THOMAS P. O'BRIEN
United States Attorney
CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division
DANIEL A. SAUNDERS (Cal. Bar # 161051)
daniel.saunders@usdoj.gov
KEVIN M. LALLY (Cal. Bar # 226402)
kevin.lally@usdoj.gov
Assistant United States Attorneys
Violent & Organized Crime Section
1500 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-2272/2170
Facsimile: (213) 894-3713
Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANTHONY PELLICANO, MARK ARNESON, RAYFORD EARL TURNER, KEVIN KACHIKIAN, and ABNER NICHERIE, Defendants.	No. CR 05-1046(E)-DSF TRIAL MEMORANDUM [18 U.S.C. § 371; 18 U.S.C. § 1001: False Statements; 18 U.S.C. § 1028(a)(7): Identity Theft; 18 U.S.C. §§ 1030(a)(2)(B), (c)(2)(B)(I): Unauthorized Computer Access of United States Information for Profit; 18 U.S.C. § 1030(a)(4): Computer Fraud; 18 U.S.C. §§ 1343, 1346: Honest Services Wire Fraud; 18 U.S.C. § 1512(c)(1): Destruction of Evidence; 18 U.S.C. § 1962©: RICO; 18 U.S.C. § 1962(d): RICO Conspiracy; 18 U.S.C. § 1963: RICO Forfeiture; 18 U.S.C. § 2511(a): Interception of Wire Communications; 18 U.S.C. § 2512: Possession of Wiretapping Device; 18 U.S.C. § 2(a): Aiding and Abetting] Trial Date: March 5, 2008 Trial Time: 9:00 a.m.

The United States, by and through its counsel of record, Assistant United States Attorneys Daniel A. Saunders and Kevin M. Lally, hereby files its Trial Memorandum for the above-captioned case.

The government respectfully requests leave of the Court to supplement or modify this memorandum as may be appropriate.

DATED: February 28, 2008

Respectfully submitted,

THOMAS P. O'BRIEN
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

_____/s/_____
DANIEL A. SAUNDERS
KEVIN M. LALLY
Assistant United States Attorneys

Attorneys for Plaintiff
United States of America

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF CONTENTS(CONTINUED)

TABLE OF CONTENTS (CONTINUED)

TABLE OF CONTENTS(CONTINUED)

PAGE(S)

TABLE OF CONTENTS (CONTINUED)

TABLE OF CONTENTS(CONTINUED)

TABLE OF AUTHORITIES

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

TABLE OF AUTHORITIES (CONTINUED)

CASES: **PAGE(S)**

STATUTES:

TABLE OF AUTHORITIES (CONTINUED)

RULES: **PAGE(S)**

I.

STATUS OF THE CASE

A. Trial is set for March 5, 2008, before the Honorable Dale S. Fischer, United States District Court Judge.

B. The estimated time for trial is eight to ten weeks.

C. Defendant Anthony Pellicano, who is pro se, currently is in custody. Defendants Mark Arneson, Rayford Earl Turner, Kevin Kachikian, and Abner Nicherie, all of whom are represented by retained counsel, are on bond.

D. Trial by jury has not been waived.

E. Absent any stipulations, the government expects to call approximately 80 to 100 witnesses in its case-in-chief.

F. The Fifth Superseding Indictment (the "indictment") is in 111 counts. Defendant Pellicano is charged with RICO (count 1), RICO conspiracy (count 2), honest services wire fraud (counts 3-33, 75-76), unauthorized computer access of United States agency information (counts 34-64, 77-78), identity theft (counts 65-69, 79-82, 87-90), computer fraud (counts 70-74, 83-86, 91-94), conspiracy to intercept wire communications (counts 95, 106), interception of wire communications (counts 96-104, 107), manufacturing and possessing a wiretapping device (count 105), and RICO forfeiture (count 111). Defendant Arneson is charged with RICO (count 1), RICO conspiracy (count 2), honest services wire fraud (counts 3-33), unauthorized computer access of United States agency information (counts 34-64), identity theft (counts 65-69), computer fraud (counts 70-74), making a false statement

(count 108), and RICO forfeiture (count 111). Defendant Turner is charged with RICO (count 1), RICO conspiracy (count 2), identity theft (counts 87-90), computer fraud (counts 91-94), conspiracy to intercept wire communications (count 95), interception of wire communications (counts 96-104, 107), making a false statement (count 109), and RICO forfeiture (count 111). Defendant Kachikian is charged with conspiracy to intercept wire communications (count 95), interception of wire communications (counts 96-104, 107), manufacturing and possessing a wiretapping device (count 105), and destruction of evidence (count 110). Defendant Nicherie is charged with aiding and abetting the interception of wire communications (count 97).

G. A copy of the Indictment is attached as Exhibit A.

II.

APPLICABLE STATUTES

A. 18 U.S.C. § 1962(c) (RICO) (count one)

1. Statutory Language

Title 18, United States Code, Section 1962(c) provides, in pertinent part:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct, or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

2. Elements

For a defendant to be found guilty of RICO, the government must prove the following: (1) there was an enterprise consisting of a group of persons associated together for a common purpose of engaging in a course of conduct; (2) the defendant was employed by or associated with the enterprise; (3) the defendant conducted or participated, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity or collection of unlawful debt; and (4) the enterprise engaged in, or its activities in some way affected, commerce between one state and another state or between a state or the United States and a foreign country. See Ninth Circuit Model Jury Instruction 8.16 (2003).

3. Applicable Law

The Supreme Court and the Ninth Circuit have both ruled that "RICO is to be read broadly." Sedima v. Imex Company Inc., 473 U.S. 479, 497 (1985); Odom v. Microsoft Corporation, 486 F.3d 541, 547 (9th Cir. 2007)(en banc). For example, the Supreme Court has been unequivocal in its finding that the RICO statute encompasses criminal conduct by both purely criminal enterprises and enterprises that engage in both legitimate and criminal behavior. United States v. Turkette, 452 U.S. 576, 581 (1981). Similarly, in Sedima, the Supreme Court, recognizing that RICO had evolved to be largely a tool of civil litigation, expressly found that the RICO statute is not limited to classic organized crime models but rather encompassed any and all conduct that

satisfied the fundamental elements of the offense. Sedima, 473 U.S. 494-497.

a. Enterprise

As defined by the RICO statute, the term "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated-in-fact." 18 U.S.C. § 1961(4); see Odom, 486 F.3d at 548 (a single individual or legal entity can qualify as an enterprise). To prove the existence of an associate-in-fact enterprise, such as the one charged in the Indictment, the government must establish the existence of an ongoing organization, whether it be formally or informally organized, acting with a common purpose and acting as a continuing unit. Id. at 548, 552. To be acting as a continuing unit, it is not necessary that every member be involved in each of the acts of racketeering, that the predicate acts be interrelated in any way, that the membership in the organization remain constant over time, or that there be any ascertainable structure to the organization. Id. at 551-52. Instead, the focus is on whether the associates' behavior consists of ongoing, as opposed to isolated, activity. Turkette, 452 U.S. at 583; Odom, 486 F.3d at 545-52.

b. Employed by or Associated with the Enterprise

A person is "employed by" an enterprise when, for example, the person is on the payroll of the enterprise and performs services for the enterprise, holds a position in the enterprise,

or has an ownership interest in the enterprise. A person is "associated with" the enterprise if the person joins with other members of the enterprise and knowingly aids or furthers the activities of the enterprise, or conducts business with or through the enterprise.

c. Conducted or Participated in the Affairs of the Enterprise

A particular defendant participates, directly or indirectly, in the conduct of the enterprise's affairs by participating in the operation or management of the enterprise by having some part in directing the enterprise's affairs. For a defendant to participate in the operation or management of the enterprise, the defendant need not exercise significant control over, or within, the enterprise. Similarly, the defendant need not have had either a formal position in the enterprise or have had primary responsibility for the enterprise's affairs as "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management" or who carry out upper management's orders. Reves v. Ernst & Young, 507 U.S. 170, 184 (1993); United States v. Fernandez, 388 F.3d 1199, 1228 (9th Cir. 2004). Therefore, "all who participate in the conduct of [the] enterprise, whether they are generals or foot soldiers," can be held legally responsible under the RICO statute. United States v. Oreto, 37 F.3d 739, 751 (1st Cir. 1994).

The RICO statute defines a pattern of racketeering activity as at least two racketeering acts within ten years of one another. 18 U.S.C. § 1961(5). In order to form a pattern, the two acts must be related to each other and pose a threat of continuing activity. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 238-40 (1989); Fernandez, 388 F.3d at 1221.

To establish that the affairs of the enterprise were conducted through a pattern of racketeering activity, evidence must exist that "the predicate offenses are related to the activities of th[e] enterprise." United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980).

d. Effect on Interstate Commerce

The Ninth Circuit repeatedly has held that only a "de minimis" effect on interstate commerce is required for a RICO violation. Fernandez, 388 F.3d at 1218; United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979). It is the activities of the enterprise, not each predicate act, which must affect interstate commerce. United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981); Rone, 598 F.2d at 573.

