IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-vs-

21-CR-6063 CJS

TONY KIRIK a/k/a
Anatoliy Kirik,

Defendant

GOVERNMENT'S TRIAL BRIEF

The United States of America, by and through its attorney, Trini E. Ross, United States Attorney for the Western District of New York, Melissa M. Marangola and Richard A. Resnick, Assistant United States Attorneys, of counsel, files its trial brief as follows:

I. BACKGROUND

The defendant, TONY KIRIK, was charged in an eight-count Indictment (the "Indictment") with various offenses involving the submission of fraudulent documents and the making of false statements to the Federal Motor Carrier Safety Administration ("FMSCA"), an agency of the United States Department of Transportation ("USDOT").

II. DEFENDANT, TONY KIRIK, AND ENTITIES

The defendant owned and managed a trucking business located at 105 McLaughlin Road, Rochester, New York, which transported goods for customers across the United States. The defendant operated his trucking business using various corporate entities, including the following:

1. Orange Transportation Services, Inc. ("Orange Transportation Services")
2. Dallas Logistics, Inc. ("Dallas Logistics")
3. TruGreen Logistics Inc.
4. Logic, Inc.
5. Main Street Logistics Inc. (Formerly known as "KT Transport")
6. ABS Logistics Inc.
7. Eagle Expeditors Inc.
8. Mile Transport Inc.
9. Motor Freight Inc.
10. Cargo Transit, Inc.
11. Coastal-Trans Inc.
12. Columbus Freight, Inc.
13. Roadaholic Corp.

The above corporate entities were interstate motor carriers regulated by the Federal Motor Carrier Safety Administration ("FMCSA"), an agency of the United States Department of Transportation ("USDOT").

III. SUMMARY OF EVIDENCE

A. FMSCA Requirements

During all times relevant to the Indictment, the FMCSA had jurisdiction over and regulated motor carriers that operated in interstate commerce. Regulated motor carriers were required to provide truthful and accurate information about their businesses and operations to the FMCSA, and were subject to periodic audits, compliance reviews, and inspections by the FMCSA.

A motor carrier operating in interstate commerce was required to obtain a USDOT number, which is a unique identifier that aids the FMCSA in collecting and monitoring safety and other information. To obtain a USDOT number, a motor carrier was required to complete and submit, and periodically update, under penalty of perjury, Motor Carrier Identification Report ("Form MCS-150"). In addition, interstate motor carriers were required to obtain a motor carrier number from the USDOT, which was used to determine, among other things, the type and level of insurance required. To obtain a motor carrier number, a motor carrier was required to complete, under penalty of perjury, a Form OP-1, Application for Motor Property Carrier and Broker Authority.

The FMCSA assigned one of four possible safety ratings to a motor carrier: Unrated, Satisfactory, Conditional, or Unsatisfactory. When a new motor carrier was first established,

it was assigned a rating of Unrated until the FMCSA completed a safety review. After a safety review, the motor carrier was assigned a specific rating. A rating of "Satisfactory" meant that the motor carrier had adequate safety management controls to meet the safety fitness standard. A rating of "Conditional" meant that the motor carrier did not have adequate safety management controls in place to meet the safety fitness standard. A rating of "Unsatisfactory" meant that the motor carrier did not have adequate safety management controls in place and had negative occurrences. Conditional and Unsatisfactory ratings impact the cost of insurance and the make it more difficult to attract and keep customers who prefer to use motor carriers with a Satisfactory rating.

To prevent owners of motor carriers from concealing a Conditional or Unsatisfactory safety rating by simply starting a new corporate entity, referred to in the industry as a "chameleon" company, the owner of a new motor carry was required to identify to the FMCSA any affiliated or reincarnated entities. If the new motor carrier was affiliated with or a reincarnation of a previous motor carrier entity, then the new entity would take on the same safety rating as its predecessor entity rather than be given an Unrated safety rating. For example, if a motor carrier has a Conditional safety rating, the new affiliated entity will then begin with a Conditional rating and the negative impact of such rating.

