RANDY S. GROSSMAN
United States Attorney
AARON P. ARNZEN, Cal Bar No. 218272
GEORGE V. MANAHAN, Cal Bar No. 239130
Assistant U.S. Attorneys
Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893
Tel: (619) 546-8384 / 7607
Email: Aaron.Arnzen@usdoj.gov / George.Manahan@usdoj.gov

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' OMNIBUS OPPOSITIN TO DEFENDANTS' MOTIONS *IN LIMINE*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

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 opposition to Defendants' motions *in limine* relating to the June 12, 2023 trial.

I. INTRODUCTION

Defendants make a variety of motions to exclude or limit the Government's evidence at trial. Most of these motions are unsupported by the law and/or the facts, and the United States opposes them.

One particularly important case in point: Jamie Yafa's motion for a hearing regarding the admissibility of co-conspirator statements and adoptive admissions. Perhaps the most voluminous evidence the United States expects to present at trial consists of recorded calls and meetings among Defendants, on the one hand, and Undercover Agent and James Mahoney, on the other hand. As explained below, Defendants' statements made during these calls are undoubtedly in furtherance of a conspiracy, and should be admitted. In addition, the pre-trial hearing that Jamie Yafa imagines would likely take days, given the number and length of calls at issue. The Court should therefore exercise its discretion under FRE 106 to address challenges to these recordings at the close of the United States' evidence.

Importantly, Defendants have filed a number of motions to exclude that are the subject of affirmative motions to admit by the United States. To the extent the its affirmative motions address the same topics, the United States refrains from repeating its arguments here, and instead incorporates those arguments herein by reference. For the sake of clarity, the United States opposes all defense motions *in limine* unless otherwise noted herein.

Jamie Yafa also presents a *Bruton* motion regarding statements that Marciniak made about the Yafa brothers during the FBI approach on Marciniak in February 2022; the introduction of these statements may risk violating the Confrontation Clause, so the United States does not oppose this motion.

II. ARGUMENT

A. The Court Should Deny Brian Volmer's Motion to Exclude his Past Civil Order from 2000

On October 27, 1998, the Securities and Exchange Commission filed a civil injunctive action against Volmer in the Central District of California. The complaint accused Volmer of more or less the same type of scheme with which he is charged here. According to the SEC, the case "illustrates the migration of illegally conducted stock touting from traditional print media to the internet." SEC Litigation Release No. Litigation Release No. 15952, October 27, 1998 (available at https://www.sec.gov/litigation/litreleases/lr15952.txt.) After a 2000 bench trial:

> The District Court held that Volmer and his two firms … were liable for touting the stock of Cetacean Industries Inc. and Juina Mining Company without disclosing compensation they received from the issuer for doing so. … The court also held Volmer and Int'l Alliance liable for making material misrepresentations in a newspaper advertisement touting stock for Cetacean Industries Inc.

SEC v. Volmer, 34 Fed.Appx. 570 (9th Cir. 2002). The Ninth Circuit rejected Volmer's appellate arguments, including the argument that his promotional efforts were legal, in a brief Memorandum Order confirming judgment against him on April 11, 2022. *Id.*

Despite the strong similarities between the prior case and the one set for trial here, the United States recognizes that the District Court's 2000 order (the "Order") are dated, and currently does not intend to introduce the Order in its case-in-chief under FRE 404(b). *See* ECF 185, at p. 26, note 11. Volmer's motion goes further, though, and appears to seek exclusion of the Order on a number of (rather ambiguously stated) grounds.

A blanket ruling excluding the Order that Volmer seeks here is not appropriate, though, because Volmer may make arguments, or testify, such that the Order would be directly impeaching and/or relevant, and should be admitted. An example: What if Volmer testifies that he never lied to any investors, and has never been in trouble with securities regulators before? Such testimony would certainly open the door for the United States to admit the Order to correct a misleading statement by Volmer (or his counsel). "A defendant

may open the door by minimizing, or attempting to explain away, a prior conviction." *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009) (citing *United States v. Baylor*, 97 F.3d 542, 545 (D.C.Cir.1996)).

Before seeking admission of the Order, the United States proposes that it inform the Court outside the presence of the jury, so that the Court can hear and consider arguments.

B. The Court Should Deny Marciniak's Motion to Exclude Cell Phone Evidence

1. Testimony Regarding Extraction of Data Using Cellebrite Does Not Require Expert Testimony

Marciniak, relying exclusively on a recent in-district, district court case, *United States v. Daniels*, No. 22CR2505-LL-1, 2023 WL 1221017, at *2 (S.D. Cal. Jan. 23, 2023), argues that "[d]ata obtained from a Cellebrite extraction cannot be introduced by a lay witness." *Daniels* is an outlier. Indeed, the First, Second, Fourth, and most importantly, the Ninth Circuit in multiple persuasive, if not controlling decisions, as well as multiple district courts, have reached the opposite conclusion—that testimony regarding extracting data (*e.g.*, texts, photos, pdfs) from a cell phone using Cellebrite is percipient evidence involving, at most, lay opinion, not expert testimony. This Court should do likewise.

First, the Ninth Circuit has concluded, repeatedly, that law enforcement witnesses may testify as non-experts about using Cellebrite software to download and review the contents of cellphones. *See United States v. Ovies*, 783 F. App'x 704, 707 (9th Cir. 2019) (unpublished) ("The district court did not abuse its discretion by allowing [a law enforcement officer] to testify about using Cellebrite to extract data from [the defendant's] cell phone without first qualifying him as an expert witness under Federal Rule of Evidence 702 [since the officer] testified only about the steps he took using the Cellebrite program; he did not opine as to the reliability or any other aspect of the Cellebrite technology and his testimony was not based on technical or specialized knowledge."); *United States v. McLeod*, 755 F. App'x 670, 673 (9th Cir. 2019) (unpublished) ("In short, [the law enforcement officer] testified about his use and interaction with Cellebrite—and how he extracted data from one of the victim's phones in this case. We have previously allowed testimony similar

to [such] testimony without requiring that the testimony meet Rule 702's expert testimony requirements."); *United States v. Seugasala*, 702 F. App'x 572, 575 (9th Cir. 2017) (unpublished) ("The officers who followed the software prompts from Cellebrite and XRY to obtain data from electronic devices did not present testimony that was based on technical or specialized knowledge that would require expert testimony.").[1]