B. 18 U.S.C. § 1962(d)(RICO Conspiracy) (count two)

1. Statutory Language

Title 18, United States Code, Section 1962(d) provides in pertinent part:

It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c).

2. Elements

For a defendant to be found guilty of RICO conspiracy, the government must prove the following: (1) the defendant knowingly agreed to conduct or participate, directly or indirectly, in the conduct of the affairs of the charged enterprise through a pattern of racketeering activity; (2) an enterprise would be established as alleged in the indictment; (3) the enterprise or

its activities would affect interstate commerce; and (4) the defendant would be associated with the enterprise.

3. Applicable Law

The terms "enterprise", "affecting interstate commerce", "pattern of racketeering activity" and "associated with the enterprise" are the same as applied to the substantive RICO offense. 18 U.S.C. § 1961. There exist three significant ways, however, in which RICO conspiracy differs from a substantive RICO offense.

First, to convict a defendant of RICO conspiracy, the government is not required to prove that the alleged enterprise was actually established, that the defendant was actually associated with the enterprise, or that the enterprise or its activities actually affected interstate commerce. Instead, because the agreement to commit a RICO offense is the essence of a RICO conspiracy offense, the government need only prove that if the conspiracy offense were completed as contemplated, the enterprise would be established, the defendant would be associated with the enterprise, and the enterprise or its activities would affect interstate commerce. Salinas v. United States, 552 U.S. 52, 65 (1997).

Second, to convict a defendant of RICO conspiracy, the government need not prove that individual enterprise members personally had agreed to commit two racketeering acts or had participated in the commission of the actual crimes. Salinas, 552 U.S. at 63 (upholding the sufficiency of a RICO conspiracy

conviction of a sheriff's deputy who facilitated scheme whereby his boss received multiple kickbacks from a prisoner in exchange for permitting unauthorized conjugal visits). Instead, the government must only prove that the particular defendant agreed that, at some point during the life of the conspiracy, a member of the conspiracy would commit, on behalf of the conspiracy, at least two related acts of racketeering, with the jury being unanimous as to which type or types of predicate racketeering activity the defendant agreed would be committed. Id. at 65. As the Salinas Court stated:

> A conspirator must intend to further an endeavor which, if completed, would satisfy all the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crimes completion . . .
>
> A (RICO or other federal) conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective (here the operation of the RICO enterprise) and may divide up the work, yet each is responsible for the acts of each other. See Pinkerton v. United States, 328 U.S. 640 (1946). If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

Salinas, 522 U.S. at 62-65.

Third, to convict a defendant of a substantive RICO offense, the government must prove that the defendant personally participated in the operation or management of the enterprise. However, such proof is not required to convict a defendant of a

RICO conspiracy offense. Rather, a defendant may be convicted of a RICO conspiracy offense provided that the defendant knowingly agreed to facilitate a scheme which, if completed, would constitute a RICO violation involving at least one conspirator who would participate in the operation or management of the enterprise. Fernandez, 388 F.3d at 1230.

In addition to the differences with substantive RICO, RICO conspiracy also differs materially from the general conspiracy statute set forth in 18 U.S.C. § 371. Specifically, while RICO conspiracy incorporates the general law of conspiracy,[1] Salinas, 552 U.S. at 63-65, Congress designed the statute to be broader in scope than a Section 371 conspiracy. As the Fifth Circuit explained:

> We are convinced that through RICO, Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate "wheel" and "chain" rationales with a new statutory concept; the enterprise.
>
> . . . RICO helps to eliminate this problem (diverse crimes by apparently unrelated individuals) by creating a substantive offense which ties together these diverse parties and crimes. . . The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit (a specific crime), it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise . . . .

---

[1] As with proof of any other type of conspiracy, the agreement need not be stated or written, but may be inferred from circumstantial evidence or the defendant's acts pursuant to the scheme. United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979); Glasser v. United States, 315 U.S. 60, 80 (1942). In addition, there is no requirement that the defendant in a RICO conspiracy know the full scope of the conspiracy or even the identity of all the conspirators. United States v. Castro, 89 F.3d 1443, 1451 (11th Cir. 1997); United States v. Sutherland, 656 F.2d 1181, 1190 (5th Cir. 1981).

United States v. Elliott, 571 F.2d 880, 902 (5th Cir. 1978) (emphasis added). For example, unlike a Section 371 conspiracy, the government need not establish that any overt acts were committed. Salinas, 522 U.S. at 63.

C. 18 U.S.C. §§ 1343, 1346 (Honest Services WireFraud) (racketeering acts one through sixty-seven; counts three through thirty-three)

1. Statutory Language

Title 18, United States Code, Section 1343, provides, in pertinent part:

[W]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Title 18, United States Code, Section 1346, provides:

[F]or the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

2. Elements

For a defendant to be found guilty of honest services wire fraud, the government must prove the following: (1) a defendant made up a scheme or plan to deprive the public of its right to honest services; (2) the defendant acted with the intent to

defraud, that is, with the intent to deprive the public of its right to honest services; and (3) the defendant used, or caused someone to use, a wire communication in interstate commerce to carry out or to attempt to attempt to carry out the scheme or plan. See Ninth Circuit Model Criminal Jury Instruction 8.102.

The use of a wire is caused when one knows that the wires will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material sent over the wire itself constituted a deprivation of the right to honest services so long as a wire was used as an important part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

3. Applicable Law

a. Parallel Construction of Fraud Statutes

The mail fraud and wire fraud statutes share as a common element the defendant's knowing participation in a fraudulent scheme. 18 U.S.C. §§ 1341, 1343 ("scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises"). "The only difference between mail fraud and wire fraud is that former involves the use of the mails and latter involves the use of wire, radio, or television communication in interstate or foreign commerce." Ninth Circuit Model Criminal Jury Instruction 8.103, Comment.

Accordingly, courts applying these statutes generally have given them parallel constructions so that fraud concepts developed in the case law under Section 1341 and Section 1343 are typically treated as interchangeable in criminal prosecutions. See United States v. Poliak, 823 F.2d 371, 372 (9th Cir. 1987) (bank fraud, wire fraud, and mail fraud); United States v. Cusino, 694 F.2d 185, 187 n.1 (9th Cir. 1982) (mail fraud and wire fraud); United States v. Louderman, 576 F.2d 1383, 1387-88 & n.3 (9th Cir. 1978) (same).

b. Non-disclosure and False Disclosure by a Public Official

Public officials have a duty to provide "honest services" to the public. United States v. Frega, 179 F.3d 793, 802 (9th Cir. 1999). As the Ninth Circuit repeatedly has recognized, this "theory of fraud most often is applied to cases involving bribery of public officials" as "the requisite 'scheme or artifice to defraud' is found in the deprivation of the public's right to honest and faithful government." United States v. Williams, 441 F.3d 716, 723 (9th Cir. 2006); Frega, 179 F.3d at 803; United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980). A public official's non-disclosure of material information to his employer can also satisfy the fraud standard set forth in Section 1346, as the employer -- in this case the government -- has a right to have its employees act honestly in the course of their duties. Frega, 179 F.3d at 803; Bohonus, 628 F.2d at 1171-72. "[T]his duty of disclosure arises not exclusively by statute, but also from the general fiduciary duty a public official owes to the

public." United States v. Sawyer, 239 F.3d 31, 40 (1st Cir. 2001) ("Sawyer II") quoting United States v. Woodward, 149 F.3d 46, 57 (1st Cir. 1998) ("Public officials . . . have fiduciary duties under common law to ensure that the public receives their honest service free of improper influence of corruption")); United States v. Waymer, 55 F.3d 564, 571 (11th Cir. 1995) ("A defendant's breach of a fiduciary duty may be a predicate for a violation of the mail fraud statute where the breach entails the violation of a duty to disclose material information").

c. Violations of State Law

Proof of honest services wire fraud "does not require proof of a violation of any state law. Because the duty of honest services owed by government officials derives from fiduciary duties at common law as well as from statute, there is not need to base a prosecution under § 1341 on allegations that the defendant also violated state law." Sawyer II, 239 F.3d at 41-42. See also Waymer, 55 F.3d at 571 ("fraud, for purposes of a mail fraud conviction, may be proved through the defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation"). However, "to say that proof of a state law violation is not required is not the same as saying that it is not permitted. Indeed, proving violations of state law is one way a federal prosecutor might choose to structure a prosecution for honest services [] fraud." Sawyer II, 239 F.3d at 42.

d. Proof of Loss Not Required

Undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services. United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996)("Sawyer I"); see also Sawyer II, 239 F.3d at 39; United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997).

e. Fraudulent Intent

The intent to deprive the public of its right to the honest services of the government official is an essential element of the offense. See Ninth Circuit Model Criminal Jury Instruction 8.102; Frega, 179 F.3d at 803. In establishing the requisite intent, the government need not prove the defendant had the specific intent to use the mails or wires to commit the fraud. If a defendant "does an act with knowledge that use of the mails [or wires] will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." See United States v. Hubbard, 96 F.3d 1227, 1229 (9th Cir. 1996) (quoting Pereira v. United States, 347 U.S. 1, 8-9 (1954)). See also United States v. Bernhardt, 840 F.2d 1441, 1447 (9th Cir. 1988).