An affiliated or reincarnated entity is one that shares with the previous entity common control, ownership, assets, or employees. Again, the reason for a new entity to take on the rating of a previous entity is to prevent unsafe trucking companies from avoiding the consequences of their actions through the simple and expedient reincorporation in a new name. The FMCSA will independently look for links between motor carriers to determine

whether someone is trying to conceal affiliations. It does this by comparing, among other things, operating locations, shared assets or drivers, and overlapping management.

B. Scheme to Conceal Conditional Rating

The evidence at trial will show the extensive efforts of the defendant to avoid having the "Conditional" safety rating assigned to one of his entities, Orange Transportation Services, Inc., to carry forward to his new entity, Dallas Logistics, Inc. To avoid disclosing the fact that he controlled both companies, he first incorporated Dallas Logistics in 2012 in the name of an employee, James Zambito (Person 1 in the Indictment), and pretended that Dallas Logistics was based in Texas. He then caused periodic documents to be filed with the FMCSA which falsely reported Dallas Logistics' principal place of business and the identity of its president.

During Dallas Logistics' safety entry audit in 2014, the defendant caused James Zambito to travel to Texas and mislead the FMCSA investigator into believing that Dallas Logistics' principal place of business was in Texas and that Dallas Logistics was not affiliated with any other motor carrier.

In the fall of 2015, the FMCSA began a compliance audit of Dallas Logistics in Texas. During that compliance review, Zambito initially attempted to mislead the investigator into believing that Dallas Logistics' principal place of business was in Texas. The investigator then became suspicious that the company was actually being operated out of Rochester, New York. As a result, the defendant caused a false MCS-150 to be filed without Zambito's knowledge changing Dallas Logistics' address to 25 Pixley Industrial Parkway in Gates, New

York.

The FMCSA's compliance review for Dallas Logistics was then referred to the FMCSA's Buffalo office. The defendant had Amanda Burgess submit a false letter to the new investigator as to why Dallas Logistics was being relocated to Gates, New York. The defendant then staged an elaborate ruse by setting up a fake office at 25 Pixley Industrial Parkway to conceal to the FMCSA that Dallas Logistics was actually related to the defendant's other trucking companies and was operated out of the McLaughlin Road address in Rochester. Amanda Burgess attended the compliance review at the fake address and made false statements to the investigator to continue the ruse. Burgess met with the FMCSA Investigator and misrepresented the sham office as Dallas Logistics' place of business and concocted a story about why.

IV. SUMMARY OF CHARGES

Count 1 - Conspiracy

Count 1 charges Conspiracy to Defraud the United States and FMCSA, an agency of the United States in violation of 18 U.S.C. §371. The count alleges that between October 2012 and in or about January 2018, the defendant and two employees (Zambito and Burgess) created false documents and made false statements to make it appear that Dallas Logistics was not affiliated in any way with Orange Transportation. The false representations caused the FMCSA to give Dallas Logistics a higher safety rating (Unrated) than it deserved and thereby resulted in lower operating costs and higher revenue from customers, along with elevated danger to people traveling on the roads.

Counts 2 and 4 - False Documents1

Counts 2 and 4 charge the defendant with knowingly making and using materially false and fraudulent documents in a matter within the jurisdiction of the federal government in violation of 18 U.S.C. §§1001(a)(3) and (2).

Specifically, Count 2 charges the defendant with submitting and aiding and abetting the submission of a Form MCS-150 for Dallas Logistics to the FMCSA on or about April 25, 2016, which falsely stated that (a) Dallas Logistics' principal address was 25 Pixley Industrial Parkway, Gates, New York; (b) James Zambito was the President of Dallas Logistics; and (c) James Zambito had electronically signed the form.

