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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN VOLMER (1),
JOSHUA YAFA (2),
JAMIE YAFA (3), and
CARL MARCINIAK (5),

Defendants.

Case No. 21CR1310-WQH

UNITED STATES' MOTIONS *IN LIMINE* TO:

1. Find Proper Authentication of Recorded Calls and Cell Phone Materials
2. Admit Statements of Defendants and Co-Conspirators
3. Admit Defendants' References to other "Deals" when Describing the GWHP and NUNZ Schemes
4. Admit Business Records
5. Admit Summaries and Charts
6. Admit Expert Testimony and Related Exhibits
7. Lay Testimony by Agent about the Meaning of Phrases Encountered in the Investigation.
8. Admit Testimony about Matters Learned in the Course of Employment
9. Admit Evidence of Defendants' Relevant Regulatory and Criminal History
10. Preclude Evidence or Argument That Defendants were Unaware Their Conduct was Unlawful
11. Preclude an Entrapment Defense
12. Preclude Advice of Counsel Defense
13. Order Reciprocal Discovery

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The United States of America, by and through its counsel, Randy S. Grossman, United States Attorney, and Aaron P. Arnzen and George V. Manahan, Assistant U.S. Attorneys, hereby files its motions *in limine* relating to the June 12, 2023 trial.

I.

INTRODUCTION

Defendants are charged with crimes arising from pump-and-dump schemes surrounding two companies: (1) Global WholeHealth Partners Corp. (ticker GWHP), which the Defendants sometimes shorthanded as "Global," and (2) Nunzia Pharmaceutical Corp. (ticker: NUNZ). James Mahoney, an FBI Confidential Human Source ("CHS"), and an FBI undercover agent ("UC Agent") who posed as Mahoney's nuts and bolts assistant/confidante, captured contemporaneous evidence of the scheme from mid- to late-2019 until in or around June 2021. This evidence largely consists of calls, text messages, and emails that Mahoney and the UC Agent exchanged with Defendants.

Four of the five defendants charged here are currently expected to go to trial; Defendant Charles STRONGO recently pleaded guilty. Through these motions, the Government seeks rulings that would allow certain evidence to be admitted, and rulings that disallow other evidence and arguments that the Defense may attempt to present.

II.

STATEMENT OF FACTS

A. Microcap Stock Fraud Schemes, Generally

Market manipulation / pump and dump schemes are pervasive in several geographic areas in the United States, including Southern California. These schemes feature a number of typical hallmarks. Conspirators typically (1) have, or take control of, a company's management and stock; (2) conceal that control; (3) issue shares to the public after deceiving transfer agents and brokerage firms; (4) engage in manipulative trading of the stock to artificially improve the stock chart; (5) coordinate exaggerated press releases with promotional campaigns; (6) sell the stock; and (7) distribute the proceeds.

To those who are uninitiated in these schemes, many of these activities often appear to be innocuous; but taken together, a combination of these and similar steps makes for a scheme to defraud. *See United States v. Jenkins*, 633 F.3d 788, 793 (9th Cir. 2011) (affirming securities fraud and money laundering convictions for "'pump and dump' scheme during which [defendants] conspired to secretly acquire millions of shares of UniDyn Corporation stock, artificially inflate its value, sell it for significant profit, and launder the proceeds."); *United States v. Laurienti*, 611 F.3d 530, 534 (9th Cir. 2010) (affirming restitution order in case involving a "pump and dump scheme," and noting the "overwhelming evidence that the criminal conspiracy existed and that the owners and managers were complicit").

B. Overview of the Scheme

James Mahoney has decades of experience in the microcap stock fraud world. By 2019, he was cooperating with the FBI as a CHS. The FBI instructed Mahoney to take calls from his former contacts and record conversations about market manipulation / pump and dump schemes. So, when Defendant Brian VOLMER reached out to Mahoney in April 2019 (after Mahoney began cooperating), Mahoney began recording conversations with VOLMER, as instructed. Mahoney also introduced UC Agent as his assistant who could help with the nuts and bolts of conducting these schemes. In turn, VOLMER introduced Mahoney and UC Agent to other members of the conspiracy. Mahoney and UC Agent recorded those conversations, too. This evidence, paired mostly with financial records collected from banks, brokerages, and stock transfer agents, provides a detailed portrait of the scheme. In brief:

After executing a reverse merger transaction with an inactive company with publicly traded stock, STRONGO became the CEO of GWHP and controlled over 99% of its stock. STRONGO held much of this stock in the names of others, including his family members and two entities that he controlled - Lionsgate Funding Group, and Lionsgate Funding Management. Under the federal securities laws, this stock could not legally be offered to the public unless and until an offering was registered with the SEC or the distribution met

an exemption to the registration requirement. STRONGO misrepresented to GWHP's transfer agent that he did not control most of these shares, which led the transfer agent to conclude that an exemption from the SEC's registration requirement applied and lift the restrictive legend from the shares. STRONGO's lies, therefore, effectively allowed the subject GWHP shares to be sold to the public in the national securities markets. STRONGO then caused his family members and entities to distribute shares to co-conspirators, and to others who would play a (perhaps) less witting role in the conspiracy.

Meanwhile, VOLMER was out raising funds for GWHP and NUNZ, which is why he reached out to Mahoney. Based largely on his actual historical profile, Mahoney played the role of a wealthy, experienced player in the penny stock space who was willing to invest in stocks that would be subject to a pump and dump scheme, with the understanding that his funds would, in part, pay for the pump. Defendants here were eager to share details with Mahoney because his money could make them rich, not only by supporting the GWHP and NUNZ deals, but also future deals.

VOLMER initially pitched Mahoney on an investment in NUNZ, a company that was managed and controlled by STRONGO. Mahoney agreed to invest a small amount – $10,000 – as a first tranche to test the deal, with the promise of a significantly larger investment if promotional campaigns worked. The group switched horses from NUNZ to GWHP – another company that was managed and controlled by STRONGO – along the way because GWHP purported to sell diagnostic test kits and was therefore well-positioned to take advantage of the COVID-19 pandemic.

Frequent discussions ensued, touching upon many of the hallmarks of a pump and dump scheme. These included:

- **Concealing control of the company and its stock**. *E.g.*, STRONGO: "We run a piece of everything, but here's the thing, my name's not on anything."
- **Using nominees**. *E.g.*, VOLMER: "If you guys need a nominee, that's what Carl [MARCINIAK] does, pretty much. All these nomin – all this shit, out of the Cooke Islands."