Fraudulent intent may be, and often must be, shown by circumstantial evidence. See United States v. Rasheed, 663 F.2d 843, 848 (9th Cir. 1981); United States v. Jones, 425 F.2d 1048, 1058 (9th Cir. 1979). Due to the difficulty in proving intent,

courts have traditionally held that "[a]ny proof, properly connected to the defendants, which establishes the manner in which the fraudulent scheme was carried into execution or the intent of the parties in relation thereto is properly admissible." United States v. Amrep Corp., 545 F.2d 797, 800 (2d Cir. 1976); see also United States v. Jackson, 845 F.2d 880, 884 (9th Cir. 1988). Under this standard, evidence of similar fraudulent conduct by the defendant which is not specifically charged in the indictment remains admissible to prove intent and a scheme to defraud. United States v. Payne, 474 F.2d 603, 604 (9th Cir. 1973); United States v. Larsen, 441 F.2d 512 (9th Cir. 1971).

f. Co-Schemer Liability

To be guilty of participation in a fraudulent scheme, a defendant need not be the mastermind of the scheme. See United States v. Price, 623 F.2d 587, 591 (9th Cir. 1980), overruled on other grounds, United States v. DeBright, 730 F.2d 1255, 1260 (9th Cir. 1987). Nor is it necessary for the government to prove that the defendant participated in every aspect of the scheme. See United States v. Melton, 689 F.2d 679, 684 (7th Cir. 1982). All that is required is proof beyond a reasonable doubt that the defendant was a knowing participant in the scheme. See United States v. Peters, 962 F.2d 1410, 1414 (9th Cir. 1992); United States v. Vaughn, 797 F.2d 1485, 1493 (9th Cir. 1986); Price, 623 F.3d at 592; United States v. Diggs, 649 F.2d 731, 736 (9th Cir. 1981), overruled on other grounds, United States v. McConney, 728

F.2d 1195 (9th Cir. 1984) (en banc); see also United States v. Earles, 955 F.2d 1175, 1177 (8th Cir. 1992) ("One who knowingly participates in an ongoing mail fraud scheme devised by another is guilty of mail fraud"). Once it is established that the defendant knowingly participated in the scheme, conspiratorial principles of vicarious liability apply to render the defendant liable for all of the fraudulent acts of his co-schemers that were within the general scope of the scheme. See United States v. Lothian, 976 F.2d 1257, 1262-63 (9th Cir. 1992); United States v. Federbush, 625 F.2d 246, 253-254 (9th Cir. 1980); Amrep Corp., 560 F.2d at 545.

D. 18 U.S.C. § 1030(a)(2),(c)(2)(B)(1) (Unauthorized Computer Access Of United States Information For Financial Gain) (counts thirty-four through sixty-four; seventy-seven through seventy-eight)

1. Statutory Language

Title 18, United States Code, Sections 1030(a)(2), (c)(2)(B)(1) provide, in pertinent part:

> [W]hoever intentionally accesses a computer without authorization, or exceeds authorized access, and thereby obtains . . . . information from any department or agency of the United States has committed a violation of this section.
>
> * * * * *
>
> [A] person who violates Section (a)(2) for purposes of commercial profit or private financial gain shall be sentenced to a fine, imprisoned not more than five years, or both.

2. Elements

For a defendant to be found guilty of unauthorized computer access of United States information for purposes of financial gain, the government must prove the following: (1) the defendant intentionally exceeded authorized access of a computer, that is, it was the defendant's conscious objective to exceed authorized access to the computer; (2) by exceeding authorized access to a computer, the defendant obtained information from any department or agency of the United States; and (3) the defendant acted for purpose of commercial advantage or private financial gain. Ninth Circuit Model Criminal Jury Instruction No. 8.78.

3. Applicable Law

A defendant exceeds authorized access when the defendant accesses a computer with authorization but uses such access to obtain information in the computer that the defendant is not entitled to obtain. 18 U.S.C. § 1030(e)(6). A defendant obtains information merely by observing it on the computer and need not remove the information from the computer to have violated this section. Ninth Circuit Criminal Model Jury Instruction Nos. 8.77, 8.78 Comment. The term "department of the United States" includes the United States Department of Justice, of which the Federal Bureau of Investigation is a component. 18 U.S.C. § 1030(e)(6), 5 U.S.C. § 101.

E. 18 U.S.C. § 1028(a)(7) (Identity Theft) (racketeering acts sixty-eight through ninety-two; counts sixty-five through sixty-nine, seventy-nine through eighty-two, eighty-seven through ninety)

1. Statutory Language

Title 18, United States Code, Section 1028(a)(7) provides, in pertinent part:

[W]hoever [] knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of federal law, or that constitutes a felony under any applicable State or local law, shall be fined under this title, imprisoned not more than five years, or both.

Title 18, United States Code, Section 1028(c)(3) provides, in pertinent part:

[Jurisdiction under Section 1028 exists when] either: (A) the production, transfer, or use prohibited under this Section is in or affects interstate or foreign commerce, including the transfer of a document by electronic means.

Title 18, United States Code, Section 1028(d)(7) provides, in pertinent part:

[T]he term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, passport number, employer or tax identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code;

(D) telecommunication identifying information, such as an electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account, or a specific communication transmitted from a telecommunications instrument; or

(E) access device, such as any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

2. Elements

For a defendant to be found guilty of identity theft, the government must prove the following: (1) the defendant knowingly possessed, used or transferred, or caused to be possessed, used or transferred, a means of identification of another person; (2) in doing so, the defendant acted without lawful authority; (3) the possession, transfer, or use was in a manner affecting interstate commerce; and (4) defendant acted with the intent to commit, or to aid or abet the commission of, any federal crime or any felony under state or local law.

3. Applicable Law

Under Section 1028(a)(7), a defendant must know that he is acting without lawful authority, not that the means of identification belongs to an actual person. United States v.

Jimenez, 507 F.3d 13, 18 n.3 (1st Cir. 2007). One way in which a defendant can act without lawful authority is by using a means of identification without the owner's consent. See e.g., United States v. Hurtado, 508 F.3d 603, 607-08 (11th Cir. 2007); United States v. Hines, 472 F.3d 1038, 1039-40 (8th Cir. 2007) (finding that defendant acted without lawful authority when he provided name of third party to police as if it were his own).

To satisfy the jurisdictional element set forth in Section 1028(c)(3), only a minimal connection with interstate commerce is required. United States v. Sutcliffe, 505 F.3d 944, 952-53 (9th Cir. 2007); United States v. Klopf, 423 F.3d 1228, 1237-39 (11th Cir. 2005); United States v. Bassey, 65 F.3d 22, 24-25 (4th Cir. 1995). To that end, a defendant "need only have the intent to accomplish acts, which, if successful, would have affected interstate or foreign commerce. The government, however, is not required to prove that the defendant had knowledge of the interstate nexus when he committed an act in violation of 1028(a)." Klopf, 423 F.3d at 1239 (finding that interstate nexus satisfied by possession of fraudulent driver's license, even if not yet used); see also, United States v. Villarreal, 253 F.3d 831, 834-35 (5th Cir. 2001) (finding that focus is not on whether the identification document actually traveled in interstate or foreign commerce or whether transfer affected interstate commerce but rather whether either would have been accomplished had the defendant accomplished his intended goals); United States v. Jackson, 155 F.3d 942, 947 (8th Cir. 1998) (interstate nexus

established by showing that defendant's scheme intended to use means of identification to defraud businesses engaged in interstate commerce).

As for the element that defendant acted with the intent to commit, or to aid or abet the commission of, or in connection with, any federal crime or any felony under state or local law, the Ninth Circuit has held that the defendant need not actually have caused another crime to be committed. All that is required is that the defendant act with the requisite intent. Sutcliffe, 505 F.3d at 959-60.

F. 18 U.S.C. § 1030(a)(4) (Computer Fraud) (counts seventy through seventy-four, eighty-three through eighty-six, ninety-one through ninety-four)

1. Statutory Language

Title 18, United States Code, Section 1030(a)(4), provides, in pertinent part:

[W]hoever knowingly and with the intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value shall be fined under this title, imprisoned not more than five years, or both.