Count 4 charges the defendant with submitting and aiding and abetting the submission of to the FMCSA a letter on Dallas Logistics' letterhead signed by Amanda Burgess that falsely stated that (a) Dallas Logistics' address was 25 Pixley Industrial Parkway, Gates, New York; (b) Dallas Logistics was created as a Texas-based business to be operated out Texas; and (c) James Zambito intended to relocate to Texas, but was unable to do so because his mother became seriously ill, followed later by his father, and that "based on these circumstances, Dallas Logistics remains in New York".

Counts 3 and 5 – Falsification of a Record

Counts 3 and 5 charge the defendant with falsification of a record with the intent to

[1] While the conspiracy charged in Count 1 will reference several false and fraudulent documents and statements that were made to the FMCSA between October 2012 and in or about January 2018, the documents and statements made prior to the expiration of the statute of limitations are not charged in the Indictment.

impede, obstruct and influence the FMCSA's investigation of Dallas Logistics and the proper administration by the FMCSA in violation of 18 U.S.C. §1519. Count 3 relates to the Form MCS-150 referenced in Count 2. Count 5 relates to the letter referenced in Count 4.

Count 6 – False Statements

Count 6 charges the defendant with making and aiding and abetting in the making of false statements to a FMCSA investigator in violation of 18 U.S.C. §1001(a)(2). The count relates to statements the defendant directed a co-conspirator to make to an FMCSA investigator who was performing a compliance review of Dallas Logistics on or about April 25, 2016.

Count 7 – Concealment of a Material Fact

Count 7 charges the defendant with concealing a material fact in violation of 18 U.S.C. §1001(a)(1). The count alleges that the defendant caused a co-conspirator to stage a sham office for Dallas Logistics at 25 Pixley Industrial Parkway, Gates, New York to conceal that the company was affiliated with the defendant and his other trucking businesses, including Orange Transportation Services.

Count 8 – Aggravated Identity Theft

Count 8 charges the defendant with Aggravated Identity Theft in violation of 18 U.S.C. §1028A(a)(1). This count alleges the defendant transferred and used the means of identification of James Zambito without lawful authority on the MCS-150 Form referenced in Count 2.

V. STIPULATIONS

To avoid the need to call additional chain-of-custody witnesses at trial, the government has requested that the defendant stipulate to the admission at trial of the following records:

1. Bank records.[2]
2. Certified Court Records.[3]
3. Documents from the various motor carrier corporate entities.
4. Emails from or to the defendant seized pursuant to a federal search warrant executed at 105 McLaughlin Road, Rochester, New York.
5. Business records of the United States Department of Transportation.
6. Business records obtained from C.H. Robinson.

VI. RULE 404(b) EVIDENCE

Rule 404(b) provides for the admission of evidence of other crimes, wrongs, and acts where such evidence is offered "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The Second Circuit evaluates Rule 404(b) evidence under an "inclusionary approach." *See United States v. Brand*, 467 F.3d 179, 198 (2d Cir. 2006). In assessing whether evidence is admissible under Rule 404(b), courts apply a four-part test: "(1) [whether] the prior act evidence was offered for a proper purpose; (2) [whether] the evidence was relevant to a disputed issue; (3) [whether] the probative value of the prior act evidence substantially outweighed the danger of unfair prejudice; and (4) [whether] the court administered the appropriate limiting

[2] In the alternative, the government intends to introduce these documents pursuant to a 902(11) certification and has provided the required notice of such to the defense.

[3] *Orange Transportation Services Inc. vs. Volvo Group North America*, 19-CR-6289 (W.D.N.Y., 2019).

instruction." *United States v. Douglas*, 415 Fed. App'x 271, 273 (2d Cir. 2010); *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009).