- **Coordinating press releases with promotion activities**. *E.g.*, VOLMER: The company's expected news releases are "good stuff, dude. … Everyone's signed off on it, its ready to go, it goes when the phone room wants it."
- **Promotions**. *E.g.*, VOLMER: "JOSH is really good. I have a call next week with JOSH; he's gonna start coming into GWHP."
- **Boiler rooms**. *E.g.*, VOLMER: "I've got eight guys ready to start their fronts; I've got four closers, one's me." JOSHUA YAFA: "I put CHARLES on the phone yesterday with Christian and his floor. And, realistically, I'm gonna get them started in like 10 days." VOLMER: "JOSH owns part of the room." VOLMER: "Phone rooms starts Monday, bro! … We had the phone call yesterday with the three phone rooms. JOSH locked em in."
- **Working together, and roles within the conspiracy**. *E.g.*, VOLMER: "OTCTipReporter, which are my partners. … That's JAMIE and JOSH. We're all partners now." VOLMER: "He [STRONGO] talks to JOSH everyday now, because JOSH is my partner. We all have – we're all embedded in the deal." JOSHUA YAFA: "Of course, 100%," in answer to UC Agent's question "You and BRIAN and CARL, you guys are all partners, right; we're all talking about the same deals here, or no?" VOLMER: "I've got the network. CARL and JOSH, we're the guys. … JOSH is the IR guy. And then we have CARL. CARL is the quick money guy, and the offshore guy."
- **Dumping the stock**: E.g., VOLMER: "By summer, dude, I'm gonna make 30 million bucks off this deal." VOLMER: "I'm in it for the quick play, meaning sometime this summer I'll sell the paper, and then let it come down and then rebuy it back right before the next wave" of COVID.

Despite some hurdles, including growing enmity among various conspirators, the group managed to promote NUNZ and GWHP stock through one or more call rooms, paid analyst reports, and email stock newsletters beginning in August 2020. The promotions supported the companies' stock price, which remained somewhat steady despite significant

selling, and the conspirators and those close to them were able to sell blocks of their shares; for example, they sold their GWHP shares for over $4 million in profit.

C. The Conspirators' References to Other "Deals" to Describe the GWHP, NUNZ Schemes

As the GWHP and NUNZ schemes progressed, Mahoney, UC Agent, and Defendants (particularly VOLMER) fell into a pattern of consistent discussions. During these discussions, they shared details about other, non-GWHP and NUNZ stock deals in which Defendants participated. Defendants (mostly VOLMER and JOSHUA YAFA) raised most of these other deals in an effort encourage Mahoney to provide funding for NUNZ, GWHP, and future deals. In many instances, Defendants were showing off their skills, which (they argued) demonstrated their ability to successfully pump GWHP and NUNZ. This included citing other deals that were also well positioned during the COVID pandemic (like GWHP, one or more of those companies purported to produce and/or sell COVID test kits) to describe some of the nuances of how the Defendants' pump and dump machinery worked.[1]

A good example: When VOLMER first introduced Mahoney and UC Agent to JOSHUA YAFA, VOLMER invited JOSHUA YAFA to describe the "phone room and all your stuff," and to use CODX as an example. Volmer: "Joshua, give him a quick – and then I want to talk about C-O-D-X, cause I know you guys have been working on that for a while. And, uh, tell him about the phone room and-and all your stuff and the network." JOSHUA YAFA responded:

> So, whoever is looking for a small cap stock, or a penny stock, or a low pr, low price biotech stock whatever it may be, um there's forty million people out there that look for these queries. We're in the process of um, of fine-tuning it where we take on a client and let's say we start them with um traditional email. And that's what we did with CODEX. We had this traditional email for CODEX um from two thousand-nineteen, so let's see, that would be a year ago. So, two

[1] Mahoney and UC Agent also presented two stocks they owned independently of Defendants and asked what it would take to use Defendants' machinery to pump those stocks. This allowed Mahoney and UC Agent to ask even more questions about the roles played by various members of the conspiracy.

> thousand and nineteen, like uh September, is when uh the just basically the email and the S-M-S started rollin' out for CODEX. That's then um we turned into um getting analyst reports. Um, I have a network of basically five different analysts um, and these are guys that are pretty well known. Like [Analyst 1] and [Analyst 2]--

Through this narrative, JOSHUA YAFA succinctly described the promotion "platform" that he and JAMIE YAFA (in conjunction with their "partners" MARCINIAK and VOLMER) used to pump stocks. There were such discussions, with the group often mentioning these other deals in the same sentence as NUNZ and GWHP.

Not surprisingly, the exact same pitch – that GWHP would be successful, just look at CODX for proof – was made to investors. A Penny Stock Prophet email blast on August 31, 2020 re: "WOW! See GWHP just Hit a High of $5... Volume Breakout" states the proposition plainly: "If you missed my previous profile CODX run from $3 to $30, here is your second chance with my newest pick GWHP…"

III.

MOTIONS AND ARGUMENT

A. Motion to Find Proper Authentication of Recorded Calls and Cell Phone Materials

Under Federal Rules of Evidence 901(a), in order "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FED. R. EVID. 901(a). "In other words, the party offering the evidence must make a *prima facie* showing of authenticity 'so that a reasonable juror could find in favor of authenticity or identification.'" *United States v. Gadson*, 763 F.3d 1189, 1203 (9th Cir. 2014); *see also United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985) ("[G]overnment need only make a prima facie showing of authenticity, as '[t]he rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.' The credibility or probative force of the evidence offered is, ultimately, an issue for the jury.") (internal citations omitted). This is a relatively easy burden to meet. *See United States v. Recio*, 884 F.3d 230, 236–37 (4th Cir. 2018) (901

burden "not high"); *United States v. Ceballos*, 789 F.3d 607, 618 (5th Cir. 2015) (901 burden "low"); *United States v. Hock Chee Koo*, 770 F. Supp. 2d 1115, 1121 (D. Or. 2011) (901 burden "not heavy").

1. Authenticating Recordings

The United States seeks to admit evidence of recordings of Defendants' conversations with the UC Agent and a confidential human source. (CHS). For such recordings, the prima facie showing involves demonstrating to a trial court that it is "satisfied that the recording is 'accurate, authentic, and generally trustworthy.'" United States v. Panaro, 266 F.3d 939, 951 (9th Cir. 2001).[2] Such foundation may be proved through extrinsic evidence, such as a witness who testifies that the recording is what it purports to be, or is a true and accurate copy of the original." *Gadson*, 763 F.3d at 1203–04; *see also Collins*, 715 F.3d at 1035 (laying foundation "[for tape recordings . . . can be done in two ways: (1) a chain of custody demonstrating the tapes are in the same condition as when they were recorded, or (2) testimony demonstrating the accuracy and trustworthiness of the tapes."); *United States v. Matta-Ballesteros*, 71 F.3d 754, 768 (9th Cir. 1995), *opinion amended on denial of reh'g*, 98 F.3d 1100 (9th Cir. 1996) (foundation for admitting recording "is done by proving a connection between the evidence and the party against whom the evidence is admitted, and can be done by both direct and circumstantial evidence."). "A recorded conversation is generally admissible unless . . . unintelligible portions are so substantial that the recording as a whole is untrustworthy." *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999).