2. Elements

For a defendant to be found guilty of having committed the offense of computer fraud, the government must prove the following: (1) the defendant knowingly exceeded authorized access of a computer that was used in interstate or foreign commerce or communication; (2) the defendant did so with the intent to

defraud, that is, an intent to deceive or cheat; (3) by exceeding authorized access to the computer, the defendant furthered the intended fraud; and (4) the defendant, by exceeding authorized access to the computer, obtained anything of value. Ninth Circuit Model Criminal Jury Instruction No. 8.81.

3. Applicable Law

While the definition of "exceeding authorized access" uniformly applies to Sections 1030(a)(4) and (a)(2), the intent needed to commit an offense under these two provisions differs. Under Section 1030(a)(4), a defendant must have an intent to defraud. Under Section 1030(a)(2), the defendant simply must act with the intent to exceed the defendant's authority to access the computer. Ninth Circuit Model Criminal Jury Instruction Nos. 8.78, 8.81, Comment. Moreover, in the context of Section 1030(a)(4), intent to defraud exists when the computer is used to obtain property of another, which property furthers the intended fraud. Ninth Circuit Model Criminal Jury Instruction No. 8.81, Comment.

G. 18 U.S.C. § 371 (Conspiracy) (counts ninety-five, one-hundred-six)

1. Statutory Language

Title 18, United States Code, Section 371, provides, in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the

conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. Elements

For a defendant to be found guilty of a Section 371 conspiracy, the government must prove the following: (1) an agreement to accomplish an illegal objective; (2) one or more overt acts in furtherance of the illegal objective; and (3) the intent required to commit the underlying substantive offense. See United States v. Garza, 980 F.2d 546, 552 (9th Cir. 1992); United States v. Medina, 940 F.2d 1247, 1250 (9th Cir. 1991); United States v. Luttrell, 889 F.2d 806 (9th Cir. 1989).

3. Applicable Law

a. The Agreement

"[T]he evidentiary requirement for establishment of an agreement in the conspiracy context is considerably more lax than in the case of an enforceable contract." United States v. Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980). To support a conspiracy conviction, "[t]he agreement need not be explicit; it may be inferred from the defendant's acts pursuant to a fraudulent scheme or from other circumstantial evidence." United States v. Cloud, 872 F.2d 846, 852 (9th Cir. 1989). See also United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1991); United States v. Hernandez, 876 F.2d 774, 777 (9th Cir. 1989). The government need not prove direct contact between co-conspirators or the existence of a formal agreement; instead, an agreement constituting a conspiracy may be inferred from the acts

of the parties and other circumstantial evidence indicating concert of action for the accomplishment of a common purpose. See Garza, 980 F.2d at 552-53; United States v. Hegwood, 977 F.2d 492 (9th Cir. 1992); United States v. Becker, 720 F.2d 1033, 1035 (9th Cir. 1983).

It is not necessary for the government to show that the defendant knew "the exact scope of the conspiracy, the identity and role of each of the co-conspirators, or the details of the operations of any particular plan." United States v. Thomas, 586 F.2d 123, 132 (9th Cir. 1978). However, the government must prove that the defendant was aware of "the essential nature of the plan." Blumenthal v. United States, 332 U.S. 539, 557 (1947). See also United States v. Krasovich, 819 F.2d 253, 255-56 (9th Cir. 1987). The key element of proof as to any specific co-conspirator is the showing that he knew, or had reason to know, of the participation of others in the illegal plan, and that he knew, or had reason to know, that the benefits to be derived from the operation were probably dependent upon the success of the entire venture. United States v. Abushi, 682 F.2d 1289, 1293 (9th Cir. 1982); United States v. Baxter, 492 F.2d 150, 158 (9th Cir. 1973).

b. Participation in the Conspiracy

The government must show that a conspiracy between at least two people existed and that the defendant was a member of the conspiracy charged. United States v. Reese, 775 F.2d 1066, 1071 (9th Cir. 1985) (conspiracy must involve at least two people);

United States v. Murray, 751 F.2d 1528, 1534 (9th Cir. 1985) (charged defendant must be member of conspiracy). Once a conspiracy is proven, evidence establishing beyond a reasonable doubt the defendant's connection to that conspiracy -- even if the connection is slight -- is sufficient to convict him of knowingly participating in the conspiracy. Hubbard, 96 F.3d at 1227; United States v. Stauffer, 922 F.2d 508, 514-15 (9th Cir. 1990); United States v. Guzman, 849 F.2d 447, 448 (9th Cir. 1988).

c. The Object

It is well established that a conspiracy charge may allege multiple objects. See United States v. Smith, 891 F.2d 703, 713 (9th Cir. 1989)("the established rule is that a charge of conspiracy to commit more than one offense may be included in a single count without violating the general rule against duplicity"). See also Braverman v. United States, 317 U.S. 49, 54 (1942); Frohwerk v. United States, 249 U.S. 204, 210 (1919); United States v. Rabinowich, 238 U.S. at 78, 86 (1915). In such cases, the government must prove that the defendant was engaged in a conspiracy to commit at least one of the alleged objects. See Luttrell, 889 F.2d at 810-11 ("Where the government charges a defendant with a conspiracy to commit several substantive crimes, the government must prove that the defendant was engaged in a conspiracy to violate at least one criminal statute"). Where a conspiracy with multiple objects is charged, a unanimity instruction should be given. See Smith, 891 F.2d at 709

(approving instruction that "the jury must unanimously agree upon the same objective as having been proved beyond a reasonable doubt").

d. Overt Acts

"In criminal law an overt act is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime." Chavez v. United States, 275 F.2d 813, 817 (9th Cir. 1960). The overt act "need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy." Rabinowich, 238 U.S. at 86. "Nor need it appear that all the conspirators joined in the overt act." Id.; see also United States v. Burreson, 643 F.2d 1344, 1348 (9th Cir. 1981) (same). As the Supreme Court has explained: "[T]he function of the overt act in a conspiracy prosecution is simply to manifest that the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." Yates v. United States, 354 U.S. 298, 334 (1957).

To obtain a conviction on a Section 371 conspiracy, the government need prove only one of the overt acts charged in the indictment. See Luttrell, 889 F.2d at 809; United States v. Indelicato, 800 F.2d 1482, 1483 (9th Cir. 1986).

e. Liability for Co-Conspirator Acts

It is a well settled tenet of conspiracy law, known as Pinkerton liability, that "a party to an unlawful conspiracy may

be held responsible for substantive offenses committed by his co-conspirators in furtherance of the unlawful project, even if the party himself did not participate directly in the commission of the substantive offense." United States v. Vasquez, 858 F.2d 1387, 1393 (9th Cir. 1988). See also Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); United States v. Olano, 62 F.3d 1180, 1199 (9th Cir. 1995). For Pinkerton liability to apply, it is necessary that the substantive offense was within the scope of the unlawful agreement, was committed in furtherance of the conspiracy, and was reasonably foreseeable as a natural consequence of the unlawful confederation. Pinkerton, 328 U.S. at 647-48. See also United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir. 1986)("A co-conspirator is responsible for any act done in furtherance of the conspiracy unless it could not reasonably be foreseen as a natural consequence of the agreement"); United States v. Reed, 726 F.2d 570, 580 (9th Cir. 1984)("The law is clear that a defendant may be convicted of the substantive acts of his co-conspirators, as long as those acts are committed pursuant to and in furtherance of the conspiracy").

A conspirator who joins a pre-existing conspiracy is bound by all that has gone on before in the conspiracy. See United States v. Umagat, 998 F.2d 770, 772 (9th Cir. 1993) ("One may join a conspiracy already formed and in existence, and be bound by all that has gone before in the conspiracy, even if unknown to him"). See also United States v. Bibero, 749 F.2d 586, 588 (9th

Cir. 1984); United States v. Saavedra, 684 F.2d 1293, 1301 (9th Cir. 1982).

f. Proof of Conspiracy

The order of proof in a conspiracy case is a matter committed to the sound discretion of the trial judge. See United States v. Fleishman, 684 F.2d 1329, 1338 (9th Cir. 1982). "The government does not have to present direct evidence. Circumstantial evidence and the inferences drawn from that evidence will sustain a conspiracy conviction." United States v. Castro, 972 F.2d 1107, 1110 (9th Cir. 1992) (emphasis in original).