Further, such evidence may include uncharged misconduct that "complete[s] the story of the crime charged." *United States v. DeVilla*, 983 F.2d 1186, 1194 (2d Cir. 1993). Such evidence may also be used to rebut a defendant's innocent explanation with which he seeks to establish that he lacked the requisite intent to commit the offense charged. The proffered evidence must, however, closely parallel the offense charged. *Id.*

Such evidence is also properly admitted if it "arose out of the same transaction or series of transactions as the charged offense, [or] if it [is] inextricably intertwined with the evidence regarding the charged offense." *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997).

Charged Conduct

Count 1 of the Indictment charges the defendant with conspiring to defraud the USDOT by submitting false and fraudulent documents to trick the USDOT into believing that Dallas Logistics had no affiliation to "***other*** motor carrier companies used by KIRIK, including Orange Transportation Services." Thus, in addition to Orange Transportation Services, the government intends to present evidence that the defendant concealed from the USDOT other companies being operated out of 105 McLaughlin Road. Such evidence is not Rule 404b evidence but rather evidence of the charged conduct.

Common Scheme/Plan

The defendant has a pattern of opening new trucking businesses each time he received a Conditional or Unsatisfactory rating by the USDOT. He, working with his family members, opened the businesses under third party names and/or submitted false documents to suggest the new businesses were not affiliated with any of his other businesses. In doing so, he engaged in an ongoing scheme to defraud the USDOT in the exact manner he did with Dallas Logistics. Such evidence falls within Rule 404(b) and includes the following:

KT Transport/Main Street Logistics

In 2000, the defendant created KT Transport, which later became Main Street Logistics, Inc., a transportation company operated out of 105 McLaughlin Road, in Henrietta, New York. The defendant was listed at the owner of the company, and he failed to list a principal place of business. The defendant listed the mailing address as 228 Rosemont Drive, Rochester, New York. The carrier was revoked from 2004 to 2018. the carrier began operations again in 2018.

On November 2, 2020, the defendant was interviewed during the Safety Audit for Main Street Logistics. The defendant did not disclose any connection to other entities.

ABS Logistics Inc.

On January2, 2004, the defendant created ABS Logistics, a transportation company. The defendant's brother-in-law Dmitriy Burkovshiy was listed at the owner of the company, and the principal place of business was located at 50B North Glen Drive, Rochester, New York.

On November 23, 2004, Burkovshiy and his wife (the defendant's sister), Lily Burovskaya were interviewed during the Safety Audit and not disclose any connection to other entities.

Eagle Expediters Inc.

On May 18, 2006, the defendant created Eagle Expediters, Inc. a transportation company operated out of 105 McLaughlin Road, in Henrietta, New York. The defendant's mother, Galina Kirik, was listed on the USDOT Form MCS-150 as the owner of the company and 2186 Chesnee Highway, Spartanburg, South Carolina was listed as the principal place of business.

On the USDOT MCS-150 Form, which contained Galina Kirik's name and affirmation under penalty of perjury, the defendant failed to disclose that Eagle Expediters, Inc. was affiliated with any other FMCSA-regulated transportation companies.

On November 1, 2007, Yaroslav Kirik, the defendant's father, with Yaroslav Fatyak, was interviewed during the Safety Audit and misrepresented to the FMCSA auditor that Eagle Expediters was not affiliated in any way to another transportation company currently or previously regulated by the FMCSA.

Orange Transportation

On October 9, 2006, the defendant created Orange Transportation Services, a transportation company operated out of 105 McLaughlin Road, in Henrietta, New York. The defendant's wife, Tanya Kirik, was listed on the USDOT Form MCS-150 as the owner of the company and 2186 Chesnee Highway, Spartanburg, South Carolina was listed as the principal place of business.

On the USDOT MCS-150 Form, which contained Tanya Kirik's name and affirmation under penalty of perjury, the defendant failed to disclose that Orange Transportation Services was affiliated with any other FMCSA-regulated transportation companies.

On February 6, 2008, during the Safety Audit, the defendant misrepresented to the FMCSA auditor that Orange Transportation Services was not affiliated in any way to another transportation company currently or previously regulated by the FMCSA and that its principal place of business was in South Carolina.