Additionally, "[w]here the government offers a tape recording of the defendant's voice, it must also make a prima facie case that the voice on the tape is in fact the

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[2] "The [G]overnment is only required to demonstrate that it took 'reasonable precautions' in preserving the evidence; it is not required to 'exclude all possibilities of tampering.'" *United States v. Collins*, 715 F.3d 1032, 1036 (7th Cir. 2013); *see also United States v. Cortellesso*, 663 F.2d 361, 364 (1st Cir. 1981) ("[T]apes are not inadmissible merely because 'one can conjure up hypothetical possibilities that tampering occurred.'").

defendant's, whether by means of a witness who recognizes the voice[3] or by other extrinsic evidence." *Gadson*, 763 F.3d at 1204 (affirming recorded jail call after law enforcement officer identified one defendant based on inferences that new voice on jail recordings was his because it coincided with the timing of his arrest, his request to use the jail phone, and his discussion of facts particular to his case). This simply requires evidence to "sufficiently narrow[] the universe of possible [speakers] so as to support an inference that the speaker[]" is the defendant. *See id.*

"There is no requirement that the tapes be put in evidence through the person wearing the recorder, or for that matter, through a contemporaneous witness to the recorded conversations." *Collins*, 715 F.3d at 1036 (quoting *United States v. Fuentes*, 563 F.2d 527, 532 (2d Cir. 1977).) Rather, courts routinely admit covert recordings through non-present law enforcement agents who facilitated and took custody of the recording. *See, e.g.*, *Collins*, 715 F.3d at 1035-37 (district court properly admitted tape recordings where informant recorded defendant on his own in Mexico and then shipped tapes to the government even though the informant "did not testify at trial and . . . no government agents were present when [he] made the recordings"); *United States v. Correa*, 519 F. App'x 602, 603 (11th Cir. 2013) (district court properly admitted videotape where FBI agent established foundation by discussing informant's competency to operate the recording equipment and inability to tamper with it, the recording appeared continuous, and by identifying the individuals on the tape); *United States v. Hemmings*, 482 F. App'x 640, 643 (2d Cir. 2012) (district court properly admitted tape recordings of conversations through non-present law enforcement agent as no requirement that participant of conversation authenticate recording); *United*

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[3] "Lay opinion . . . is permissible so long as the witness testifying has [the] requisite familiarity with the speaker. The opinion must be based on hearing the voice at any time under circumstances that connect it with the alleged speaker. Fed. R. Evid. 901(b)(5). Rule 901(b)(5) establishes a low threshold for voice identifications—an identifying witness need only be minimally familiar with the voice he identifies. Once the offering party meets this burden, the probative value of the evidence is a matter for the jury." *United States v. Ortiz*, 776 F.3d 1042, 1044–45 (9th Cir. 2015) (internal case citations and quotation marks omitted).

States v. Schuman, 111 F. App'x 276, 277 (5th Cir. 2004) (district court properly admitted tape recordings authenticated by law enforcement agent who established the fidelity of the recording equipment and the absence of material alterations, and identified the voice of the CI).

Here, the United States will admit all or nearly all of the recordings through UC Agent. For the majority of those recordings, UC Agent was present during the conversation and can easily lay the foundation. But he can equally authenticate the subset of recorded calls on which Mahoney participated without UC Agent by explaining the systematic manner the FBI used to collect the recordings, and Mahoney's consistent adherence to the FBI's instructions regarding collecting the recordings. Furthermore, UC Agent will testify that the items discussed on the recordings are in line with his own discussions with Defendants during the same time period (*e.g.*, the same topics were discussed, same plans were previewed, and same roles were covered by Defendants) and were consistent with UC Agent's instructions to Mahoney regarding topics to discuss. These recordings should therefore be admitted through UC Agent's testimony.

2. Authenticating Texts and Other Cell Phone Evidence

The United States also seeks to introduce evidence extracted from Defendants' seized cell phones, such as text messages, electronic photographs, and other documents. Indeed, on April 12, 2023, the United States provided Defendants notice identifying 95 exhibits extracted from the seized cell phones of Defendants Brian Volmer, Charles Strongo, and Joshua Yafa (the "Cell Phone Evidence") that the United States intends to admit at trial.[4] (Additionally, if the Court denies defendant Carl Marciniak's motion to suppress evidence

[4] At that time, the United States requested Defendants stipulate to the authentication of the records. Note, all Defendants had previously received in discovery all of the files extracted from the cell phones responsive to the search warrant justifying the searches, including the 95 files which were identified on April 12, 2023, as potential United States trial exhibits. Furthermore, since the United States' notice, Defendant Strongo has pled guilty. Therefore, the United States may choose alternative means to authenticate the 43 exhibits extracted from his phone.

from his seized cell phone,[5] the United States may seek to introduce similar evidence from that phone.) At the same time, the United States provided notice of its intent to rely on a certification of FBI Special Agent David Coonan pursuant to FED. R. EVID. 902(14)[6] to authenticate the Cell Phone Evidence if the parties did not stipulate to such authentication (since Agent Coonan is stationed in South Africa and therefore traveling to San Diego for trial would be inconvenient).[7] The United States now moves this Court for an order permitting authentication of the Cell Phone Evidence by such a certification.

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[5] On February 6, 2023, Defendant Marciniak filed a motion to suppress evidence from his cell phone. (ECF Nos. 164 (motion), 165 (opposition), 173 (supplemental opposition.) An evidentiary hearing regarding the motion was held on March 9, 2023. (ECF Nos. 170-172, 175.) The prosecution team is holding off reviewing the phone for possible trial exhibits until after the motion is resolved.

[6] FED. R. EVID. 902(14) states:

> The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: . . . (14) Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

FED. R. EVID. 902(11), which more generally allow states:

> The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

[7] If the parties do so stipulate prior to the Court's response to this motion, the United States will withdraw the motion.

The rules of evidence allow for the self-authentication of copied electronic data because:

> [T]he Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Fed. R. Evid. 902, 2017 Adv. Comm. N. Therefore, a district court properly admits exhibits under the self-authentication procedure outlined in Federal Rules of Evidence 902(11) and 902(14) based on an appropriate certification signed under penalty of perjury pursuant to 28 U.S.C. § 1746. *See United States v. Nishida*, No. 20-10238, 2021 WL 3140331, at *2 (9th Cir. July 26, 2021) (unpublished); *see also United States v. Dunnican*, 961 F.3d 859, 872 (6th Cir. 2020) (affirming self-authentication of text messages extracted from defendant's cell phone based on 902(14) certification); *United States v. Ramadan*, No. 17-20595, 2021 WL 2941956, at *1 (E.D. Mich. July 13, 2021) (The types of evidence that falls under these rules include, for example, . . . data copied from electronic devices, like . . . a phone, under FED. R. EVID. 902(14)"). Furthermore, a district court's reliance on a 902(14) certification "does not implicate the Confrontation Clause, which applies only to 'testimonial statements,' because the certification [is] not testimony—it [is] never entered into the record or shown to the jury, but rather merely used to establish that the . . . exhibit is self-authenticating." *Nishida*, 2021 WL 3140331, at *2.

Attached as Exhibit 4 to this motion is a certification authenticating the data extracted from Defendants' seized cell phones that meets the requirements of FED. R. EVID. 902(14) and (11). Therefore, the Court should order that the Cell Phone Evidence, and any other exhibits the United States later identifies from the data extracted from Defendants' cell phones, is self-authenticating, that is requires no extrinsic evidence of authenticity to be admitted.

B. Motion to Admit Statements of Defendants and Co-Conspirators

As described above, Defendants and their co-conspirators made statements on telephone calls, text messages, and emails that were recorded or otherwise captured by Mahoney and UC Agent. These communications are the most significant evidence of the conspiracy and scheme to defraud. Defendants' statements are admissible under Federal Rule of Evidence 801(d)(2)(A), under which a party's own statement is non-hearsay directly admissible against the party. *United States v. Matlock*, 415 U.S. 164, 172 (1974) (a party's "own out-of-court admissions … surmount all objections based on the hearsay").