Other Circuits have uniformly reached the same conclusion. For instance, in *United States v. Montijo-Maysonet*, 974 F.3d 34 (1st Cir. 2020), the First Circuit explained that testimony from a law enforcement officer on his use of forensic software to copy documents from a cell phone is, although founded on particularized knowledge gained on the job, based on personal knowledge predicated on a process of reasoning familiar in everyday life, and therefore not expert testimony:

> These days, most anyone with a cellphone knows they store information about text messages, including the sender, recipient, and content. You don't need to be a software engineer to pick up a cellphone, open a messaging application, and interpret the words in the bubbles as messages sent and received. In doing so, ordinary people rely on a "process of reasoning familiar in everyday life," not any expert knowledge about software coding or cellphone circuitry. If [the law enforcement officer] had opened [the defendant's] phone and taken screenshots of his conversations with [defendant's cohort], no one suggests she'd need any "scientific, technical, or specialized knowledge" to identify them as text messages. *See United States v. Ganier*, 468 F.3d 920, 926 (6th Cir. 2006) (noting that certain "[s]oftware programs ... may be as commonly used as home medical thermometers," such that "[t]he average layperson today may be able to interpret the[ir] outputs ... as easily as he or she interprets everyday vernacular").
>
> In this case, investigators used forensic software to copy that same info from [the defendant's] phone and display it on paper. To be sure, most of us don't see "extraction reports" every day. But as we've held time and again, Rule 701 lets in "particularized knowledge" that police officers gain on the job, so long as it's "well founded on [their] personal knowledge and susceptible to cross examination." [citations]

---

[1] *Ovies*, *McLeod*, and *Seugasala*, are all unpublished and therefore not binding precedents. Furthermore, as *Daniels* pointed out, *McLeod* determined that allowing testimony regarding the use of Cellebrite to extract data from a cell phone would have been harmless even it reached the opposite conclusion on the expert question, while *Ovies* "decline[d] to reach the question whether the introduction of Cellebrite evidence requires expert testimony." Regardless, the persuasive force of these three Ninth Circuit panels, as well as all of the other citations discussed above, far outweighs that of the one outlier case Marcinak relies on.

> No less than an experienced drug agent decoding drug deals, or an investigator construing a plain-language billing chart he found in a suspect's home, [citation], [the law enforcement officer] simply interpreted the plain language (like "SMS message" and, well, "to" and "from") on the spreadsheet, which was labeled with the case number and "which phone it was extracted from" . . . . None of that testimony "turn[ed] on or require[d] a technical understanding of the programming or internal mechanics of the [forensic extraction] technology."

Id. at 47-48.

Likewise, in *United States v. Marsh*, 568 F. App'x 15 (2d Cir. 2014) (unpublished), the Second Circuit concluded that testimony from a law enforcement officer that he used Cellebrite to download and review the contents of two cellular phones did not involve expert testimony because it did not involve offering an opinion based on specialized knowledge. *See id.* at 16-17. Specifically, the Second Circuit concluded that:

> [The law enforcement officer] explained his training in the use of Cellebrite technology to retrieve text messages and other data from a cellular phone; described how he used Cellebrite to do so in this case; and testified that he confirmed the results by checking the messages on the phone itself. He then testified to the contents of the messages retrieved from the phone. [The officer] did not purport to render an opinion based on the application of specialized knowledge to a particular set of facts; nor did his testimony turn on or require a technical understanding of the programming or internal mechanics of the technology.

Id. at 17.

Similarly, in *United States v. Chavez-Lopez*, 767 F. App'x 431 (4th Cir. 2019), the Fourth Circuit concluded that a Department of Homeland Security intern's testimony "concern[ing] the actions he took to extract the data—hooking the phones up to a computer, following a few prompts, and saving data onto an external drive . . . is . . . best characterized as testifying about facts in his personal knowledge." *Id.* at 434. To the extent that through his testimony, the intern "offered the opinion that Cellebrite copies data from a cellphone, [such opinion] derived from his personal experience using the software." The Fourth Circuit explained:

> That testimony requires no more specialized knowledge than other opinions we have considered lay testimony, such as police officers' testimony that a substance they observed was methamphetamine, that a shorthand statement made to them carried a certain meaning, or that an observed use of force was objectively reasonable. [citations] [The intern's] testimony didn't require a technical understanding of Cellebrite, and he made no claims about the

> program's effectiveness or reliability. He only testified about copying data from one drive to another, which is "the product of reasoning processes familiar to the average person in everyday life."

Id.; *see also United States v. Smith*, No. 21-CR-30003-DWD, 2022 WL 17741100, at *7 (S.D. Ill. Dec. 16, 2022) ("Here, the government contends that it is not necessary to call an expert witness to testify about the technology that underlies the extraction of data from a device for that extracted data and the officers review of it to be received into evidence. This Court agrees so long as the witness does not veer off into the realm of an expert by attempting to explain technology and forensic processes for which he has no specialized knowledge."); *Gray v. Koch Foods, Inc.*, No. 2:17-CV-595-RAH, 2021 WL 4191387, at *2 (M.D. Ala. Sept. 14, 2021) ("The Court concludes that Coker may testify in this case but only in the limited capacity of a fact witness regarding the procedures and Cellebrite program he employed and the data that he extracted from Jackson's phone."); S*ec. & Exch. Comm'n v. Sabrdaran*, No. 14-CV-04825-JSC, 2016 WL 7826653, at *1 (N.D. Cal. Oct. 20, 2016) (testimony about extracting Cellebrite data "not expert opinion"). This Court should emulate the reasoning of all of these other courts and conclude that using Cellebrite to extract data from cell phones does not require expert testimony.