When a defendant is charged with conspiracy, evidence tending to show the existence of a conspiracy is admissible even though such evidence does not implicate the defendant as the defendant's conviction is conditioned upon proof of the conspiracy. United States v. Vega-Limon, 548 F.2d 1390, 1391 (9th Cir. 1977). A conspiracy is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the purposes of the conspiracy. United States v. Bloch, 696 F.2d at 1215; United States v. Krasn, 614 F.2d 1229, 1236 (9th Cir. 1980).

g. Co-conspirator Declarations

Declarations by one co-conspirator during the course of and in furtherance of the conspiracy may be used against another conspirator because such declarations are not hearsay. See Fed. R. Evid. 801(d)(2)(E). Further, statements made in furtherance

of a conspiracy were expressly held by the Supreme Court in Crawford v. Washington, 541 U.S. 36, 56 (2004) to be "not testimonial" such that their admission does not violate the Confrontation Clause. As such, the admission of co-conspirator statements pursuant to Fed. R. Evid. 801(d)(2)(E) requires only a foundation that: (1) the declaration was made during the life of the conspiracy; (2) it was made in furtherance of the conspiracy; and (3) there is, including the co-conspirator's declaration itself, sufficient proof of the existence of the conspiracy and of the defendant's connection to it. See Bourjaily v. United States, 483 U.S. 171, 173, 181 (1987).

The government must prove by a preponderance of the evidence that a statement is a co-conspirator declaration in order for the statement to be admissible under Rule 801(d)(2)(E). Bourjaily, 483 U.S. at 176; United States v. Crespo de Llano, 838 F.2d 1006, 1017 (9th Cir. 1987). Whether the government has met its burden is to be determined by the trial judge, and not the jury. United States v. Zavala-Serra, 853 F.2d 1512, 1514 (9th Cir. 1988).

The trial court has discretion to determine whether the government may introduce co-conspirator declarations before establishing the conspiracy and the defendant's connection to it. United States v. Loya, 807 F.2d 1483, 1490 (9th Cir. 1987). It also has the discretion to vary the order of proof in admitting a co-conspirator's statement. Id. The court may allow the government to introduce co-conspirator declarations before laying the required foundation under the condition that the declarations

will be stricken if the government fails to ultimately establish by independent evidence that the defendant was connected to the conspiracy. Id.; United States v. Spawr Optical Research, Inc., 685 F.2d 1076, 1083 (9th Cir. 1982); Fleishman, 684 F.2d at 1338.

It is not necessary for the defendant to be present at the time a co-conspirator statement was made for it to be introduced as evidence against that defendant. Sendejas v. United States, 428 F.2d 1040, 1045 (9th Cir. 1970). Similarly, declarations of an unindicted co-conspirator made in furtherance of the conspiracy may be used against a charged conspirator. United States v. Nixon, 418 U.S. 683, 701 (1974); United States v. Williams, 989 F.2d 1061, 1067 (9th Cir. 1993).

To be admissible under Fed. R. Evid. 801(d)(2)(E) as a statement made by a co-conspirator in furtherance of the conspiracy, a statement must "further the common objectives of the conspiracy," or "set in motion transactions that [are] an integral part of the [conspiracy]." United States v. Arambula-Ruiz, 987 F.2d 599, 607-08 (9th Cir. 1993); United States v. Yarbrough, 852 F.2d 1522, 1535 (9th Cir. 1988). Such statements are admissible whether or not they actually result in any benefit to the conspiracy. Williams, 989 F.2d at 1068; United States v. Schmit, 881 F.2d 608, 612 (9th Cir. 1989). Thus, co-conspirator declarations need not be made to a member of the conspiracy to be admissible under Rule 810(d)(2)(E) and can be made to government informants and undercover agents. Zavala-Serra, 853 F.2d at 1516 (statements to informants and undercover agents); United States

v. Tille, 729 F.2d 615, 620 (9th Cir. 1984) (statements to informants); United States v. Echeverry, 759 F.2d 1451, 1457 (9th Cir. 1985) (statements to undercover agent).

Courts have interpreted the "in furtherance of" requirement broadly and have considered, among others, the following co-conspirator declarations as being made "in furtherance of the conspiracy":

1. statements made to induce enlistment in the conspiracy (United States v. Arias-Villanueva, 998 F.2d 1491, 1502 (9th Cir. 1993);

2. statements made to keep a conspirator abreast of a co-conspirator's activity, to induce continued participation in a conspiracy, or to allay the fears of a co-conspirator. Arias-Villanueva, 998 F.2d at 1502;

3. statements made to prompt action in furtherance of the conspiracy by either of the participants to the conversation. United States v. Layton, 720 F.2d 548, 556 (9th Cir. 1983);

4. statements related to the concealment of the criminal enterprise. Tille, 729 F.2d at 620); Garlington v. O'Leary, 879 F.2d 277, 283 (7th Cir. 1989);

5. statements seeking to control damage to an ongoing conspiracy. Garlington, 879 F.2d at 283;

6. statements made to reassure members of the conspiracy's continued existence. United States v. Yarbrough, 852 F.2d 1522, 1535 (9th Cir. 1988);

7. statements by a person involved in the conspiracy to induce a buyer's purchase of contraband by assuring the buyer of the person's ability to consummate the transaction. Echeverry, 759 F.2d at 1457;

8. statement identifying another co-conspirator as source for the contraband to be sold to purchaser. United States v. Lechuga, 888 F.2d 1472, 1480 (5th Cir. 1989);

9. "puffing", boasts and other conversation designed to obtain the confidence of another conspirator (or apparent conspirator who actually was an undercover agent). United States v. Santiago, 837 F.2d 1545, 1549

(11th Cir. 1988); United States v. Lechuga, 888 F.2d 1472, 1480 (5th Cir. 1989); United States v. Miller, 664 F.2d 94, 98 (5th Cir. 1981); and

10. statements that refer to another conspirator as the boss, the overseer, or sir (United States v. Barnes, 604 F.2d 121, 157 (2d Cir. 1979).

H. 18 U.S.C. § 2511 (Interception Of Wire Communications) (counts ninety-six through one-hundred-four, one-hundred seven)

1. Statutory Language

Title 18, United States Code, Section 2511(a)(1) provides, in pertinent part:

[A]ny person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept, any wire, oral or electronic communication shall be fined under this title or imprisoned for not more than 5 years, or both.

2. Elements

For a defendant to be found guilty of interception of wire communications, the government must prove the following: (1) the defendant intercepted, endeavored to intercept or procured another person to intercept or endeavor to intercept a wire, oral or electronic communication; and (2) the defendant acted intentionally, that is, deliberately and not negligently or inadvertently. 18 U.S.C. § 2511(a)(1).

I. 18 U.S.C. § 2512(1)(b) (Manufacture/Possession Of Wiretapping Device) (count one-hundred five)

1. Statutory Language

Title 18, United States Code, Section 2512 provides, in pertinent part:

[A]ny person who intentionally manufactures, assembles, possesses or sells any electronic, mechanical, or other device,

knowing or having reason to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire, oral, or electronic communications, and that such device, or any component thereof, has been or will be sent through the mail or transported in interstate or foreign commerce shall be fined under this title or imprisoned not more than five years, or both.[2]

2. Elements

For a defendant to be found guilty of the charge of manufacturing or possessing a wiretapping device, the government must prove the following: (1) the defendant manufactured, assembled, possessed, or sold an electronic, mechanical, or other device; (2) the defendant knew or had reason to know that the design of such device rendered it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; and (3) the defendant knew or had reason to know that such device or any component thereof had been or would be sent through the mail or transported in interstate or foreign commerce. 18 U.S.C. § 2512(1)(b).

J. 18 U.S.C. § 1001 (False Statements) (counts one-hundred-eight, one-hundred-nine)

1. Statutory Language

Title 18, United States Code, Section 1001 provides, in pertinent part:

---

[2] Section 2512(2)(B) provides for a defense in the limited circumstance when the manufacturer or possessor has a contract with a federal or state governmental authority to lawfully possess the materials. No such contract existed here.

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States, knowingly and willfully . . . (2) makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title, imprisoned not more than five years, or both.

2. Elements

For a defendant to be guilty of having made a false statement, the government must prove the following: (1) the defendant made a false statement in a matter within the jurisdiction of a department of the United States; (2) the defendant acted willfully, that is deliberately and with knowledge that the statement was untrue; and (3) the statement was material to the department's activities or decisions. Ninth Circuit Model Criminal Jury Instruction No. 8.66.

3. Applicable Law

Under Section 1001, the question of whether a matter comes within the jurisdiction of a department of the United States -- in this case, the Federal Bureau of Investigation -- is a matter of law to be decided by the Court. Commentary, Ninth Circuit Model Criminal Jury Instruction No. 8.66. Moreover, it is well established that statements made to the Federal Bureau of Investigation during the course of a criminal investigation are statements made within the jurisdiction of that department. United States v. Rogers, 466 U.S. 475, 479 (1984).

To establish that a defendant has acted willfully, all that must be proven is that the defendant deliberately told the government agent a statement that the defendant knew to be untrue. It is irrelevant whether, in doing so, the defendant acted with the intention of influencing the government agent when making the false statement. United States v. Yermian, 468 U.S. 63, 73 (1984).