TruGreen Logistics

On October 16, 2009, the defendant created TruGreen Logistics, Inc., a transportation company that operated out of 105 McLaughlin Road, in Henrietta, New York. The defendant was listed on USDOT Form MCS-150 as the owner of the company and 3515 Magnolia Avenue, Louisville, Kentucky was listed as the principal place of business.

On the USDOT MCS-150 Form, (which the defendant affirmed under penalty of perjury), the defendant failed to disclose that TruGreen Logistics, Inc. was affiliated with any other FMCSA-regulated transportation companies, or that it was operated out of Rochester, New York.

On February 23, 2011, during the Safety Audit, the defendant misrepresented to the FMCSA auditor that TruGreen Logistics was not affiliated in any way to another transportation company currently or previously regulated by the FMCSA and that its principal place of business was in Kentucky.

Motor Freight, Inc.

On April 9, 2010, the defendant and his brother, Pavel Kirik, created Motor Freight, Inc., a transportation company that operated out of 105 McLaughlin Road, in Henrietta, New York. The defendant's brother, Pavel Kirik, was listed as the owner of the company and Inman, South Carolina was listed as the principal place of business.[4]

On the DOT MCS-150 Form, which contained Pavel Kirik's name and affirmation under penalty of perjury, the defendant failed to disclose that Motor Freight, Inc., was affiliated with any other FMCSA-regulated transportation companies and that its principal place of business was in Rochester, New York.

In December 2012, James Zambito was interviewed during an FMCSA audit and admitted that Motor Freight, Inc. shared assets and drivers with Orange Transportation and TruGreen Logistics. He admitted that all three companies were operated out of 105 McLaughlin Road. On December 14, 2012, Motor Freight, Inc. was downgraded to a Conditional Rating.

Mile Transport Inc.

On May 6, 2009, the defendant created Mile Transport Inc., a transportation company. The defendant's brother-in-law Dmitriy Burkovshiy was listed at the owner of the company, and the principal place of business was located at 2495 Creekway Drive, Columbus, Ohio. On the USDOT OP-1 Form, Burkovshiy failed to report the company was related to any other USDOT regulated company.

[4] During a safety audit, the FMCSA discovered the listed principal business address of Motor Freight, Inc. was actually a residence, and the homeowners had no knowledge of Motor Freight Inc.

Columbus Freight

On January 16, 2012, the defendant and his cousin, Ruslan Tsyapura, created Columbus Freight, a transportation company that operated out of 105 McLaughlin Road, in Henrietta, New York. The defendant's cousin, Ruslan Tsyapura, was listed as the owner of the company and Inman, South Carolina was listed as the principal place of business. The address was later changed to Columbus, Ohio.

On the USDOT MCS-150 Form, which contained Ruslan Tsyapura's name and affirmation under penalty of perjury, the defendant failed to disclose that Columbus Freight was affiliated with any other FMCSA-regulated transportation companies.[5]

On August 6, 2012, Jacqueline Bussel was interviewed during the Safety Audit and misrepresented to the FMCSA auditor that Columbus Freight was not affiliated in any way to another transportation company currently or previously regulated by the FMCSA despite listing the defendant as Vice President of the company and James Zambito as the District Sales Manager.

Logic Inc. (Formerly Dependable Drivers)

On May 18, 2015, the defendant created Logic, Inc., a transportation company that operated out of 105 McLaughlin Road, in Henrietta, New York. The defendant's brother, Pavel Kirik, was listed on USDOT Form MCS-150 as the owner of the company and 2809 Tophill Road, Monroe, North Carolina was listed as the principal place of business.

On the USDOT MCS-150 Form, (which Pavel Kirik affirmed under penalty of perjury), Pavel Kirik failed to disclose that Logic Inc. was affiliated with any other FMCSA-regulated transportation companies, including Dallas Logistics and Orange Transportation, which were in existence at the time.