2. Agent Coonan's Certification Conforms To Federal Rule of Evidence 902(14) and Does Not Implicate The Confrontation Clause

Marciniak's argument that the government's use of Agent Coonan's Certification pursuant to Fed. R. Evid. 902(14) to authenticate copied electronic data from Defendants' cell phones violates Defendants' Confrontation Clause rights is without merit. As the government explained in its motion to allow use of the certification (ECF No. 185 at 9-11), the Ninth Circuit has concluded that a district court may rely on a 902(14) certification without "implicat[ing] 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 [an] . . . exhibit is self-authenticating." *United States v. Nishida*, No. 20-10238, 2021 WL 3140331, at *2 (9th Cir. July 26, 2021) (unpublished). Therefore, Agent Coonan's certification is nothing like the

affidavit reporting the material seized from the defendant was proven to be cocaine by forensic analysis at issue in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). Indeed, the Ninth Circuit's *Nishida* decision specifically cites *Melendez-Diaz*, *see* 2021 WL 3140331, at *2, because it distinguishes between an "*authenticat[ing]*" affidavit and "*create[ing]* a record for the sole purpose of providing evidence against a defendant." *Melendez-Diaz*, 557 U.S. at 322–23 (emphasis in original).

Marciniak's other briefly mentioned complaints regarding Agent Coonan's certification are equally meritless. Marciniak offers no support that only a "certified examiner" is a "qualified person" under Fed. R. Evid. 902(14). Certainly, no such requirement was mentioned in any of the 902(14) cases cited above. Here, Agent Coonan's sworn certification attests that he has "training and experience in collecting electronic evidence, including from digital devices. Specifically, in concert with the trained specialists at the Regional Computer Forensics Laboratory ("RCFL"), I have personally conducted forensic extractions of numerous digital devices-chiefly cellular telephones." (ECF No. 185-4 at 2, ¶ 1.) Therefore, he is a "qualified person" to author the 902(14) certificate the government seeks to use.

Finally, Marciniak misunderstands the reference to Fed. R. Evid. 902(11) in 902(14). Certifications pursuant to 902(14) do not also have to meet the substantive requirements of business records stated in 902(11), only the procedural requirements (including appropriate notice), which have been met here. *See* Fed. R. Evid. 902, Advisory Committee Notes, 2017 Amendments, ¶ 14 ("The reference to the 'certification requirements of Rule 902(11) or (12)' is only to the procedural requirements for a valid certification.").

C. The Court Should Deny Defendants' Motions to Exclude or Limit Expert Testimony

The United States affirmatively moved to introduce testimony by three experts in its case in chief, and will refrain from repeating its arguments here. Defendants' arguments to exclude such testimony contains additional flaws however, which are addressed here.

For example, Marciniak argues that the United States' notice regarding FINRA's Alexander Scoufis, FBI Forensic Accountant Benjamin McDonnell, and transfer agent representative Amanda Cardinalli are all insufficiently particular to meet Rule 16's requirements. Marciniak, however, fails to cite a single case in which a similarly detailed expert notice was deemed inadequate. The United States is confident that the level of detail provided in its notices is more than sufficient and exceeds Rule 16's requirements. *See* ECF 189-1 (United States' expert disclosures); *see also* Fed. R. Crim. Proc. 16, Notes of Advisory Committee on Rules—2022 Amendment ("The amendment requires a complete statement of all opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial."). The Court should deny Defendants' motions to exclude expert testimony based on the level of specificity in the United States' expert notices.

Marciniak also argues that expert testimony should be excluded because the United States' proffered experts have not yet signed their expert notices. *E.g.*, ECF 189, at p. 6 ("The Court should prohibit the government from calling Alexander Scoufis because the government … has failed to provide a disclosure that has been approved and signed by Mr. Scoufis."). There are no grounds for exclusion based on the lack of signatures because the witnesses will sign their respective expert notices well before trial, and likely before the motion *in limine* hearing. To put the defense arguments in context, the United States provided early expert disclosures to aid the Defendants' trial preparation, and Defendants now seek to penalize the United States for doing so. Simply put, Defendants have failed to

show (and cannot show) that they have suffered any prejudice whatsoever from having witness signatures in hand in advance of trial.

1. Alexander Scoufis

Marciniak also argues that Mr. Scoufis' expected testimony constitutes "dual-rule" testimony because it would mix fact testimony and expert opinions. But Mr. Scoufis' testimony would not make him a fact witness in any respect. Importantly, he will not testify that he has personal knowledge of the facts alleged in the indictment, has never communicated with Defendants, and has no knowledge of or interaction with the facts, defendants, or other witnesses in this case aside from his role as an expert witness employed by FINRA. And his anticipated testimony about trading data (Blue Sheet Data, stock price and volume summaries) does not transform him into a fact witness. Indeed, the central purpose of expert testimony is to help decipher evidence to make it more understandable to the jury. *See United States v. Holguin*, 51 F.4th 841, 851 (9th Cir. 2022) (quoting Fed. R. Evid. 703: "[a]n expert may base an opinion on facts or data in the case that the expert has ... personally observed"). Such testimony is exactly what is expected from Mr. Scoufis (*e.g.*, it takes a certain level of training and experience to interpret Blue Sheet Data), and it falls squarely within the ambit of expert testimony.

For his part, Jamie Yafa moves to limit Mr. Scoufis' testimony about various types of manipulative trading. ECF 191, at p. 5-7. To be sure, Mr. Scoufis will not testify that any specific action or conduct by Defendant's broke the law or an SEC rule here—he may merely be asked describe, as a general matter, what manipulative trading is and how it can be accomplished. And any hypothetical questions will not come so close the facts here that it risks blurring the line between industry practice and defendants' conduct. *See id.* at p. 6-7.

2. Benjamin McDonnell

Jamie Yafa argues that Mr. McDonnell should not be permitted to testify that "NUNZ and GWHP lacked the resources to operate in accordance with the representations made in reports, newsletters and advertisements disseminated to the investing public." ECF 191, at

p. 8. The Court should deny the motion on these grounds because the United States does not intend to present any such testimony or evidence through Mr. McDonnell.