In addition to Defendant's own statements, Mahoney and UC Agent made a number of statements to the conspirators on the recorded calls about the developing schemes. The conspirators, including Defendants, were active participants on the calls, and there is no indication that they did not hear and agree with Mahoney's and UC Agent's statements. Adoptive admissions are admissible under Federal Rule of Evidence 801(d)(2)(B) where a declarant made a statement and the defendant "manifested that it be adopted or believed it to be true." Defendants' adoptive admissions should therefore be admitted. *United States v. Monks*, 774 F.2d 945, 950 (9th Cir. 1985) (adoptive admissions may be presented to the jury where "sufficient foundational facts have been introduced for the jury reasonably to conclude that the defendant did actually hear, understand and accede to the statement.").

In addition, statements by any conspirators, including Defendants, are admissible when presented by the United States as non-hearsay under Rule 801(d)(2)(E) if they were made during and in furtherance of a conspiracy or common enterprise. *See generally Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988). Such statements are non-testimonial and there is no right to confront the declarant. *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

On the other hand, Defendants themselves may not elicit testimony or present recordings of their own statements without affording the United States the opportunity for cross-examination. Such evidence is improper "self-serving" hearsay when offered by the defense. *See, e.g.*, *United States v. Ortega*, 203 F.3d 675, 679 (9th Cir. 2000); *United States*

v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988) (*per curiam*) ("It seems obvious defense counsel wished to place [the defendant's] statement...before the jury without subjecting [the defendant] to cross examination, precisely what the hearsay rule forbids.").

Defendants cannot sidestep the prohibition against hearsay by invoking the so-called rule of completeness. FEDERAL RULE OF EVIDENCE 106 provides "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." But this rule is limited, and merely designed to prevent "misunderstanding or distortion" caused by the introduction of only part of a document or recorded statement that could only be cured by admission of the full record. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988). It does not allow adverse parties to introduce any unedited statement merely because the proponent party has offered an edited or excerpted version. "It is often perfectly proper to admit segments of prior testimony without including everything, and adverse parties are not entitled to offer additional segments just because they are there and the proponent has not offered them." *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996).

The rule, then, is only designed to cure what might otherwise present the jury with a misleading impression created by taking something from the statement out of context. Consider *United States v. Vallejos*, where the defendant argued that redacted portions of his statement to investigators should be admitted "to show the jury the 'flavor of the interview,' to 'humanize' [the defendant], to prove his 'character,' and to convey to the jury the voluntariness of the statement." 742 F.3d 902, 905 (2014). The Ninth Circuit found this unpersuasive, pointing out that defendants are not entitled to introduce such evidence when it is not specifically designed to correct a misleading impression created because a particular statement was taken out of context. *Id.*

Here, the United States will not offer misleading statements or remove admissions from important context such that clarification is necessary, and the rule of completeness therefore does not apply.

C. Motion to Admit Defendants' References to Other "Deals" When Describing the GWHP and NUNZ Schemes

The United States seeks to introduce evidence of discussions surrounding other, non-GWHP and NUNZ deals to describe, explain or discuss the contours of the machinery they would apply to the GWHP and NUNZ schemes. To mitigate the risk of undue prejudice, the United States does not intend to prove that these other deals were fraudulent or illegal.

Because the conspirators discussed these other stocks in connection with, and to illuminate, their plans and actions with respect to GWHP and NUNZ, the other stocks are intrinsic evidence of the crimes for which Defendants are charged. The evidence is therefore not subject to Rule 404(b). As the Ninth Circuit explained:

> Other act evidence that is inextricably intertwined with a charged offense is independently admissible and is exempt from the requirements of Rule 404(b). ... Such intrinsic evidence includes evidence constituting a part of the transaction that serves as the basis for the criminal charge. … Intrinsic evidence, however, also includes evidence that is necessary to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime. ... This is because the jury cannot be expected to make its decision in a void—without knowledge of the time, place, and circumstances of the acts which form the basis of the charge. … This includes circumstantial evidence explaining the general nature of a defendant's business activity and providing a context in which the transactions at issue took place.

United States v. Anderson, 741 F.3d 938, 949-50 (2013) (internal citation, quotations omitted).

Here, introduction of these conspiratorial discussions will provide the jury with "knowledge of the time, place, and circumstances" surrounding the GWHP and NUNZ schemes, and allow for a "coherent and comprehensible story regarding the commission of the crime."

Federal Rule of Evidence 404(b) offers an alternative means to introduce the evidence. First, the evidence is relevant because, through these discussions, Defendants expressly described the mechanisms they intended to use to pump GWHP and NUNZ stock.

The discussions are therefore direct proof that Defendants intended to, and did, engage in the precise conduct that is alleged in the indictment.

Second, the conduct is not too remote in time. Defendants' discussions with Mahoney and UC Agent about these other deals took place during the fraud period alleged in the Indictment (September 2019 through March 2021). And the other deals themselves were either in the works at the same time or had recently wrapped up. CODX was a "COVID play," and its promotions ran during the pandemic, and CODX was referenced in by name in the GWHP promotional materials published to advance the scheme charged here. *See Lozano*, 623 F.3d 1055, 1059-60 (9th Cir. 2010) (three years not too remote).

Third, the evidence is sufficient to show that one or more of the conspirators promoted these other deals. Using the same example, VOLMER repeatedly credited JOSHUA YAFA and JAMIE YAFA with promoting CODX; JOSHUA YAFA took credit for the deal himself while on the call with Mahoney and UC Agent described *supra*; and JOSHUA YAFA stated that his brother JAMIE YAFA was personally responsible for CODX's promotion on at least one call.

Fourth, the use of boiler rooms and penny stock newsletter blasts that were used to pump these other stocks is virtually identical to the plan to promote GWHP and NUNZ. Indeed, the similarities are exactly why Defendants were talking to Mahoney and UC Agent about the other deals – in effect, they were using these other deals to describe their methodologies and successes to convince Mahoney and UC Agent that the same methodologies, as applied to GWHP and NUNZ, would likely produce similarly impressive (albeit fraudulent) results.

Finally, the evidence should not be excluded under Rule 403. The evidence is highly relevant to Defendants' intent and knowledge of the boiler rooms and penny stock newsletters that they intended to, and did, use to pump and dump GWHP and NUNZ. And, once again, any prejudice would be insufficient to meet Rule 403's "unfair" standard. The evidence is not voluminous and would not take an undue amount of time to present – indeed,

many of the references to these deals are in recorded discussions that also feature of GWHP and NUNZ, often in the same sentence or two.

D. Motion to Admit Business Records

At trial, the United States intends to offer records documenting the regularly conducted activity of businesses or organizations including securities brokerages and transfer agents, and banks. Moreover, the United States intends to introduce market reports and similar commercial publications reflecting the price and volume of trading in GWHP and NUNZ securities in the relevant time period. Under Federal Rule of Evidence 803(6) and (17), such records documenting regularly-conducted activity and reflecting market quotations or compilations that are generally relied on are not excluded by the rule against hearsay. Moreover, Rule 902(11) allows for the self-authentication of business records with a suitable certification. The United States has obtained (or will soon obtain) certifications from the relevant custodians of each set of business record described here, and has produced (or will soon produce) those records to the defense in discovery. Those certifications serve to self-authenticate the records to be admitted under Rule 803(6).