On April 5, 2016, during the Safety Audit, the defendant misrepresented to the FMCSA auditor that Logic Inc. was not affiliated in any way to another transportation company currently or previously regulated by the FMCSA and that its principal place of business was in North Carolina.

[5] In 2001, Tsyapura opened a transportation company called Roadaholic Corporation. The company was operated by the defendant and his father, Yaroslav Kirik. In 2004, Roadaholic Corporation was transferred from Tsyapura to the defendant.

The fraudulent conduct regarding the companies identified above is identical to the charged conduct and is therefore admissible under Rule 404(b). This evidence will be offered for a proper purpose, will be relevant to a disputed issue, and its probative value will substantially outweigh the danger of unfair prejudice. The court can administer the appropriate limiting instruction to the jury.

Motive

The defendant's motive in this case is greed. Among other impacts, the defendant would have lost significant revenue from clients for having a Conditional Rating by the USDOT. Brokerage Company C.H. Robinson was one of Orange Transportation's largest clients during the conspiracy period.

In March 2012, Orange Transportation was given a Conditional Rating by the USDOT; this information was given to C.H. Robinson which then gave Orange Transportation a time period to return to a passing rating before being placed on a "Do Not Use" list. In short, Orange Transportation was likely going to lose C.H. Robinson as a customer because of the Conditional rating. Six months later, Dallas Logistics was formed, and C.H. Robinson began using Dallas Logistics as a carrier company. A C.H. Robinson employee will testify that they would not hire a new company if it had a Conditional Rating.[6] Due to the charged scheme, Dallas Logistics had a "Not Rated" status and was suitable for C.H. Robinson standards.

[6] Dallas Logistics would have received a Conditional Rating from the USDOT had it disclosed being related to Orange Transportation on the MCS-150 Form.

C.H. Robinson has systems in place to avoid hiring companies like Dallas Logistics that were simply an extension of another company (Orange Transportation) with an unsuitable rating. C.H. Robinson had a database that cross-referenced the employee names, billing locations, and mailing addresses, among other information, of their carrier companies that was used to find connections between carriers.

To avoid this linkage, the defendant, along with his family members, executed various contracts with C.H. Robinson using fictitious names. For instance, on December 6, 2012, the defendant executed a contract with C.H. Robinson listing "Mark Jensen" as the Vice President of Dallas Logistics. Witnesses will explain that "Mark Jensen" was never an employee of Dallas Logistics. On March 7, 2012, Pavel Kirik executed a contract with C.H. Robinson listing "Ben Jenkins" as the Vice President of Motor Freight Inc. Witnesses again will explain that "Ben Jenkins" was never an employee of Motor Freight Inc. The defendant and his family members executed several fraudulent contracts with C.H. Robinson throughout the various entities discussed above. They deceived C.H. Robinson through these means to avoid losing a large source of revenue for their collective companies.[7]

Witnesses will further testify that the defendant and his brother routinely gave false names to individuals on telephone calls taking place at 105 McLaughlin Road. They did so to continue the illusion of that the various companies were unrelated.

[7] At trial, the government intends to present several similar fraudulent contracts involving the defendant's various transportation companies and C.H. Robinson.

First, Rule 404(b) is not needed for the admission of this evidence because such evidence directly relates to the conduct charged in Count 1. However, this evidence is also admissible under Rule 404(b) to establish motive, opportunity, intent, preparation, plan, and knowledge.

VII. MOTION IN LIMINE

A. THE COURT SHOULD PRECLUDE THE DEFENDANT FROM OFFERING EVIDENCE OF INDUSTRY STANDARDS.

The Court should preclude the defendant from offering evidence or argument regarding industry standards (i.e., other companies also create "chameleon companies") because introducing such evidence constitutes an improper attempt at jury nullification.