Jamie Yafa also argues that Mr. McDonnell should not be permitted to summarize penny stock newsletters sent out by the Yafa brothers and their network, including because there (supposedly) are not so many newsletters that a summary is necessary, and because it might highlight the false statements in the newsletters. There are, however, hundreds of newsletters at issue, which would make a demonstrative exhibit or summary chart particularly helpful to the jury here. And—to state the obvious—of course the United States should be permitted to draw attention to relevant portions of evidence! Every skilled trial attorney can and should do exactly that to make efficient use of the Court's and the jury's time.

3. Amanda Cardinalli

Mr. Cardinalli worked for GWHP's transfer agent during the fraud period alleged in the indictment. Volmer argues that Ms. Cardinalli's testimony would fall into the expert category, and that she cannot possibly be an expert because she has not published or testified as an expert. ECF 187, at p. 3 ("It appears that Ms. Cardinalli has never testified as an expert before"). This argument fails for two reasons.

First, the United States will seek to introduce lay—not expert—testimony by Ms. Cardinalli about her role as GWHP's transfer agent. 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."

Second, for every single person who has testified as an expert, there was always a first time. The United States knows of no caselaw that somebody who is otherwise qualified as an expert by virtue of their experience and knowledge in a particular field are precluded from offering expert testimony merely because they have not done so before. The world

would run out of qualified experts within a generation or two, with no replacements in sight, if this nonsensical rule was implemented.

D. The Court Should Deny Marciniak's Motion to Exclude Evidence of his Prior Conviction

The United States affirmatively moved to introduce evidence of Marciniak's prior conviction in its case-in-chief (ECF 185, at pp. 25-27), and will refrain from repeating those arguments here.

Marciniak also argues that "there is nothing in the mere fact of Mr. Marciniak's conviction that demonstrates a particular [sic] detailed knowledge of securities law." ECF 189, at p. 11. Perhaps this is true insofar as "detailed" knowledge goes. But the conviction does undoubtedly show that Marciniak was, at the time of the pump and dump scheme alleged here, aware that pump and dump schemes are illegal, and he acknowledged as much and that he participated in one in his plea agreement in the Philadelphia case. This is certainly relevant, given that the United States will have to prove that Marciniak knowingly agreed to jointly undertake criminal activity (for purposes of the conspiracy count against him) and acted with an intent to defraud (for purposes of the securities fraud count). Simply put, the conviction is a significant piece of non-propensity evidence that should be admitted.

E. The Court Should Deny Marciniak's Motion to Exclude Evidence of Other Stock Tickers

The United States affirmatively moved to admit Defendants' references to other "deals" when describing the GWHP and NUNZ Schemes (ECF 185, at p. 14-16), and will refrain from repeating those arguments here.

F. The Court Should Deny Jamie Yafa's Motion for a Pretrial Hearing Regarding the Admissibility Of Co-Conspirator or Adoptive Admission Statements

1. Admissibility of Coconspirator Statements

"Under [Fed. R. Evid.] 801(d)(2)(E), the statement of a co-conspirator is admissible against the defendant if the government shows by a preponderance of the evidence that a conspiracy existed at the time the statement was made; the defendant had knowledge of,

and participated in, the conspiracy; and the statement was made in furtherance of the conspiracy." *United States v. Bowman*, 215 F.3d 951, 960–61 (9th Cir. 2000). With regard to evidence of a conspiracy, "[t]he question is merely whether there [is] proof of a sufficient concert of action to show the individuals to have been engaged in a joint venture." *United States v. Fries*, 781 F.3d 1137, 1151-52 (9th Cir. 2015). The statement must be considered but does not by itself establish the existence of the conspiracy or participation in it. *See* Fed. R. Evid. 801(d). The Government's proof of a conspiracy is typically circumstantial as most conspiracies are clandestine in nature. *See United States v. Reed*, 575 F.3d 900, 924 (9th Cir. 2009); *United States v. Weaver*, 594 F.2d 1272, 1274 (9th Cir. 1979). Once a conspiracy is so proven, "only 'slight evidence' is necessary to connect a coconspirator to the conspiracy." *United States v. Perez*, 658 F.2d 654, 658 (9th Cir. 1981).

"To be deemed 'in furtherance,' a statement 'need not be necessary or even important to the conspiracy, or even made to a coconspirator, as long as it can be said to advance the goals of the conspiracy in some way." *United States v. Ciresi*, 697 F.3d 19, 28 (1st Cir. 2012). Common examples of statements that are sufficiently in furtherance of a conspiracy to allow their admission as coconspirator statements include statements to:

- induce enlistment or further participation in the group's activities;
- prompt further action on the part of conspirators;
- reassure members of a conspiracy's continued existence;
- allay fears regarding the safety of the conspiracy activities;
- keep a person abreast of an ongoing conspirators' activities;
- identifying members of a conspiracy;
- discuss the particular roles of other coconspirators;
- avoid detection by law enforcement.

See United States v. Yarbrough, 852 F.2d 1522, 1535–36 (9th Cir. 1988); *United States v. Crespo de Llano*, 838 F.2d 1006, 1017 (9th Cir. 1987); *United States v. Sears*, 663 F.2d 896, 905 (9th Cir. 1981); *United States v. Williamson*, 53 F.3d 1500, 1520 (10th Cir. 1995).