E. Motion to Admit Summaries and Charts

The United States intends to introduce charts and other records summarizing the content of voluminous records that cannot be conveniently examined in court. Summaries of Defendants' and their co-conspirators' voluminous financial records will help the jury to review and comprehend the defendants' and their co-conspirators' ownership of, and trading in, GWHP and NUNZ securities. The United States will provide the Defendants with advance copies of the summaries it intends to use, along with the Bates numbers for each of the independently-admissible records used to create each summary or chart. These summaries and charts themselves are admissible under Federal Rule of Evidence 1006, because they will distill voluminous writings and recordings that are admissible in evidence but cannot be conveniently examined in court. "The proponent of a summary of 'voluminous writings' under Fed. R. Evid. 1006 must, in this Circuit, establish that the underlying materials upon which the summary is based are admissible in evidence.

Although the underlying materials must be 'admissible,' they need not be 'admitted' in every case." *United States v. Meyers*, 847 F.2d 1408, 1412 (9th Cir. 1988) (quotations and citations omitted); *see also United States v. Johnson*, 594 F.2d 1253, 1255 (9th Cir. 1979). All of the United States' summary exhibits will consist of information taken from admissible but voluminous records that need not be admitted in evidence themselves.

F. Motion to Admit Expert Testimony and Related Exhibits[8]

Alex Scoufis - The United States intends to call Alex Scoufis as an expert witness. Mr. Scoufis works for FINRA (the Financial Industry Regulatory Authority), a regulator that operates under the SEC's oversight. Currently, he serves as Assistant General Counsel for FINRA's Criminal Prosecutions Assistance Group ("CPAG"). In that role, he conducts detailed analysis of financial records, creates and prepares trial exhibits, and testifies as an expert or summary witness in federal criminal trials. He also has attended and presented at financial fraud conferences, roundtables, and working group meetings. He has provided summary or expert testimony in fourteen criminal cases. Prior to CPAG, Mr. Scoufis served as an Investigator in FINRA's Office of Fraud Detection and Market Intelligence, where he investigated potential insider trading violations. Mr. Scoufis's resume is attached as Exhibit __. In the foregoing roles, Mr. Scoufis has obtained specialized training and experience in the securities markets and the regulation of these markets and securities professionals.

The United States intends to call Mr. Scoufis to testify about the nature, structure, and regulation of the securities markets, and the roles of FINRA and the Securities and Exchange Commission in such regulation. Mr. Scoufis is specifically expected to testify regarding, *inter alia*, the following topics: (a) background information about the nature, structure, and regulation of the securities markets; (b) the SEC's and FINRA's roles in regulating the trading of stocks of publicly traded companies; (c) general securities industry

[8] The United States provided Defendants with a written summary of the testimony to be elicited from Mr. Scoufis, FBI SA Tarwater, and Mr. McDonnell, as well as a description of their qualifications, as required by Federal Rule of Evidence 16(a)(1)(G). *See* Exhibits 1, 2, 3, attached hereto.

terms; (d) disclosure requirements of publicly-traded companies registered with the Securities and Exchange Commission ("SEC"); (e) documents required to be filed with the SEC to comply with such disclosure requirements; and (f) the general characteristics of acquiring and merging a public shell with a private company.

In addition, he is expected to testify that it is outside of business norms for public companies or their personnel to disclose material, non-public information to persons and entities outside the company without a compelling need to do so, and selectively making such disclosures could violate the SEC's Regulation FD, in addition to other securities laws. Moreover, it is often illegal to trade on the basis of such information, or to tip others so that they can trade on the basis of such information. Mr. Scoufis also is expected to summarize the trading prices and volumes of GWHP and NUNZ stock; and to identify trades placed by or on behalf of defendants, and to describe the ownership structure of the companies (who owned how many shares) at different points in time, based on brokerage records, "Blue Sheet" data,[9] transfer agent records, and similar documents.

This testimony is admissible under Federal Rule of Evidence 702.[10] Mr. Scoufis is clearly "qualified as an expert by knowledge, skill, experience, training, or education." *Id.* Further, his presentation of "technical, or other specialized knowledge will assist the trier of fact to understand the evidence" in this case. *Id.* Here, Mr. Scoufis will ***not*** offer an

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[9] "Blue sheet" data refers details to all purchases and sales of a specific security during a particular time frame. Registered brokerage firms are required by law to provide this trading information upon request to the SEC. The data submission includes the following for each reported transaction of a publicly traded security: account name; account address; brokerage account number; trade date; settlement date; whether the trade was a purchase or sale; amount number of shares; share price; and transaction amount. Mr. Scoufis will testify about the conspirators' trades reflected in the Blue Sheet data.

[10] Because Mr. Scoufis had substantial experience in all of these areas, his testimony is akin to non-expert testimony under Rule 701 that is based on the perception and experience of the witness. While the government does not believe that all of Mr. Scoufis' testimony would fall under the umbrella of Rule 702, the Court need not decide the question because Mr. Scoufis' proffered testimony clearly satisfies the more stringent requirements of Rule 702.5

opinion about the propriety of Defendant's actions. Rather, he will share with the jury some basic concepts surrounding the securities markets and regulation.

To the extent Mr. Scoufis' testimony ventures into the realm of opinion under Rule 702, it will be based on his education and many years of practice and experience in the fields of securities and securities regulation. As such, his testimony necessarily will be grounded in sufficient facts and data, will be the product of reliable principles and methods, and will reliably apply those principles and methods to the facts of this case. Because Mr. Scoufis is amply qualified to provide expert testimony, and his anticipated testimony satisfies the requirements of Rule 702, this Court should rule that Mr. Scoufis' testimony is admissible.

During his testimony, Mr. Scoufis should be allowed to testify about the purpose of the federal securities laws, *i.e.*, that the overarching purposes of the securities laws include creating a level playing field and ensuring that investors have access to adequate information to make investment decisions. Without this touchstone, Mr. Scoufis' testimony will likely seem to the jury like a long list of technical rules that have nothing to do with one another. Mr. Scoufis is likely to be one of the first witnesses to testify at trial, and is expected to lay the groundwork required to understand the remainder of the factual evidence presented in the case. The jurors' ability to grasp his testimony, and learn about the industry in which the scheme took place – the playing field on which Defendants committed their fraud – will increase exponentially if they can associate groups of rules and regulations with their overarching, and undebatable, purposes.

FBI Special Agent Jeremy Tarwater - The United States also intends to call FBI Special Agent Jeremy Tarwater as an expert witness. SA Tarwater has investigated microcap stock fraud – including market manipulation / pump and dump schemes – for over a decade. He has reviewed hundreds of investigative files, debriefed perpetrators, been the designated handler for CHS's (including long-running sources), monitored conversations about these schemes via T-III wiretaps, posed as a perpetrator in undercover operations, and testified in federal proceedings, all concerning market manipulation / pump and dump schemes. He has received and provided extensive training on white collar crime and market

manipulation schemes to and from the SEC, FINRA, and other law enforcement and regulatory groups. He has also been detailed full-time to the SEC's Division of Enforcement, working out of the Commission's Home Office in Washington, D.C. Before joining the SEC, SA Tarwater was a corporate and securities attorney with Latham & Watkins LLP and then Farella Braun + Martel LLP.