Defense arguments designed to promote or encourage jury nullification are improper and should not be permitted. *In re United States*, 945 F.3d 616, 626 (2d Cir. 2019). Trial judges should "block defense attorneys' attempts to serenade a jury with the siren song of nullification." *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *see also United States v. Young*, 20 F.3d 758, 765 (7th Cir. 1994) (affirming a trial court's grant of a government motion in limine to exclude jury nullification arguments). The Court's duty to prevent nullification encompasses orders precluding the defense from introducing irrelevant evidence or evidence only relevant to improper jury nullification arguments. *See, e.g.*, *United States v. Penn*, 969 F.3d 450, 458 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2526 (2021) (noting that evidence sought to be admitted solely for nullification is irrelevant and inadmissible); *In re United States*, 945 F.3d at 630–31 (explaining that evidence of sentencing consequences upon

conviction would be irrelevant if offered solely for purpose of nullification); *United States v. Peterson*, 945 F.3d 144, 157 (4th Cir. 2019) (holding trial court properly precluded defense evidence of his lengthy state sentence given its "self-evident invitation to jury nullification"); *United States v. Lynch*, 903 F.3d 1061, 1080 (9th Cir. 2018) (noting that the jury "has no sentencing function" and "should be admonished to reach its verdict without regard to what sentence might be imposed"); *United States v. Walsh*, 654 Fed. App'x. 689, 696–97 (6th Cir. 2016) (affirming trial court's refusal to allow the defense to argue the legitimacy of federal marijuana laws); *United States v. Dunkin*, 438 F.3d 778, 780 (7th Cir. 2006) (holding that a defense unsupported by credible evidence should not be submitted to a jury since it invites improper jury nullification); *United States v. Funches*, 135 F.3d 1405, 1408 (11th Cir. 1998) (affirming a trial court's exclusion of evidence that a defendant relied to his detriment on erroneous advice from a state official that he could lawfully possess a gun; the defense was irrelevant to the federal charge and its only relevance would have been to "inspire a jury to exercise its power of nullification."); *United States v. Greer*, 620 F.2d 1383, 1384 (10th Cir. 1980) ("presenting information to the jury about possible sentencing is prejudicial"); *United States v. Gorham*, 523 F.2d 1088, 1097–98 (D.C. Cir. 1975) (affirming a trial court order precluding defense evidence that might encourage a "conscience verdict" of acquittal).

Pursuant to Federal Rule of Evidence 403, the Court may preclude evidence if its probative value is outweighed by, *inter alia*, the risk of potential jury nullification. *See United States v. Rivera*, No. 13-cr-149, 2015 WL 1725991, at *2 (E.D.N.Y. Apr. 15, 2015) (district court may consider "the risk of jury nullification" in determining admissibility of evidence

under FRE 403) (*citing United States v. Al Kassar*, 660 F.3d 108, 124 (2d Cir. 2011)); *United States v. Levin*, No. 15-cr-101, 2016 WL 299031, at *10 (S.D.N.Y. Jan. 25, 2016) (same). Indeed, "the fact that certain conduct may be common or general practice in an industry was not relevant to the jury's consideration of the conduct of [a defendant], and is not a defense to wire fraud." *United States v. Mendlowitz*, No. S2 17 CR. 248 (VSB), 2019 WL 6977120, at *5 (S.D.N.Y. Dec. 20, 2019), *aff'd*, No. 21-2049, 2023 WL 2317172 (2d Cir. Mar. 2, 2023). "'[E]verybody is doing it' is not a defense to the crime of wire fraud or conspiracy to commit wire fraud; just as 'everybody speeds' is not a defense if your car happens to get picked up on the radar." *United States v. Connolly*, No. 16 Cr. 370 (CM), 2019 WL 2125044, at *13 (S.D.N.Y. May 2, 2019). Nor does "[t]he argument that 'everybody does it' make it . . . more or less likely that [the defendant] engaged in the activity charged in the indictment." *United States v. Arrow-Med Ambulance, Inc.*, No. 17-CR-73-JMH, 2018 WL 2728023, at *2 (E.D. Ky. June 6, 2018) (precluding evidence that other ambulance companies in the same geographical region engaged in similar billing and business practices as those charged in the indictment).