Importantly, however, the inquiry regarding "whether a statement was made 'in furtherance of' a conspiracy . . . do[es] not focus on its actual effect in advancing the goals of the conspiracy, but on the declarant's intent in making the statement." *United States v. Zavala–Serra*, 853 F.2d 1512, 1516 (9th Cir.1988); *see also United States v. Shores*, 33 F.3d 438, 443 (4th Cir. 1994) ("A statement by a co-conspirator is made 'in furtherance' of a conspiracy if it was intended to promote the conspiracy's objectives, whether or not it actually has that effect."). The broad context or circumstances in which the statement was made can serve as sufficient foundation to infer that a statement was made in furtherance of a conspiracy; the statement's purpose does not need to be laid bare on the pages of the trial transcript. *See United States v. Larson*, 460 F.3d 1200, 1211 (9th Cir. 2006), on reh'g en banc, 495 F.3d 1094 (9th Cir. 2007). Furthermore, a statement can be admissible as a coconspirator statement even if it is made to a non-conspiracy member, including a confidential human source or an undercover agent,[2] as long as the declarant is a coconspirator who meant the statement to further the conspiracy. *See United States v. Piper*, 298 F.3d 47, 53 (1st Cir. 2002) ("The black-letter principle is that statements made in the course of a discussion between a coconspirator and a third party who is a stranger to the conspiracy are admissible under Rule 801(d)(2)(E), provided that they meet the Rule's foundational requirements. That is true regardless of whether the third party is a tipster, an informant, an undercover officer, or a mere acquaintance."); *see also United States v. Torres*, 742 F. App'x 244, 246 (9th Cir. 2018) (unpublished) (reversing district court's exclusion of statements between a co-conspirator and an undercover agent); *United States v. Smith*, 441 F.3d 254, 262 (4th Cir. 2006) ("[S]tatements made by a conspirator to a non-member of the conspiracy are considered to be 'in furtherance' of the conspiracy 'if they are designed to induce that party either to join the conspiracy or to act in a way that will assist it in accomplishing its objectives.'"); *United States v. Williamson*, 53 F.3d 1500, 1519 (10th Cir. 1995) ("[T]he fact that one party to a conversation is a government agent or

[2] "[S]tatements made unwittingly to a Government informant" are "clearly nontestimonial." *Davis v. Washington*, 547 U.S. 813, 825 (2006).

informer does not of itself preclude the admission of statements by the other party—if he or she is a member of a conspiracy—under Rule 801(d)(2)(E). . . . Stated alternatively, in deciding whether statements are admissible under Rule 801(d)(2)(E), the appropriate focus is on whether the statements were 'made by' a member of the conspiracy, and not on whether the statements were 'made to' a member of the conspiracy."); *United States v. Ayala*, 469 F. Supp. 2d 357, 364 (W.D. Va. 2007) ("Although the statements were made to a government agent, a non-member of the conspiracy, the statements were designed to induce him to act in a manner that would have assisted in the accomplishment of the conspiracy's objectives.").

2. Courts Typically Determine Admissibility of Coconspirator Statements At Close of Government's Evidence

"[A] district court is not required to make a . . . ruling prior to admitting a statement under Rule 801(d)(2)(E). Instead, the court may admit the statement provisionally when it is introduced, deferring a final decision until the close of evidence."[3] *United States v. Ciresi*, 697 F.3d 19, 25 (1st Cir. 2012); *see also Means v. United States*, 469 U.S. 1058, 1061 (1984) ("There is general agreement that the district court has the discretion to admit coconspirator's statements conditionally prior to proof of the existence of a conspiracy."); *United States v. Rocha*, 916 F.2d 219, 239 (5th Cir. 1990) (a "district court need not make a determination, prior to the introduction of the statement, whether the proposed statement complies with Rule 801(d)(2)(E)"). In other words, it is within a district court's discretion to determine the order of proof required for the Government to admit coconspirator statements in a criminal trial. *See United States v. Loya*, 807 F.2d 1483, 1490 (9th Cir. 1987) ("The fact that the district court may have admitted the statement of co-conspirator Tellez-

[3] Such provisional admission is subject to a later motion to strike if the government fails to meet its foundational requirements. *See United States v. Spawr Optical Rsch., Inc.*, 685 F.2d 1076, 1083 (9th Cir. 1982); *United States v. Batimana*, 623 F.2d 1366, 1369 (9th Cir. 1980). A mistrial need only be declared if taking all the circumstances into consideration, there is a manifest or high degree of necessity for doing so. *See Renico v. Lett*, 559 U.S. 766, 773–74 (2010).

Vega prior to the presentation of independent evidence of the existence of the conspiracy is not error."); *United States v. Reed*, 726 F.2d 570, 580 (9th Cir. 1984) ("Coconspirator statements may be admitted conditionally 'subject to a later motion to strike if the prosecution fails to establish the required foundation.'"); *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983) ("It was therefore not an abuse of discretion for the court to allow the government to introduce coconspirator statements prior to establishing prima facie the existence of a conspiracy."); *see also United States v. Bourjaily*, 781 F.2d 539, 542 (6th Cir. 1986), aff'd, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) ("[C]ourt may wait until the United States' case is complete before making findings and ruling on its admissibility" of coconspirator statements).

Indeed, since the evidence of the conspiracy is frequently much of the evidence presented by the government at trial, courts frequently determine it is impractical to determine whether co-conspirator statements are admissible before trial. *See, e.g.*, *United States v. Apodaca*, 275 F. Supp. 3d 123, 137-39 (D.D.C. 2017) ("[T]he 'practical impediments' to holding a pretrial hearing on the preliminary questions about the existence of a conspiracy and the defendant and declarant's participation in it, has led to the general practice in this jurisdiction to defer these determinations until the trial."). As one Ninth Circuit district court explained:

> [T]he provisional admission of co-conspirator's statements during trial . . . allows the government, through its case-in-chief, to present the necessary evidence to lay proper foundation for such co-conspirator statements and allows the court to properly evaluate the admissibility of such evidence in context at trial. In contrast, a pretrial evidentiary hearing to address the admissibility of all proposed co-conspirator statements would create a mini-trial solely about proposed evidence at a time when the court does not have the full context of the proposed evidence and the necessary facts to determine eligibility.

United States v. Singh, No. 3:13-CR-0117-LRH-VPC, 2016 WL 6542829, at *3 (D. Nev. Nov. 2, 2016); *see also United States v. Yandell*, No. 2:19-CR-00107-KJM, 2023 WL 2071282, at *5 (E.D. Cal. Feb. 16, 2023) ("Without . . . context, a pretrial procedure focused on co-conspirators' statements is unlikely to be a useful or reliable way to determine whether those statements are admissible.").