The United States intends to call SA Tarwater to testify about the *modus operandi* typically used to conduct market manipulation / pump and dump schemes. This testimony will be based on his extensive experience investigating precisely these types of cases. He is expected to testify that such schemes are usually carried out by groups of individuals who play various roles. These schemes typically involve efforts to: (1) secure control of a company's management and stock; (2) conceal that control, *e.g.*, through the use of nominees and offshore brokerage accounts; (3) deceive transfer agents into lifting restrictive legends from blocks of shares so the shares can be sold into the public markets; (4) deceive brokerage firms so that they will accept stock deposits (which is also necessary to trade in the public markets); (5) engage in various forms of manipulative trading to artificially improve the stock charts that investors often view on Yahoo Finance or other stock market focused websites; (6) coordinate exaggerated press releases with promotional campaigns (*e.g.*, penny stock newsletters, boiler rooms, paid analyst reports); (7) sell the stock; and (8) distribute the proceeds.

Here, testimony about the *modus operandi* of pump and dump schemes is plainly relevant and helpful. Defendant cannot assert that the average juror would be well-versed in how pump and dump schemes typically operate, or that jurors would be familiar with the methods generally used to accomplish and coordinate their criminal activities. Under these circumstances, "'[t]he federal courts uniformly hold … that government agents or similar persons may testify as to general practices of criminals to establish the defendants' *modus operandi*.'" *United States v. Mejia-Luna*, 562 F.3d 1215, 1219 (9th Cir. 2009) (quoting *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984)). While the relevant caselaw in this Circuit has largely developed in criminal alien and drug smuggling cases, the same

principals can and should apply in a fraud case. The Ninth Circuit firmly established as much in *Johnson* (which was tried in this District), where defendant faced securities fraud and related charges arising from a scheme to defraud investors. "Such evidence helps the jury understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." *Johnson*, 735 F.2d at 1202 (confirming lower court's decision to allow witness "to testify for the Government as an expert witness on fraudulent schemes."); *see also United States v. McCollum*, 802 F.2d 344, 346 (9th Cir. 1986) (confirming admission of expert because "testimony regarding the typical structure of mail fraud schemes could help the jury to understand the operation of the scheme"); *United States v. Whitehead*, 176 F.3d 1030, 1035 (8th Cir. 1999) (finding expert testimony regarding check kiting activity was properly admitted); *United States v. Yoon*, 128 F.3d 515, 527 (7th Cir. 1997) (same); *United States v. Tolliver*, 451 F. App'x 97, 105 (3d Cir. 2011) (allowing expert testimony where "[m]ost of [witness's] testimony concerned the nature of a typical bank fraud scheme involving identity theft").

Applying these guideposts here, SA Tarwater's testimony about the *modus operandi* of pump and dump schemes should be admitted because it would greatly assist the jury in understanding the operation of such schemes. Notably, SA Tarwater will ***not*** be asked on direct examination about the evidence gathered in this case (SA Tarwater was not the case agent on the underlying investigation) or whether he believes these Defendants engaged in a pump and dump scheme.

FBI Forensic Accountant Benjamin McDonnell - The United States also intends to call FBI Forensic Accountant Benjamin McDonnell as a witness. The Court may determine that this testimony falls into the expert category.

Mr. McDonnell is assigned to an FBI San Diego Field Office squad that investigates white collar crime, including securities fraud. He has experience investigating securities fraud generally and pump-and-dump/market manipulation schemes specifically. He has a Master's Degree in Business Administration, with an emphasis on Financial Fraud Examination and Management. He is also a Certified Public Accountant and a Certified

Fraud Examiner. Before joining the FBI, Mr. McDonnell worked as a supervisor for a financial investigation and dispute services firm. Based on his training and experience, Mr. McDonnell has specialized knowledge of and skills in forensic accounting.

Among other things, Mr. McDonnell is expected to provide trial testimony regarding the holdings, sales, and flow of funds and stock relevant to this case. These were held or sold by, and/or flowed between and among GWHP and/or NUNZ, Defendants in this case, uncharged co-conspirators, nominees of Defendants, and shareholders who worked and communicated with Defendants, co-conspirators, and nominees. Mr. McDonnell will also summarize information and data disclosed in reports filed with the Securities and Exchange Commission (*e.g.*, outstanding shares and ownership stakes held by control persons) and Secretaries of State (*e.g.*, corporate documents filed by Lionsgate Funding Group and Lionsgate Funding Management). He will also create one or more charts summarizing promotional emails featuring GWHP and NUNZ.

This testimony, and the related exhibits, should be admitted. Mr. McDonnell is clearly "qualified as an expert by knowledge, skill, experience, training, or education." *Id.* Further, his presentation of "technical, or other specialized knowledge will assist the trier of fact to understand the evidence" in this case. *Id.*

To the extent Mr. McDonnell's testimony is deemed to offer an opinion under Rule 702, it will be based on his training and experience in the field of forensic accounting. As such, his testimony necessarily will be grounded in sufficient facts and data, will be the product of reliable principles and methods, and will reliably apply those principles and methods to the facts of this case.

G. Motion to Admit Lay Testimony by Agent About the Meaning of Phrases Encountered in the Investigation.

UC Agent was involved in the pre-indictment investigation of this case for 18 months or more. During that time, he engaged in steady conversations by phone, text and email with the conspirators. He had the opportunity to talk to Defendants about the GWHP and NUNZ schemes, to expressly ask what was meant by certain phrases, and to learn what was

meant through context and chronology. He also reviewed calls recorded by Mahoney in which UC Agent did not directly participate.

UC Agent is therefore in position to provide the jury with useful information about the meaning of sometimes nuanced and situationally-specific phraseology used during conversations, and his lay testimony to that effect should be admitted. *See, e.g.*, *United States v. Barragan,* 871 F.3d 689, 703 (9th Cir. 2017) (lay opinion testimony admissible where "agents made clear that their interpretations were based on their review of hundreds of calls and text messages during the investigation"); *United States v. Gadson*, 763 F.3d 1189, 1209 (9th Cir. 2014) (same where lay opinion testimony by law enforcement were based, in part, on "review of around 100 hours" of phone calls).

H. Motion to Admit Testimony About Matters Learned in the Course of Employment

The Government moves to allow testimony by at least three witnesses who have worked in the securities industry, and/or employed fraudulent practices in the securities industry, including STRONGO (who has pleaded guilty); Michael Mitsunaga (and perhaps others similarly situated to Mitsunaga), who transacted in and communicated with others about NUNZ and GWHP stock at STRONGO's direction; and Amanda Cardinalli, a percipient witness who worked for GWHP's registered securities transfer agent, Nevada Agency & Transfer Co. ("NATCO").

Testimony by STRONGO, Mitsunaga and other similarly situated, and Cardinalli may touch upon some of the areas that Mr. Scoufis is expected to testify about, *i.e.*, the securities markets and regulations. For example, during their testimony, STRONGO and Mitsunaga may well refer to some of these topics to describe their backgrounds; NUNZ's and GWHP's corporate history, including the reverse merger that made GWHP a public company; their intentions and expectations surrounding the new issuances of stock in these companies; their decisions to buy, sell, deposit, transfer, and trade the stock; their discussions concerning significant news about the company prior to NUNZ's and GWHP's

public announcements; promotions surrounding the companies; manipulative trading in the companies' stock; and plans to liquidate the stock.