The materiality of a false statement is tested at the time the alleged false statement was made. United States v. McKenna, 327 F.3d 830, 839 (9th Cir. 2003).[3] Furthermore, in assessing whether a statement was material to the activities or decisions of the Federal Bureau of Investigation, it is irrelevant whether the agents knew at the time the statement was made that the statement was false. Instead, the critical issue in determining materiality is whether the false statement was of a type that could have influenced the agency's decisions or activities. For example, in United States v. Brogan, 522 U.S. 398 (1998), the Supreme Court considered whether an "exculpatory no" in response to a question from federal agents about whether the defendant, a union officer, had accepted impermissible cash payments was material given that the agents knew at the time the statement was

---

[3] McKenna involves an analysis of materiality in a perjury context. However, in Kungys v. United States, 485 U.S. 759, 770 (1988), the Supreme Court found that "the federal courts have long displayed a quite uniform understanding of the materiality concept as embodied in such statutes [including Sections 1001 and 1621]." See also, United States v. Berger, 473 F.3d 1080, 1098 (9th Cir. 2007) (same).

made that the statement was false. In finding that the statement was material, the Supreme Court stated:

> We cannot imagine how it could be true that falsely denying guilt in a government investigation does not pervert a governmental function. Certainly the investigation of wrongdoing is a proper governmental function and; since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function. It could be argued perhaps, that a disbelieved falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange. . .

Brogan, 522 U.S. at 399-400. Similarly, in United States v. Goldfine, 538 F.2d 815 (9th Cir. 1976), the Ninth Circuit considered a challenge to materiality where the federal agents knew the statement at issue to be false at the time it was made, and therefore conceded they had not been misled or influenced by the false statement. In concluding that the statement was material, the Goldfine court stated:

> We believe that the conduct Congress intended to prevent by [Section] 1001 was the willful submission to federal agencies of false statements calculated to induce agency reliance on action irrespective of whether actual favorable agency action was, for other reasons, impossible. We think the test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances.

Goldfine, 538 F.2d at 820-21 (quoting United States v. Quirk, 167 F.Supp. 462, 464 (E.D. Pa. 1958)). See also United States v. McBane, 433 F.3d 344, 350-51 (3d Cir. 2005) (citing Goldfine for proposition that the issue of materiality is not whether the

government was misled but whether the statement was of a type capable of influencing a reasonable decision maker); United States v. Whitaker, 848 F.2d 914, 916 (8th Cir. 1988) (citing Goldfine for proposition that "it is irrelevant what the agent who heard the statement knew at the time the statement was made"); United States v. Fern, 696 F.2d 1269, 1273 (11th Cir. 1983) (citing Goldfine for the proposition that the fact that the government is not influenced by the false statement is immaterial). As the Ninth Circuit reiterated in United States v. Service Deli Inc., 151 F.3d 938, 941 (9th Cir. 1998), "the test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its ends as measured by collateral circumstances."

K. 18 U.S.C. § 1512(c)(1) (Destruction Of Evidence) (count one-hundred-ten)

1. Statutory Language

Title 18, United States Code, Section 1512(c)(1) provides, in pertinent part:

[W]hoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding shall be fined under this title or imprisoned not more than 20 years, or both.

2. Elements

For a defendant to be guilty of destruction of evidence, the government must prove the following: (1) the defendant acted corruptly; (2) the defendant altered, destroyed, mutilated or

concealed a record, document or other object; and (3) the defendant acted with the intent to impair the object's availability for use in an official proceeding. 18 U.S.C. § 1512(c)(1).

3. Applicable Law

For purposes of this provision, a defendant acts corruptly when he intends to wrongfully impede the due administration of justice. United States v. Matthews, 505 F.3d 698, 704-05 (7th Cir. 2007); see also Arthur Anderson LLP v. United States, 544 U.S. 696, 705-06 (2005) (noting that the term corruptly is usually associated with wrongful, depraved or evil conduct). An official proceeding need not be pending or about to be instituted at the time of the offense, but one must at least be contemplated. 18 U.S.C. § 1512(f)(1); Arthur Anderson LLP, 544 U.S. at 707-08. Furthermore, there need not be any showing that the item destroyed would have been admissible in any such proceeding. 18 U.S.C. § 1512(f)(2).

L. 18 U.S.C. § 2 (Aiding and Abetting and Causing an Act to be Done) (all counts)

1. Statutory Language

Title 18, United States Code, Section 2, provides, in pertinent part:

[W]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

2. Elements

For a defendant to be guilty of aiding and abetting an

offense, the government must prove the following: (1) the underlying crime was committed by someone; (2) the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit the crime; and (3) the defendant acted before the crime was completed. Ninth Circuit Model Criminal Jury Instruction No. 5.1 (2003)

3. Applicable Law

It is not a prerequisite to conviction for aiding and abetting that the principal be convicted, indicted, or even identified, although the government must prove that someone committed the underlying crime. See United States v. Mann, 811 F.2d 495, 497 (9th Cir. 1987); United States v. Barnett, 667 F.2d at 835, 841 (9th Cir. 1982). Instead, in order to establish a defendant's guilt as an aider and abetter, the government must prove that the defendant knowingly associated himself with a criminal venture and by his participation in that venture sought to make it succeed. See United States v. Vaccaro, 816 F.2d 443, 455 (9th Cir. 1987); United States v. Vaughn, 797 F.2d 1485, 1492 (9th Cir. 1986); United States v. McKoy, 771 F.2d 1207, 1215 (9th Cir. 1985). Conscious assistance in the planning of a crime is a sufficient basis for aider and abetter liability. See McKoy, 771 F.2d at 1216; United States v. Barnett, 667 F.2d 835, 841-842 (9th Cir. 1982).

M. State Law Bribery (racketeering acts ninety-three through one-hundred twelve)

1. Statutory Language

California Penal Code Section 67 (giving or offering a bribe) provides, in pertinent part:

[E]very person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion or other proceeding as to such officer is punishable by imprisonment in the state prison for two, three or four years . . . .

California Penal Code Section 68 (asking for or receiving a bribe) provides, in pertinent part:

[E]very executive or ministerial officer, employee or appointee of the State of California, county or city therein or political subdivision thereof, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the state prison for two, three or four years . . . .

California Penal Code Section 7(6) defines bribe as:

[A]nything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.

California Penal Code Section 7(3) defines corruptly as:

[A] wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or some other person.

2. Elements

In order for a defendant to be found guilty of giving or offering a bribe under California Penal Code Section 67, the government must prove the following: (1) the defendant gave or offered a bribe; (2) the defendant did so with the specific intent corruptly to influence another person in his official capacity as to some act, decision, vote, opinion or other proceeding; and (3) the person to whom the bribe was given or offered was an executive officer of the State of California.

In order for a defendant to be guilty of asking for or receiving a bribe, the government must prove the following: (1) the defendant was an executive officer; (2) the defendant asked for, received, or agreed to receive, a bribe; and (3) the defendant's request for, receipt of, or agreement to receive a bribe was upon an agreement or understanding that his official action would be influenced thereby.

3. Applicable Law

It is well established that a police officer qualifies as an "executive officer" under Sections 67 and 68 of the California Penal Code. People v. Pacheco, 263 Cal. App. 2d 555, 557 (1968) (recognizing that the term executive officer as used in the bribery statutes has "long been held to include police officers").

It is equally well established that "linkage between a payment and a specific official decision is not required under California bribery law."[4] Frega, 179 F.3d at 805. Therefore, under Section 67, the offense of bribery of an executive officer is complete when the gift or offer is made with the corrupt intent required. Id. at 805. Similarly, under Section 68, the crime is complete when the executive officer "asks, receives or agrees to receive any bribe. No action on the part of the victim, such as payment, delivery or otherwise, is necessary to complete the offense." People v. Bringham, 72 Cal. App.2d 1, 6-7 (2d Dist. 1945). As a result, the question of intent must focus on the party that offers or seeks the bribe and not on the victim who is asked to receive or to pay the bribe and thus, there need not be a meeting of the minds between the two parties. Id.

It is essential to the crime of bribery that the subject matter upon which the bribe is to operate actually exists and has been or can be brought before the executive officer. It is not necessary, however, that the proposed act which is influenced or done by the bribe be a part of the performance of the duties imposed by law upon the officer in question. It is sufficient that the act sought to be influenced is within the general scope of the officer's duties and within his apparent ability to perform. CALJIC 7.10.

---

[4] In this regard, the California bribery statutes differ from the federal bribery/anti-gratuity statutes. Frega, 179 F.3d at 805.

N. RICO Forfeiture (Count one-hundred-eleven)

Title 18, United States Code, Section 1963(a)(1) provides, in pertinent part:

[W]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law, any interest the person has maintained in violation of section 1962.

Title 18, United States Code, Section 1963(a)(3) provides, in pertinent part:

[W]oever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States, irrespective of any provision of State law any property constituting, or derived from, any proceedings which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of Section 1962.