There is one outlier jurisdiction on this question—the Fifth Circuit. *See United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979) (en banc) ("The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator.").[4] Such approach has been rejected in most other circuits, including the Ninth Circuit. *See United States v. Jesenik*, No. 3:20-CR-228-SI, 2022 WL 11815826, at *18 (D. Or. Oct. 20, 2022) (James "is not the approach taken in the Ninth Circuit."); *Singh*, 2016 WL 6542829, at *3 ("[I]n the Ninth Circuit . . . a [*James*] hearing is disfavored."); *United States v. Goldfarb*, No. CR 07 260 003 PHX DG, 2008 WL 4534297, at *1 (D. Ariz. Oct. 3, 2008) ("In [*United States v.*] *Zemek*, [634 F.2d 1159 (9th Cir. 1980),] however, the Ninth Circuit expressly rejected the *James* approach . . . .").

3. The Court Should Follow The Typical Procedure Here

Yafa offers no good reason for the Court to depart from the typical procedure of provisionally admitting coconspirator statements and allowing the government to prove them up in its case-in-chief. Yafa's argument that the number of coconspirator statements obtained by a confidential human source and undercover agent, and the number of defendants, weighs in favor or so departing lacks merit. Indeed, typically courts cite the burden of having to make foundational calls of a significant amount of evidence in a complex case in a pretrial setting as a reason to allow the provisional admission of coconspirator statements. *See United States v. Rodriguez-Landa*, No. 213CR00484CAS135610, 2019 WL 653853, at *28 (C.D. Cal. Feb. 13, 2019) ("The Court will already hear this evidence during the upcoming month-long trial. It need not hear it

---

[4] Some courts order a "middle approach" requiring the government to make a preliminary summary of its evidence establishing the predicate facts, while deferring the final decision until the conclusion of the presentation of the evidence. *See United States v. Joyce*, No. 14-CR-00607-PJH-4, 2017 WL 895563, at *5 (N.D. Cal. Jan. 20, 2017), aff'd sub nom. *United States v. Guillory*, 740 F. App'x 554 (9th Cir. 2018). Even if the Court decided to take such an approach here, the summary of the Government's evidence discussed in the Indictment (ECF No. 1) and in the government's motion in limine brief (ECF No. 185) would suffice to meet such approach.

twice."); *United States v. Sahakian*, No. CR 02-938 (A) VAP, 2008 WL 11383346, at *2 (C.D. Cal. July 28, 2008) ("Defendant Sahakian identifies approximately two dozen inmate witnesses who might testify to statements of co-conspirators. The Court declines to try this case twice by conducting . . . pretrial hearings" on the foundation for coconspirator statements); *see also United States v. Zemek*, 634 F.2d 1159, 1169 n.13 (9th Cir. 1980) (recognizing the "questionable" practicality of pretrial procedure for determining coconspirator statement foundation in a complex conspiracy case). Furthermore, by waiting until it hears all of the evidence in the government's case-in-chief, the Court will be in the best position to make an individualized finding whether the jury should be instructed that certain statements are only admitted against certain defendants. *Cf. Rodriguez-Landa*, 2019 WL 653853, at *28 ("If, at the end of trial . . . the Court concludes that only certain defendants participated in the conspiracy, or that certain statements may only be admitted against certain defendants, the Court will issue rulings in accordance with such individualized findings.").

The United States anticipates, however, that the evidence will demonstrate that all defendants participated in a conspiracy to willfully employ deceptive contrivances in connection with the purchase and sale of NUNZ and GWHP securities. The strength of such evidence will be bolstered by how the various types of evidence corroborates each other. For instance, coconspirator statements about such aspects of the conspiracy as control of stock, timing and amounts of buying and selling of stock, and timing and content of promotional campaigns and press releases, will be corroborated by bank, trading, and other records, as well as other coconspirator statements and testimony of participants of the conversation during which the statements were made. It is only when the Court has the full context of the evidence that it will be in the optimal position to rule on the statements' admissibility.

The March 4, 2021, recorded conversations[5] between Defendant Volmer and the CHS and UC (and a second CHS not expected to testify), who were later joined by phone by Defendants Marciniak and Jamie Yafa, provides good examples of statements that will be admissible as to all non-declarant defendants[6] as coconspirator statements.[7] During those conversations, Defendants attempted to get the CHS and UC to further participate in the pump and dump scheme charged in the Indictment, and similar schemes. Specifically, Volmer (before Marciniak and Yafa called in) explained how successful Defendants efforts had been so far by stating that the amount of GWHP shareholders increased from 40 to 1500 in the last 5 months, and that a recent 8k stated that there was $1.4 million of trading on the stock. Volmer stated those trading numbers happened "on its own, we didn't do anything." When questioned, however, he stated that GWHP's performance was Jamie Yafa and Cark Marciniak doing, but not Josh Yafa. Volmer added, "we set it up so the platform – even Josh has to go to Jamie for the platform."

---

[5] The final transcript of the March 4, 2021, recordings is still being finalized, so there may be some changes from the quotes used in this memo. It is not expected that any such changes will affect the substance of the quotes.

[6] Statements made by a defendant declarant are not hearsay pursuant to Fed. R. Evid. 801(d)(2)(A).

[7] Jamie Yafa moves this Court to exclude the March 4, 2021, statements against him as adoptive admissions. Adoptive admissions, which are defined as non-hearsay pursuant to Fed. R. Evid. 801(d)(2)(B), are where the circumstances surrounding an individual's response or lack of response (e.g., language, conduct, or revealing silence) to a statement objectively indicate the individual's belief or acceptance of the truth of the information contained in the statement. *See Neuman v. Rivers*, 125 F.3d 315, 320 (6th Cir. 1997); *United States v. Miller*, 478 F.3d 48, 51 (1st Cir. 2007); *United States v. Lopes*, 578 F. Supp. 3d 158, 162 (D. Mass. 2021); *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 262 F. Supp. 2d 251, 262 (S.D.N.Y. 2003). As Yafa states, the foundational requirements for the admission of adoptive admissions are " that the defendant did actually hear, understand and accede to the statement." *United States v. Monks*, 774 F.2d 945, 950 (9th Cir. 1985). Although the government may well use adoptive admissions as a theory of admissibility to some statements, it does not intend to do so against Yafa for statements made during the March 4, 2021, meeting. Therefore, Yafa's motion to exclude statements from that meeting should be denied as moot.

