 905 (1983).

The trial court has discretion to determine whether the government may introduce co-conspirator declarations before establishing the conspiracy and the defendant's connection to it. United States v. Loya, 807 F.2d 1483, 1490 (9th Cir. 1987).

Co-conspirator statements fall within a "firmly rooted hearsay exception." Therefore, if a statement is properly admissible under Rule 801(d)(2)(E), no additional showing of reliability is necessary to satisfy the requirements of the Confrontation Clause. Bourjaily, 483 U.S. at 183-184; Yarbrough, 852 F.2d at 1536; United States v. Knigge, 832 F.2d 1100, 1107 (9th Cir. 1987), amended, 846 F.2d 591 (9th Cir. 1988). In determining if these foundational facts have been established, the court may consider hearsay and other evidence not admissible at trial. See Fed. R. Evid. 104(a) and 1101(d)(1); Bourjaily, U.S. at 178-179. Moreover, co-conspirators statements are not testimonial and do not violate the confrontation clause. United States v. Allen, 425 F.3d 1231, 1235 (9th Cir. 2005).

G. Tape Recordings

When audio tapes and transcripts to be presented at trial are in English, the recordings themselves are the evidence of the conversation. See, e.g., United States v. Franco, 136 F.3d 622, 625 (9th Cir. 1998). The government plans to provide the members of the jury with transcripts of the conversations in question as an aide to the jury. However, the transcripts will not be introduced into evidence. The government may establish

the identification of a voice through either direct or circumstantial evidence. See United States v. Turner, 528 F.2d 143, 162 (9th Cir. 1975).

H. Immunity Agreements

One witness in the case, Susan Shore, has an immunity and cooperation agreement with the government. It is appropriate for the government to introduce the "truthful testimony" provisions in such an agreement after a defendant has attacked the credibility of a witness. See, e.g., United States v. Necoechea, 986 F.2d 1273, 1278-79 (9th Cir. 1993)(reference to "truthful testimony" aspect of plea agreement permissible in direct examination of witness whose credibility was challenged in defendant's opening statement).

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VI.

CONCLUSION

The government requests leave to file such additional memoranda as may become appropriate during the course of the trial.

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Respectfully submitted,

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