Title 18, United States Code, Section 1963(m) provides, in pertinent part:

[I]f any of the property described in subsection (a), as a result of any act or omission of the defendant: (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been comingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the

defendant up to the value of any property described in paragraphs (1) through (5).

1. Elements

For a RICO forfeiture judgment to be imposed against a defendant convicted under Sections 1962(c) or (d), the government must prove the following: (1) it is more likely than not that the property at issue was acquired or maintained through racketeering activity; or (2) it is more likely than not that the property constitutes the proceeds of racketeering activity.

2. Applicable Law

The Supreme Court has recognized that "Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws . . . ." Libretti v. United States, 516 U.S. 29, 38-39 (1995). The forfeiture provisions set forth in Section 1963 operate in personam against the assets of the defendant and serve as part of the defendant's sentence following conviction.[5] Libretti, 516 U.S. at 38-39; Alexander v. United States, 509 U.S. 544, 559 (1993).

Section 1963(a)(1) provides for forfeiture of interests that the enterprise acquired or maintained, legitimately or illegitimately, in the course of its racketeering activity.

[5] As forfeiture relates to sentencing and not the question of guilt or innocence, the government respectfully submits that the trial should be bifurcated with the forfeiture proceeding being tried to the same jury immediately following the return of either a RICO or RICO conspiracy conviction against defendants Pellicano, Arneson and/or Turner.

Russello v. United States, 464 U.S. 16, 22 (1983). Although Section 1963(a)(1) was construed by the Supreme Court in Russello as providing for the forfeiture of the enterprise's proceeds,[6] Congress codified the Russello holding in Section 1963(a)(3), which effectively allows for money judgments by expressly extending the reach of RICO forfeiture to all illicitly obtained proceeds directly or indirectly obtained by the enterprise as well as any property purchased using such proceeds. Furthermore, Section 1963(m) permits forfeiture of substitute assets up to the value of the illicitly obtained proceeds in the event that the defendant lacks sufficient funds to satisfy the forfeiture judgment. Likewise, if the defendant no longer has assets at the time forfeiture is ordered, the court can issue a monetary judgment to be satisfied out of future earnings of the individual. See e.g., United States v. Casey, 444 F.3d 1071, 1073-74 (upholding monetary judgment in Section 853 forfeiture[7] against individual who had spent all of the illicitly obtained funds and noting that "requiring imposition of a money judgment on a defendant who currently possesses no assets furthers the remedial purposes of the forfeiture statute by ensuring that all

---

[6] Under Section 1963(a)(3), the term proceeds encompasses the gross, not net, receipts of the racketeering activity. See, e.g., United States v. Simmons, 154 F.3d 765 (8th Cir. 1998) (defendant liable for gross amount of bribe and cannot deduct overhead expenses); United States v. DeFries, 129 F.3d 1293, 1314-15 (D.C. Cir. 1997) (RICO forfeiture includes federal taxes paid on salaries earned through racketeering activity).

[7] See United States v. Nava, 404 F.3d 1119, 1124 n.1 (9th Cir. 2005) (noting that section 853 is "substantially identical" to RICO forfeiture).

eligible criminal defendants receive the mandatory forfeiture sanction Congress intended and disgorge all ill-gotten gains, even those already spent"); United States v. Ginsburg, 773 F.3d 798, 802 (7th Cir. 1985) (en banc) (finding that "a racketeer who dissipates the profits or proceeds of his racketeering activity on wine, women and song has profited from . . . crime to the same extent as if he had put the money in his bank account").

As RICO forfeiture serves as a part of a defendant's sentence, the government's burden of proof is set at the preponderance of the evidence standard. United States v. Garcia-Guizar, 160 F.3d 511, 517 (9th Cir. 1998) (applying preponderance standard in analogous Section 853 proceeding); United States v. Corrado, 227 F.3d 543, 553 (6th Cir. 2000) (preponderance standard applies to RICO forfeiture proceedings). Furthermore, RICO forfeiture judgments apply jointly and severally to all defendants who are convicted under Section 1962. United States v. Browne, 505 F.3d 1229, 1278-79 (11th Cir. 2007) (citing holding in United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986) that "imposition of joint and several liability in a forfeiture order upon RICO co-conspirators is not only permissible but necessary [] to effectuate the purpose of the forfeiture provision"); United States v. Edwards, 303 F.3d 606, 643-44 (5th Cir. 2002) (same); Corrado, 227 F.3d at 553 (same).

III.

STATEMENT OF FACTS

The government intends to introduce evidence at trial to establish the following facts, among others:

A. THE ENTERPRISE

Operating under a veneer of legitimacy created by his position as the head of Pellicano Investigative Agency ("PIA"), defendant Anthony Pellicano ("Pellicano") obtained a vaunted reputation as a private investigator who reliably obtained information that other investigators could not. As a result, Pellicano was able to charge PIA's clients fees that started at $25,000 and frequently escalated into the hundreds of thousands of dollars.

Underneath this veneer, however, was a racketeering enterprise that prospered by trafficking in illegally acquired confidential personal information.[8] Through systematic bribes paid to both law enforcement and telephone company employees, Pellicano created a network of associates who would provide him with access to confidential law enforcement and telephone company information that he was not legally entitled to possess. For example, to obtain ready access to confidential criminal history information (i.e., rap sheets) and police reports, Pellicano paid Sergeant Mark Arneson ("Arneson") of the Los Angeles Police

[8] As witness testimony will establish that Pellicano often demanded and received cash payments, the $2,079,250 in RICO forfeiture sought in count one-hundred-eleven constitutes a conservative calculation of the proceeds collected by the enterprise in connection with the charged conduct.

Department ("LAPD") a monthly retainer of $2,500,[9] as well as additional cash payments. In return, Arneson, after being provided with names of investigative targets, would access LAPD's protected law enforcement databases to acquire criminal history and other confidential information on the targets, which he then would fax to Pellicano.[10] Moreover, to conceal the fact that Arneson illegally was providing Pellicano with this information, Pellicano implemented procedures at PIA whereby Arneson would be shielded from the public when at PIA's offices and whereby the information faxed to PIA by Arneson would be reformatted so that the original documents could be shredded and the remaining documents would have no mention of Arneson as the source of the information.[11]

---

[9] If limited just to payments made by check, Pellicano paid Arneson $8,875 in 1997, $47,915 in 1998, $38,325 in 1999, $34,500 in 1999, $32,250 in 2001, and $27,500 in 2002. A series of the $2,500 monthly payments serve as the basis of racketeering acts 93 through 112, which charge either offering or receiving a bribe.

[10] From 1999 (as far back as LAPD retained records) through Pellicano's arrest in 2002, Arneson conducted more than 2,500 inquiries on more than 300 Pellicano investigative targets. The numbers of inquiries exceeds the number of investigative targets because the same name may be run against multiple law enforcement databases (e.g., NCIC, DMV, etc.) or a series of inquiries would be made using multiple iterations of the same name. Given that several databases were used, several different statutes were violated by Arneson's runs. For example, inquiries made on California-based databases violated the identity theft provisions of 18 U.S.C. § 1028(a)(7), while those that traveled across state lines also violated the wire fraud provisions set forth in 18 U.S.C. §§ 1343, 1346.

[11] Occasionally, these internal procedures would break down. For example, recovered from PIA's computers were scanned computer printouts of DMV and criminal history information for

Furthermore, as Arneson was not always available and further lacked access to police reports in areas outside of LAPD's jurisdiction, Pellicano developed other sources in other law enforcement agencies. For example, Pellicano utilized Beverly Hills Police Officer Craig Stevens to occasionally conduct database inquiries and obtain police reports on his behalf. Stevens has pled guilty to two counts of honest services wire fraud, four counts of computer fraud, and one count of making a false statement to the FBI in connection with having illegally provided Pellicano with confidential information from protected law enforcement databases.

In addition to his paid sources at local police departments, Pellicano also had paid sources at SBC who would provide him with confidential telephone company information, such as subscriber information, telephone bills, and cable pair information, which, in turn, could be used to implement a wiretap. As with Arneson, defendant Rayford Earl Turner served as Pellicano's "on-call" source at SBC.[12] However, as Turner lacked access to SBC's confidential databases, he, in turn, developed sources with the requisite access, including Teresa Wright and Michelle Malkin. Wright has pled guilty to computer fraud in connection with

---

Bryan Lourd and Kevin Huvane bearing Arneson's name and a date of August 10, 2001, which comports with the date when Arneson conducted database inquiries on these individuals.

[12] While Pellicano employees will testify that Turner frequently received cash payments, Pellicano's bank records reflect payments to Turner of $10,100 in 1997, $8,625 in 1998, $8,975 in 1999, $4,000 in 2000, $3,080 in $2001 and $1,875 in 2002.

illegally transferring SBC confidential information to Turner, and both Wright and Malkin will testify that they provided such information to Turner during and after his retirement from SBC.