Later, Volmer stated that GWHP's price was $0.98, "on the way to ten cents." When asked if the price decrease was due to the financing Strongo did, Volmer responded, "[Strongo's] a liar. Charles? He's full of shit. He only puts out things that may look good. It's a story stock. He had no intention of ever building a company."

After Marinciak and Yafa called in, Yafa explained that:

> I've been in business since basically '99. For the last five to six years, I have borrowed two different newsletters that are paid membership. So, I've switched my business model to basically paid membership with financial newsletters. And I've put together — definitely a powerhouse networks. So, you've probably seen some of the deals I've done over the last six months I would imagine. . . .

Later, after Volmer asked for a description of the platform, Yafa explained:

> Publishers, there's probably about the same amount of as—as newsletters that I own. You're looking at about 20 different publishers, access to, always on a rotation, so that's also how things can stay so consistent over that period of time. . . . When I started CODX, CODX was basically getting—about to get delisted. It was illiquid. And once I stated the campaign it basically got back into compliance and really started to ramp things up.

Marcinak then added:

> With the platform you know there's 20 targeted publishers that [Jamie] likes to use. But there is upwards of probably close to 2000 different sources on the platform that are utilized for business services and other types of businesses besides stocks. And, you know, the way it works is, instead of blowing 100 grand in a day on a newsletter, and getting a 1- or 2-day bang, he's able to target consistently, and put in front of individuals who are interested in these types of companies, you know, the research report, you know, some write ups, as well as re-disseminate the news from the company or the 8-K . . . The way it works is, and how we work, is that emails go out, and we only pay as they click through. Okay. So, it's a little bit different than going on like a Google campaign. . . . That's why we're able to get such good penetration and traction in the market, and—and consistent volume is because people that are actually clicking through and reading these things are buyers and the buying sticks. On GW, I think shareholder base has gone from like 60 people to 1400 I think it was.

Yafa than continued explaining:

> That's what separates a paid membership versus all the other crap that's out there. You're getting, basically, seeded investors that are looking for stuff that is long term. As long as the company is doing what they are supposed to be doing as a company, putting out news, staying consistent—it's a whole different animal. . . .

Yafa ended by saying:

> It's pretty basic. It really is. What I put together though is, I think, what you're looking for, more of a consistent campaign, you know, versus the one-hit wonder where stuff gets—goes up, with decent volume, and then it just disappears, and then it's not liquid. With this, you'll see, all the deals that I've done, they—stocks snowball and then create their own momentum. And, you know, it's just a—a better campaign.

Soon thereafter, Marciniak explains that he had Jamie Yafa drop off the line because "we got to have a Chinese firewall between [Yafa] and—and the budget." He then stated that he had a referral for a guy in Toronto, Joe Pavalo, who "will help you guys get set up if you need to deposit shares offshore." Then, after the CHS answered Marciniak's question about "what types of deals you guys have right now," Marciniak explained more about how he operates, saying:

> How we works is—look, we don't want to hold any paper if we don't have to. You guys would obviously hold the paper. We need to create a budget. We like to spend about $125 grand a week. If that's in your range—if you got a more pricier deal like the $3 dollar deal and you have enough in your war bag to support that then, you know, it's about a half a million dollar-a-month campaign. If the deal starts from scratch like Global did, you're looking at about 5-to-1 on the first week, 5-to-1 on the second week, by the third week you're up to about 10-to-1, and then higher up towards 20-to-1, you know, toward the end of the month, into second month.

Still later, while Marciniak was explaining how much money the CHS and UC would need to pay to successfully run their scheme, Marcinak stated:

> We'll create all the content . . if you need to or if we need to talk to them you can just say this is part of your network. . . . We just want you guys to be comfortable. As far as a half-a-million dollars a month, I mean, we've spent more than that. . . . On CODX, when it was humming they were—they were kicking over about a million bucks a month. And, you know, it just depends on the deal. Every deal is different, every budget is going to be different.

After being asked if the company itself would pay for the activities he was offering, Marciniak answered:

> The company, you know, for instance on Global, like, we're deep in Global, okay, we've been paying the notes off, we raised them some money in the beginning; we bridged them, I mean, we're really deep in that deal. . . . And, we working with them every day. . . . So we work with them every day. The company has, the company has through third-party shareholders arranged for us to get paid in shares and cash. . . . Basically, the company can issue restricted shares to—to us. They certainly can't issue any freetrading because then we would run into an issue with scalping. But they can issue a block of restricted, and we can work off that with what you guys have and then we'll

> come up with an agreement on how we want to split that up at the end of the day.
>
> Toward the end of the conversation, Marcinak told the CHS and UC:
>
> We want to work with you guys. . . . Whatever you guys need us to do we'll do. Whatever you're budget is, we'll accommodate it. . . . We can line up a 3-day deal. If you just want to just get liquid, we'll get you liquid. If you want to work something longer—we're involved with this Global for probably the next two years. . . . It's been expensive. And we got into it we we're told one thing, it turned out to be another thing, and we've had to babysit it in order to—to not burn—burn our people.

By the end of the government's case-in-chief, it will easily demonstrate by a preponderance of the evidence that a conspiracy existed at the time these statements were made; Defendants had knowledge of, and participated in, such conspiracy; and all of these statement were made in furtherance of that conspiracy. Specifically, the statements were made in furtherance of the conspiracy because they were made with the intent of having the CHS and UC to further participate in the pump and dump scheme charged in the Indictment, and similar schemes, by investing more money, allay any fears they might have about such schemes, and explain the various roles played by the members of the schemes.

