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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.
14

15 JOSHU YAFA (2), and
16 JAMIE YAFA (3),

17 Defendants.
18

Case No. 21CR01310-WQH

UNITED STATES'
SUPPLEMENTAL BRIEF
REGARDING THE
PARTIES' MOTIONS *IN*
LIMINE

19 The United States, by and through its counsel, Randy S. Grossman, United States
20 Attorney, and Aaron P. Arnzen and George V. Manahan, Assistant U.S. Attorneys, hereby
21 files this Supplemental Brief Status Report regarding the evidentiary hearing calendared for
22 July 5, 2023.
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1 The parties filed a number of motions *in limine* in advance of trial. However, now
2 that three of the five defendants (Strongo, Volmer and Marciniak) named in the indictment
3 have pleaded guilty, and the remaining defendants (Joshua Yafa and Jamie Yafa, or the
4 “Trial Defendants”) and the United States have met and conferred, there are only limited
5 areas of disagreement with respect to the filed motions. Based on its discussions with
6 counsel for the Trial Defendants, the United States anticipates that the parties will take the
7 following positions on the filed motions *in limine*:

8 **I. Government’s Prior Motions:**

- 9 **1. Find Proper Authentication of Recorded Calls and Cell Phone Materials: No**
10 **dispute as to authenticity.** The Trial Defendants have indicated that they are
11 willing to stipulate to the authenticity of cell phone evidence, most of which takes
12 the form of text messages and emails retrieved from defendants’ phones in 2021.
13 The Trial Defendants reserve their right to object on other grounds (*e.g.*, hearsay,
14 relevance). The United States therefore does not believe that the Court needs to rule
15 on this portion of the motion.
- 16 **2. Admit Statements of Defendants and Co-Conspirators: Some dispute remains.**
17 The parties would appreciate the opportunity to support their arguments about this
18 topic at the motions *in limine* hearing. The outstanding issue largely concerns the
19 parties’ positions concerning when the Court should find that a conspiracy exists for
20 purposes of determining whether the requirements for admission of statements under
21 FRE 801(d)(2)(E) have been met.
- 22 **3. Admit Defendants' References to other "Deals" when Describing the GWHP**
23 **and NUNZ Schemes: No dispute remains.** The Trial Defendants do not expect to
24 object to the introduction of references to other “deals” as described in the United
25 States’ motion. The United States has represented to the Trial Defendants that it
26 does not intend to prove that these other deals were fraudulent, but only to present
27 evidence that these other deals concerned stocks that were subject to promotion by
28

1 the Trial Defendants, and that prices of some the stocks increased during the relevant
2 period.

3 **4. Admit Business Records: No dispute remains.** The United States has identified
4 voluminous documents that it intends to introduce under the business records
5 exception to the hearsay rule, and the Trial Defendants have indicated that they agree
6 that the documents meet the requirements set forth in FRE 803(6) and 902(11).

7 **5. Admit Summaries and Charts: No dispute remains.** The United States has
8 disclosed the summaries of voluminous evidence that it intends to introduce at trial,
9 and the Trial Defendants have indicated that they agree that the summaries and charts
10 meet the requirements set forth in FRE 1006.

11 **6. Admit Expert Testimony and Related Exhibits: Some dispute remains.** The
12 Trial Defendants have indicated that they do not expect to challenge the admissibility
13 of expert testimony presented by Alex Scoufis or Benjamin McDonnel, but they do
14 object to SA Tarwater's anticipated testimony regarding the *modus operandi* of
15 pump and dump schemes. The parties would appreciate the opportunity to support
16 their arguments about this topic at the motions *in limine* hearing.

17 **7. Lay Testimony by Agent about the Meaning of Phrases Encountered in the**
18 **Investigation: No dispute remains.** The Trial Defendants do not anticipate
19 objecting to this testimony.

20 **8. Admit Testimony about Matters Learned in the Course of Employment: No**
21 **dispute remains.** The Trial Defendants do not anticipate objecting to this testimony.

22 **9. Admit Evidence of Defendants' Relevant Regulatory and Criminal History: No**
23 **dispute remains.** The United States has agreed to introduce evidence of a penny
24 stock bar against Josh Yafa, but refrain from referencing the criminal conviction that
25 led to the bar (largely based on how long ago the conviction came about). In return,
26 the Trial Defendants anticipate refraining from objection to the introduction of the
27 penny stock bar order. As for Defendant Volmer's penny stock bar, the Trial
28 Defendants are still determining whether they object to this bar order on FRE 403

1 grounds. If they do not object on FRE 403 grounds, then any party (including the
2 United States) would have the ability to impeach Mr. Volmer based on the bar order.

3 **10.Preclude Evidence or Argument That Defendants were Unaware Their**
4 **Conduct was Unlawful: No dispute remains.** The United States intends to
5 withdraw this motion.

6 **11.Preclude an Entrapment Defense.** No dispute remains. The Trial Defendants do
7 not anticipate presenting such a defense.

8 **12.Preclude Advice of Counsel Defense.** No dispute remains. The Trial Defendants
9 do not anticipate presenting such a defense.

10 **13.Order Reciprocal Discovery.** The United States still seeks such an order as to the
11 Trial Defendants.

12 **II. Defendants' Prior Motions:**

13 For their part, defendants have also submitted various motions *in limine*. That said,
14 all of the defense motions either surround the same evidentiary issues as those addressed
15 above, or are moot because the filing defendant(s) have pleaded guilty and the Trial
16 Defendants do not presently intend to pursue or argue in favor of such defense motions.

17 **III. Additional Motion:**

18 **A. Motion to Admit Testimony via Two-Way Video Conferencing Technology**

19 The United States recently telephonically interviewed Robert Goldman, who the
20 United States anticipates calling as a trial witness. However, Mr. Goldman stated that he
21 does not travel due to extreme motion sickness triggered in cars, planes, and trains. His
22 reactions to moving vehicles of virtually any kind that can transport people significant
23 distances can include epileptic seizures and other serious conditions. The impact on Mr.
24 Goldman's life is significant, *e.g.*, his children study abroad and he has not and will not
25 visit them, his father lives out of state and Mr. Goldman hasn't seen his father in many
26 years, and Mr. Goldman has not been on a plane in approximately 15 years. Mr. Goldman
27 lives in Maryland. Mr. Goldman provided the United States with a brief written history of
28 challenges created by his ailments, which is attached hereto as Exhibit 1. Given these

1 circumstances, the parties have contemplated whether a deposition under Federal Rule of
2 Criminal Procedure 15, or live trial testimony by two-way videoconferencing technology
3 (VTC) would be preferable. The United States and the Trial Defendants would prefer VTC.
4 The Trial Defendants are prepared to waive their confrontation clause rights to the extent
5 live VTC testimony might infringe those rights, and they consent to Mr. Goldman's
6 testifying in this manner. Defendants agree that the use of a remote video procedure is
7 necessary and the reliability of the testimony is otherwise assured.

8 For these reasons, the United States moves for admission of Mr. Goldman's trial
9 testimony via VTC. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305 n. 3 (2009)
10 (the right to confrontation may be waived); *Wilson v. Gray*, 345 F. 2d 282, 286 (9th Cir.
11 1965) (defense may waive right to cross examination and confrontation, and waiver may be
12 accomplished through counsel).

13 Respectfully submitted,

14 RANDY S. GROSSMAN
15 United States Attorney

16 /s/ Aaron P. Arnzen
17 AARON P. ARNZEN
18 Assistant United States Attorney
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