For her part, Ms. Cardinalli will offer testimony about her role as a transfer agent. She will testify about the steps she takes to determine whether restrictive legends on stock certificates should be removed, including through an analysis of documents submitted to her for this purpose in light of (1) the relevant SEC statutes and rules, and (2) the purposes underlying those regulations. Ms. Cardinalli will also testify about the specific analysis that NATCO conducted to determine whether to lift a restrictive legend on GWHP stock certificates the were transferred to shareholders, including the conspirators, over time – her analysis included reviewing, and relying on, misrepresentations made to NATCO by Defendants and others.

While these witnesses are not expected to offer opinions, allowing them to discuss some fundamentals about these topics would be helpful to the jury in understanding their testimony. This testimony should be permitted under Rules 602 and 701. Rule 701 provides that a witness who is not testifying as an expert may offer testimony in the form of opinions or inferences which are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The Advisory Committee's notes make clear that the amendment was not intended to alter the previous practice of allowing percipient witnesses to testify about things outside the knowledge of ordinary jurors (*e.g.*, the practices of a particular business or industry) without being forced to be qualified as an expert:

> [M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of a business without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The [December 1, 2000] amendment does not purport to change this analysis.

Rule 701 Advisory Committee Notes regarding 2000 Amendments.

Courts have followed this guidance in allowing non-expert testimony about business and finance. "[R]ule 701 does not preclude testimony by business owners or officers on matters that relate to their business affairs." *Texas A&M Research Foundation v. Magna Transp., Inc.*, 338 F.3d 394, 403 (5th Cir. 2003). "Indeed, an officer or employee of a corporation may testify to industry practices and pricing without qualifying as an expert." *Id.* (citing *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1223 (11th Cir. 2003)); *see also Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 399, 403 (3d Cir. 1980) ("The personal knowledge of appellant's balance sheets acquired by Zeitz as Teen-Ed's accountant was clearly sufficient under Rule 602 to qualify him as a witness eligible under Rule 701 to testify to his opinion of how lost profits could be calculated and to inferences that he could draw from his perception of Teen-Ed's books.").

As discussed above, several of the United States' witnesses have training and experience outside the ken of ordinary jurors. These witnesses will necessarily be called upon to provide their understanding of certain aspects of the securities industry and its regulation, so as to fully explain their testimony and its import to the jury. Because this testimony will be based on their personal knowledge and lengthy experience in the field, it is admissible under Rule 602 and should not be subject to the additional strictures of Rule 702.

I. Motion to Admit Evidence of Defendants' Relevant Regulatory and Criminal History

The United States will seek to introduce evidence of two of the Defendants' criminal history to the extent such history arises from their prior involvement in schemes similar to the one charged here. Specifically:

- MARCINIAK pleaded guilty to a felony and, on December 12, 2017, judgment was entered against him for his participation in a market manipulation scheme in the District of Pennsylvania. He was on supervised release in 2019 when he began

participating in the scheme charged here. *See U.S. v. Marciniak, et al.*, DPA Case No. 2:14-cr-00133-GAM.

- JOSHUA YAFA pleaded guilty to a felony and, in 2009, judgment was entered against him for his participation in a market manipulation scheme in the Southern District of New York. *See U.S. v. Yafa*, SDNY Case No. 1:05-cr-01129-VM. The SEC brought a parallel civil action for the same or similar conduct, which was resolved by way of consent judgment on May 13, 2009. *See SEC v. Yafa*, SDNY Case No. 1:05-cv-06480-PAC. We understand that a penny stock bar was imposed against JOSHUA YAFA in connection with these cases. On recorded calls, the present conspirators discussed the bar's impact on the structure of and roles played within the conspiracy charged here, and the fact that JOSHUA YAFA could promote stocks with a price above $5 per share while his partner and brother JAMIE YAFA could promote stocks at any price.[11]

Thus, the United States moves to present this evidence to show knowledge, absence of mistake, or lack of accident pursuant to FRE 404(b). The evidence meets the relevant criteria.

First, the evidence is relevant because it shows that the conspirators were familiar with the regulatory and legal landscape surrounding the promotion of microcap stocks. After all, this history arises from microcap stock fraud-type violations. The evidence also refutes a potential defense argument that securities regulations are complicated and Defendants had little understanding or knowledge of them. It also helps show how and why JOSHUA YAFA and JAMIE YAFA worked together – JOSHUA YAFA was barred from soliciting investments in penny stocks, *i.e.*, stocks with a share price below $5. That

[11] In addition, VOLMER was named in an SEC civil injunctive action alleging that he touted the stock of two companies without disclosing compensation he received from the issuer for doing so. The court found VOLMER liable, and on October 16, 2000, entered judgment against him. *See SEC v. Volmer*, CD Cal Case No. 98cv8698-JSL. However, this evidence may be too remote in time to be admitted under FRE 404(b).

explains why JAMIE YAFA claimed to promote such stocks, even though text messages between the two indicate they really worked together in their pump efforts.

Second, the conduct is not too remote in time. While JOSHUA YAFA's conviction is dated, the penny stock bar is ***permanent***, and he was violating the bar by soliciting investments in GWHP (the share price of which was often below $5). MARCINIAK's conviction is also several years old. However, as VOLMER noted in his calls with Mahoney and UC Agent, MARCINIAK was exceptionally careful, even "paranoid" (VOLMER's description) and therefore took care to evade regulatory and law enforcement scrutiny by, *e.g.*, changing his handle of encrypted apps and communicating in what VOLMER called "ghost chats." MARCINIAK was also on supervised release at the time the conspiracy was ongoing, and violated the terms of supervised release by virtue of his conduct here.

Third, the evidence is sufficient to show that JOSHUA YAFA and MARCINIAK engaged in penny stock fraud, given that they both pleaded guilty to related charges.

Fourth, the conduct in the prior cases is virtually identical to the conduct alleged here. Both prior convictions involved fraudulent and deceptive means to pump up the price of a microcap stock and sell it to unsuspecting investors at inflated prices.

Finally, the evidence should not be excluded under Rule 403. The evidence is highly relevant to Defendants' knowledge, absence of mistake, or lack of accident when they engaged in pump and dump activity surrounding NUNZ and GWHP. Any prejudice that did present itself would be insufficient to meet Rule 403's "unfair" standard. The evidence is not voluminous and would not take an undue amount of time to present.

J. Motion to Preclude Evidence or Argument That Defendants were Unaware Their Conduct was Unlawful

Defendants should not be permitted to argue that their guilt depends on whether or not they knew their conduct was unlawful. The defendants may, of course, be permitted to argue that they lacked the requisite *mens rea* for the charged offense, including an intent to defraud or knowledge of the objects of the conspiracy. But none of the charges in the indictment require proof that Defendants knew that their conduct was unlawful. To convict

under 15 U.S.C. § 78ff(a), there must be a showing of willful action. *United States v. Tarallo*, 380 F.3d 1174, 1188 (9th Cir. 2004) ("Under our jurisprudence, then, 'willfully' as it is used in § 78ff(a) means intentionally undertaking an act that one knows to be wrongful; 'willfully' in this context does *not* require that the actor know specifically that the conduct was unlawful.") (emphasis in original). To support a conviction for conspiracy, the Supreme Court has held the "general conspiracy statute, 18 U.S.C. § 371, offers no textual support for the proposition that to be guilty of conspiracy a defendant in effect must have known that his conduct violated federal law." *United States v. Feola*, 420 U.S. 671, 687 (1975). Given this unambiguous law, Defendants should be precluded from offering evidence or arguments that they were unaware their conduct was unlawful.