To the extent Yafa argues that coconspirator statements that took place before he joined the conspiracy could not be used against him (ECF No. 191 at 5:2-4, 10:23-25), he is wrong. It is well settled that co-conspirator statements made before a defendant joins the conspiracy are admissible against a defendant. *See United States v. Segura-Gallegos*, 41 F.3d 1266, 1272 (9th Cir. 1994) ("Statements of his co-conspirators are not hearsay even if they were made before [defendant] entered the conspiracy."); *United States v. Saavedra*, 684 F.2d 1293, 1301 (9th Cir. 1982) ("[A] conspirator who joins a pre-existing conspiracy is bound by all that has gone on before in the conspiracy."). Similarly, Yafa's brief mention of his confrontation rights do not support his motion since coconspirator statements do not implicate the Confrontation Clause. *See United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005) ("[C]o-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's*[8] holding."); *Yarbrough*, 852 F.2d at 1536 ("[T]he requirements of

[8] *Crawford v. Washington*, 541 U.S. 36 (2004).

801(d)(2)(E) and the confrontation clause of the sixth amendment are identical" therefore "the requirements of 801(d)(2)(E) have been met there [is] no independent violation of the confrontation clause."

For all of these reasons, the Court should deny Yafa's motion for a pretrial hearing on the admissibility of coconspirator statements.

G. The Court Should Deny Marciniak's Motion for a Bill of Particulars

Pursuant to Federal Rule of Criminal Procedure 7(f), a district court may order a bill of particulars within 14 days after arraignment, or at a later time with the permission of the court. *See also Wong Tai v. United States*, 273 U.S. 77, 82 (1927) (grant or denial of a bill of particulars is a matter of discretion for the trial court). A bill of particulars is appropriate only when necessary: (1) to "inform the defendant of the nature of the charges against him with sufficient precision to enable him to prepare for trial," (2) "to avoid or minimize the danger of surprise at the time of trial," and (3) to enable a defendant "to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague, and indefinite for such purposes." *United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991) (quoting *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979)). "A bill of particulars should be limited to these purposes . . . ." *United States v. Cerna*, No. CR 08–0730 WHA, 2009 WL 2998929, at *2 (N.D. Cal. Sept. 16, 2009). In other words, "the purpose of the bill of particulars . . . is not [to] entitle[the defendant] to know all the evidence the government intends to produce but *only the theory of the government's case*." *United States v. Ryland*, 806 F.2d 941, 942 (9th Cir. 1986) (emphasis added).

An indictment that is "sufficiently detailed to tell the defendants the essential facts of the crimes with which they were charged . . . obviate[s] the need for a bill of particulars." *United States v. Federbush*, 625 F.2d 246, 252 (9th Cir. 1980). Furthermore, "[e]ven if an indictment is vague, a bill of particulars is not necessary if the government's disclosures and discovery adequately advise the defendant of the charges against him." *United States v. Middleton*, 35 F. Supp. 2d 1189, 1193 (N.D. Cal. 1999); *see also Ayers*, 924 F.2d at 1484 (affirming denial of bill of particulars since government's provision of "significant amount

of discovery," allowed defendant to sufficiently prepare his defense for trial). Importantly, a bill of particulars is not appropriate to provide the "when, where, and how" of the acts forming the basis of the criminal charge. *See Giese*, 597 F.2d at 1181; *see also United States v. DiCesare*, 765 F.2d 890, 897 (9th Cir.), amended, 777 F.2d 543 (9th Cir. 1985) (bill of particulars not warranted to provide names of unknown coconspirators, date on which conspiracy began, or unspecified overt acts that comprised the charged activity). Put differently, "[a] bill of particulars, unlike discovery, is not intended to provide the defendant with the fruits of the government's investigation. Rather, it is intended to give the defendant only that minimum amount of information necessary to permit the defendant to conduct his own investigation." *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985).

Here, the 11-page Indictment contains 17 paragraphs describing the manner and means by which Defendants conspired to engage in a pump-and-dump scheme, and actually committed securities fraud, as well as 7 paragraphs describing overt acts taken in support of the conspiracy. (ECF No. 1.) These paragraphs are sufficiently detailed to tell Defendants the essential facts of the crimes with which they are charged and therefore to obviate the need for a bill of particulars. In other words, since the government's theory of the case is discernable from reading the Indictment, a bill of particulars is not appropriate. Marciniak's motion for a bill of particulars to have the government detail how stock tickers other than the two the government charges Defendants conspired to pump-and-dump is an inappropriate attempt to discover the details of the evidence (i.e., the when, where, and how) supporting the charges against them. Therefore, the motion should be denied.

Additionally, Marciniak does not argue that there is insufficient discovery regarding those other stock tickers to allow him to investigate how they fit into Defendants' scheme. Indeed, he admits that in the Ninth Circuit, sufficient discovery disclosures obviate the need for a bill of particulars. But, relying on two out-of-circuit district court cases, he nonetheless asks for a bill of particulars. That is not the purposes of a bill of particulars. While not necessary, the government proffers that appropriate investigation by defendants will reveal that when discussing their conspiracy with the UC and CHS, typically in an attempt to get

them to invest more money, they frequently discussed their similar schemes involving other stock tickers to display their bona fides in perpetuating such schemes. The government contends such discussions are therefore inexplicitly intertwined with the charged conduct. Defendants are entitled to object to this or any other evidence if they have an appropriate basis. But it does not entitle them to a bill of particulars. Therefore, Marciniak's motion for one should be denied.

H. Defense Motions that the United States does not Oppose

Jamie Yafa anticipates that he will move to redact or exclude statements that Marciniak made during the FBI's approach on Marciniak in February 2022. The United States tentatively agrees that Marciniak's statements to law enforcement about Jamie Yafa, if admitted, risks violating the Confrontation Clause. On that basis, the United States currently does not intend to introduce the subject statements.

III. CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court deny Defendants' motions *in limine*.

DATED: April 24, 2023.

Respectfully submitted,

RANDY S. GROSSMAN
United States Attorney

/s/ Aaron P. Arnzen
AARON P. ARNZEN
GEORGE V. MANAHAN
Assistant U.S. Attorneys