In addition, permitting "industry standard" evidence presents the grave risk of prejudice since "there [is] a likelihood of jury confusion that the standard against which [defendant's] conduct [is] to be measured [is] industry practice rather than whether his conduct violated the wire fraud statute." *Mendlowitz*, 2019 WL 6977120, at *7. Any relevance, then, is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury. *Id.*

VIII. SUMMARY WITNESSES AND SUMMARY CHARTS

The government intends to present testimony from IRS Special Agent Alan Roth to summarize the evidence in this case. This will include the introduction into evidence of charts summarizing the evidence contained in the financial records and to provide general timelines regarding significant events. The evidence supporting the charts will be placed into evidence before the charts are offered into evidence. The government also intends to rely on these charts during its closing remarks. The purpose of these charts is to aid the jury in its understanding of the evidence presented during the trial. Copies of these charts will be presented to defense counsel prior to trial after they are completed. The admission of testimony summarizing evidence is governed under Federal Rule of Evidence 1006, which provides that a party "may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court."

IX. WITNESS EXCLUSION

The government will move for the exclusion of all witnesses until their testimony has been completed, pursuant to Federal Rule of Evidence 615.

X. POTENTIAL WITNESS ISSUE

The government intends to present the testimony of one or more of the defendant's relatives at trial. These witnesses obviously identify with the adverse party and have declined

meetings with the government in advance of trial. Pursuant to Fed. Rule of Crim. Procedure 611(c)(2), the government may seek to ask leading questions upon their direct testimony. In advance of doing so, the government will ask the Court for permission to treat them as hostile witnesses.

XI. POWER POINT PRESENTATION DURING OPENING STATEMENT

Due to the somewhat complex nature of the prosecution, the government intends to utilize a power point presentation during its opening statement. This presentation will assist the government in describing the counts against the defendant and the evidence the government anticipates it will introduce at the trial. *See United States v. Burns,* 298 F.3d 523, 541 (6th Cir. 2002) (permitting the presentation after reviewing each slide, as long as there would be evidence about each image that appeared on the test).

In *United States v. De Peri,* 778 F.2d 963, 978-79 (3rd Cir. 1985), the Court held that "[a]s long as the opening statement avoids references to matters that cannot be proved or would be inadmissible, there can be no error, much less prejudicial error." The Court further stated that "we take notice that such charts are often employed in complex conspiracy cases to provide the jury with an outline of what the government will attempt to prove." *Id.* at 979; *see United States v. Fried,* 881 F.2d 1077 (6th Cir. 1989) ("Use of a chart in opening statement is generally permissible, since it is not evidence, and as the purpose of opening argument is to give a broad outline of the case and facts to be proved, a visual outline of a party's argument is not

significantly different from an oral outline.") (italics omitted); *United States v. Taylor,* 210 F.3d 311 (5th Cir. 2000).

XII. JUDICIAL NOTICE

Pursuant to the doctrine of judicial notice and Rule 201 of the Federal Rules of Evidence, if requested by a party, the Court must take judicial notice of any undisputed facts, if supplied with the necessary information, which are either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. The government will ask the Court to take judicial notice of the undisputed fact that the Federal Motor Carrier Safety Administration is an agency or department of the United States of America.

XIII. RECIPROCAL DISCOVERY

The government has provided extensive discovery to the defense and has made available all the items of evidence, whether intended to be used at trial or not, over which the government has custody or control for defense review. The government renews its request that the defendant be ordered to produce any and all discovery, which has not yet been

produced, to which the government is entitled under Rules 16(b)(1)(A), 16(b)(1)(B) and 16(b)(1)(c) of the Federal Rules of Criminal Procedure.

DATED: Rochester, New York, March 28, 2024.

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