K. Motion to Preclude an Entrapment Defense

Because much of the evidence in this case was developed through an undercover operation, the United States anticipates that Defendants may claim they were "entrapped" by Mahoney or UC Agent. However, Defendants cannot make a *prima facie* showing on the facts presented in this case, and the Court should preclude them from offering any testimony – including their own – or argument in support of an entrapment defense.

While the evidence may be "slight, there still must be some evidence demonstrating the elements of [a] defense before an instruction must be given." *United States v. Spentz*, 653 F.3d 815, 818 (9th Cir. 2011). "The entrapment defense has two elements: (1) the defendant was induced to commit the crime by a government agent, and (2) he was not otherwise predisposed to commit the crime." *Id.* (citing *United States v. Barry*, 814 F.2d 1400, 1401 (9th Cir. 1987) (internal quotations omitted)). The Ninth Circuit's binding precedent thus establishes that the defense "is not entitled to have the issue of entrapment submitted to the jury in the absence of evidence showing some inducement by a government agent *and* a lack of predisposition by the defendant." *Id.* (emphasis in original).

Here, there is no evidence in support of either element of the entrapment defense. First, there was absolutely no inducement by Mahoney or UC Agent. Defendants and their co-conspirators had already hatched and begun to execute their scheme well before

Mahoney or UC Agent ever heard of NUNZ or GWHP. What's more, VOLMER is the one who affirmatively reached out to Mahoney to seek funding that (VOLMER hoped) would advance the schemes. Further still, the questions posed by Mahoney and UC Agent were designed to explore the machinery that Defendants already had in place and intended to utilize here.

Moreover, Defendants were certainly predisposed to commit the crimes at issue here. JOSHUA YAFA suffered a penny stock bar after pleading guilty in the Southern District of New York to pump and dump conduct (although, back in the day, they used fax machines instead of email blasts); JAMIE YAFA helped JOSHUA YAFA evade the bar by putting his (JAMIE YAFA's) name on materials concerning stocks with share prices under $5 but in reality worked side by side with JOSHUA YAFA in pumping stocks for a living; VOLMER has a regulatory history with the SEC stemming from his failure to disclose his compensation in promotional touts; and MARCINIAK was barely out of prison for a pump and dump scheme charged in the Eastern District of Pennsylvania when VOLMER started describing MARCINIAK as his "partner" here.

To the extent Defendants present additional proof at trial to warrant an entrapment instruction, the United States will seek to introduce certain evidence to rebut the defense. This includes evidence that would otherwise be admissible for only limited purposes under FRE 404(b), or not admissible at all. *See United States v. Thomas*, 134 F.3d 975, 980 (9th Cir. 1998), as amended on denial of reh'g (Apr. 10, 1998) ("For the jury to find predisposition beyond a reasonable doubt, it must consider the defendant's character."); FED. R. EVID. 405(b) ("When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.")

For the foregoing reasons, the United States requests that the Court preclude an entrapment instruction on the current state of the record. If Defendants meet their burden to present an entrapment defense, the United States requests that the Court admit evidence

of Defendants' other pump and dump / market manipulation conduct to prove their predisposition.

L. Motion to Preclude Advice of Counsel Defense

Although attorneys seem to have staked out virtually every corner of the securities industry, no Defendant has given notice to the Court or the United States that he/she will assert an advice of counsel defense at trial. Nor have they waived privilege or provided materials that would support such a position. The law is clear – privilege may not be "'used both as a sword and a shield.'" *Kaiser Found. Health Plan, Inc. v. Abbott Labs, Inc.*, 552 F.3d 1033, 1042 (9th Cir. 2009) (quoting *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992)). "To qualify for an advice of counsel instruction, a defendant must demonstrate that he fully disclosed to his attorney all material facts and relied in good faith on the attorney's recommended course of conduct." *United States v. Munoz*, 233 F.3d 1117, 1132 (9th Cir. 2000) (superseded on other grounds as stated in *United States v. Van Alstyne*, 584 F.3d 803, 817 (9th Cir. 2009)); *see also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991) (party may not invoke privilege "to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.") Proving reliance on advice of counsel, of course, involves a waiver of privilege. Defendants here do not qualify for an advice of counsel defense because they have not waived privilege.

Further, defendants should not be permitted to, in effect, rely on an incomplete advice of counsel defense by pointing to actions they took after consulting with attorneys. This would allow them to use attorneys as "both a sword and shield," and present the same inherent unfairness described above. So, for example, Defendants should not be permitted to elicit testimony that they or their co-conspirators took steps, or thought their conduct was lawful, based on what their attorneys told them or documents their attorneys prepared. If Defendants were allowed to present this evidence, they would have all the benefits of an advice of counsel defense – *i.e.*, arguing that they counted on counsel to steer them in the right direction, and therefore could not have had the intent to defraud – without having to waive the privilege or meet the legal requirements for the defense.

In sum, because they have not provided notice or waived privilege, Defendants should not be permitted to argue or present evidence that their conduct was legal because they and/or their co-conspirators consulted with attorneys.

M. Motion to Order Reciprocal Discovery

Although the United States anticipates that Defendants will produce reciprocal discovery, at this time, no reciprocal discovery has been provided. The United States, on the other hand, has provided and will continue to produce discovery, including reports of witness interviews and other Jencks Act materials, well in advance of trial and significantly above and beyond any obligation set forth in the Federal Rules or the Constitution.

This Court should preclude evidence the defense seeks to introduce at trial if it is not produced to the United States promptly and in advance of trial. Both the Supreme Court and the Ninth Circuit have upheld the exclusion of evidence when the defense has failed to produce discovery prior to trial. *See Taylor v. Illinois*, 484 U.S. 400, 410- 11 (1988) (excluding evidence that was not identified by the defendant until the middle of trial); *United States v. Scholl*, 166 F.3d 964, 972 (9th Cir. 1999) (upholding the exclusion of defense exhibits because they were not disclosed until after the jury was sworn in). The United States also requests that the Court order both defendants to comply before trial with Rule 26.2 of the Federal Rules of Criminal Procedure, which requires the production of prior statements of all witnesses other than the defendants. In particular, if the defense has met with witnesses and obtained statements and information, the United States is entitled to such material under Rule 26.2. The United States will object and ask this Court to exclude any testimony of witnesses whose prior statements have not been provided to the United States. Rule 16(b)(1)(C) and Federal Rules of Evidence 702, 703, and 705 also require defendants to provide notice of and disclosures relating to expert witnesses, including written summaries describing the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications. To date, the defendants have not provided notice of any expert witness, any summaries of testimony, or reports by expert witnesses. Accordingly, unless that information is produced promptly, the United States seeks an order

pursuant to Fed. R. Crim. P. 16(d)(2)(C) precluding the defense from offering any expert testimony at trial.

IV

CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court grant its motions *in limine*.

DATED: April 24, 2023.

Respectfully submitted,

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