Finally, while historical confidential information was valuable to the enterprise and its clients, the gold standard for confidential information was real-time private communications, and such information could only be systematically obtained through illegal wiretaps. To that end, Pellicano and defendant Kevin Kachikian ("Kachikian") devised and constructed wiretapping hardware and software that they called "Telesleuth." Beginning in approximately 1995, Pellicano and Kachikian built approximately 50 of the Telesleuth interface boxes[13] and, over the years, Kachikian continued to provide Pellicano with technical assistance for the Telesleuth program as problems would arise during Pellicano's illegal use of this program. With the additional aid of Turner, Pellicano repeatedly implemented wiretaps against investigative targets and thereby surreptitiously stole their most intimate and confidential secrets. This information was used to the personal or litigative benefit of PIA's clients, which, in turn, permitted the enterprise to both maintain its vaunted reputation and thrive financially.

[13] This conduct serves as the basis for count one-hundred-five, which charges a violation of 18 U.S.C. § 2512 (manufacturing or possessing a wiretapping device).

B. THE WORKINGS OF THE ENTERPRISE[14]

1. The Enterprise's Investigation of Robert Maguire (count 95 ¶ 67)

In 1996, Susan Reddan Maguire initiated divorce proceedings from Los Angeles real estate developer Robert Maguire. In August 1996, Ms. Maguire was advised by her attorneys that: (1) Pellicano should be retained to obtain evidence confirming Robert Maguire's ongoing affair with his mistress, Rosa Serrano; and (2) to rebut Mr. Maguire's persistent claims that his real estate empire was on the verge of bankruptcy and that he therefore lacked the necessary resources to provide Ms. Maguire with the settlement to which she believed she was entitled after two decades of marriage. During the course of this investigation, confidential information regarding multiple investigative targets was acquired through, among other means, confidential database inquiries and illegal wiretaps. For these services, Ms. Maguire paid PIA hundreds of thousands of dollars in cash, checks and jewelry.

Ms. Maguire will testify that, during the course of this representation, Pellicano: (1) showed her lists of telephone numbers and addresses, which he claimed to have obtained from sources in the phone company; (2) provided her with a DMV photograph of Rosa Serrano; (3) played her wiretapped telephone calls that Robert Maguire had with his psychiatrist, various

[14] Given the number of counts at issue, the government has not addressed every count but rather has provided a representative overview of the type of evidence that will be presented at trial.

business associates, and Rosa Serrano, as well as calls that Rosa Serrano had with members of her family; (4) advised her that he had set up the wiretapping program in a house in Pasadena near where Robert Maguire was living with Rosa Serrano during the divorce proceedings; and (5) repeatedly warned her of the legal problems that would arise should she disclose the existence of the wiretapping.

Several PIA employees also will testify as to the wiretapping that occurred during the course of this investigation. For example, former PIA employee Lily LeMasters will testify that: (1) she listened to and translated several calls between Rosa Serrano and her Spanish-speaking family members for Ms. Maguire; (2) she went with Pellicano to rent a studio apartment in the Pasadena area, near where Robert Maguire was living; (3) Pellicano set up a computer in the apartment, telling her that it was for the Maguire case; and (4) while at the apartment on another occasion to check on the computer, she heard Pellicano call Turner and instruct him to come by the apartment.

2. The Enterprise's Investigation of Jane Does 1-9 (racketeering acts 1-2, 5-7, and 69-72)

In October 1998, John Gordon Jones was charged by the Los Angeles County District Attorney's Office with raping nine women whom he allegedly met at nightclubs, drugged, and sexually assaulted. PIA was hired to assist in the defense of Jones, who was acquitted following trial in 2001. During the course of this

investigation, confidential information regarding multiple investigative targets, including the rape victims, was acquired through, among other means, protected law enforcement database inquiries.[15]

The identities of the rape victims, who were identified at trial only as "Jane Does One Through Nine," were obtained from Deputy District Attorney Kerlin and matched with inquiries run by Arneson, whom Kerlin will testify had no involvement to the Jones' prosecution.[16] For example, on January 11, 1999, Arneson conducted NCIC database inquiries on Jane Doe Four and Jane Doe Five. On January 21, 1999, Arneson conducted a DMV database inquiry on Jane Doe Three. On January 22, 1999, Arneson conducted a DMV database inquiry on Jane Doe Two. On January 25, 1999, Arneson conducted NCIC database inquiries on Jane Doe Six and Jane Doe Seven. On February 9, 1999, Arneson conducted an NCIC database inquiry on Jane Doe Eight and a DMV database inquiry on Julie Westby, who was the roommate of Jane Doe One. On February 22, 1999, Arneson conducted a DMV database inquiry on Jane Doe One.

---

[15] From documents generated during the course of the criminal and civil cases arising from the Jones matter, as well from statements made by Jones' attorneys, it is known that illegal wiretapping occurred in this case. However, due to statute of limitations issues, no wiretapping charge was filed.

[16] Pellicano employees have stated that, in late 1999 or early 2000, Pellicano became so concerned that Deputy District Attorney Karla Kerlin was going to execute search warrants at his offices that he ordered that all files be examined and purged of DMV information, placing particular emphasis on documents that could be tied back to Arneson.

Additional evidence of the illicit database inquiries will be presented in the form of documents obtained from the files of Jones' defense attorneys, which include: (1) reports on PIA letterhead, dated February 23, 1999, giving personal address and DMV information for Jane Does One and Eight, as well as for Julie Westby; and (2) a summary of information on Jane Doe Two that included DMV and other personal information that was attributed to the "Pellicano Report."

3. The Enterprise's Investigation of Kissandra Cohen (racketeering acts 26-27, 74; count 95 ¶ 72)

In the spring of 2000, attorney Edward Masry hired PIA to investigate Kissandra Cohen, a former associate who had filed a sexual harassment and wrongful termination suit against Masry after being terminated on December 26, 1999. During the course of this investigation, confidential information regarding multiple investigative targets was acquired through, among other means, protected law enforcement database inquiries and illegal wiretaps. For these services, Masry paid PIA $34,250.

On May 15, 2000, Arneson conducted NCIC database inquiries on Kassandra Cohen [sic] and her father, Michael Cohen, and further conducted a DMV database inquiry on Kissandra's mother, Mandy Cohen. Former PIA employee LeMasters will testify that she recalled reformatting DMV reports on Kissandra Cohen and seeing a DMV photo of her.

With respect to the use of illegal wiretaps, a summary of intercepted calls recovered from PIA's computers will be introduced at trial. In addition, former PIA employees LeMasters

and Tarita Virtue will testify that they personally listened to wiretapped calls involving Cohen. Of note, Virtue will testify that she listened to hundreds of Cohen's telephone calls over approximately a two-month period in the summer of 2000, including calls between Cohen and her own attorney in which they discussed legal strategy and case developments. Virtue also recalled a conversation in which Cohen told her mother that she had sued the dog groomer at Petco who had harmed her dog. Cohen will testify that, in mid-2000, shortly after she had filed her lawsuit against Masry, she began noticing strange clicking and buzzing noises on her phone, as well as random disconnections. Cohen also will testify about telephone conversations that she had in mid-2000 with Petco management and potential witnesses regarding an injury to her family's dog that had occurred while the dog was being groomed at Petco and which resulted in Cohen's father filing suit against Petco.

4. The Enterprise's Investigation of Erin Finn (racketeering acts 28-29, 75, 88; count 96; count 95 ¶¶ 73-74)

In approximately July of 2000, former music executive Robert Pfeifer hired PIA to investigate Erin Finn, a former girlfriend of Pfeifer's who had served as a witness against him in pending civil litigation. During the course of this investigation, confidential information regarding multiple investigative targets was acquired through, among other means, protected law enforcement database inquiries and illegal wiretaps. For these services, Pellicano was paid $100,000.

Pfeifer made his initial payment of $25,000 to PIA on July 28, 2000. On August 2, 2000, Arneson conducted NCIC database inquiries on Erin Finn and associates Peter Kuhns, David Holly, and Deborah Krey. Furthermore, on August 18, 2000, Arneson conducted DMV and local databases inquiries on Aaron Mestman, who also had been assisting Pfeifer in matters relating to Finn.

With respect to the use of illegal wiretaps, Pfeifer has pleaded guilty to aiding and abetting the illegal wiretapping of Finn and further has admitted that he hired Pellicano to wiretap Finn. In addition, considerable additional evidence of the wiretap exists, which includes, but is not limited to the following: (1) on August 2, 2000 (date of the Arneson inquiries of Finn and her associates), SBC employee Teresa Wright, at the request of Turner, conducted a database inquiry on SBC's proprietary BOSS system on Erin Finn and entered "ERR" to serve as cover for the illicit inquiry; (2) Finn, after receiving anonymous e-mails reflecting the subject matter of telephone conversations that she had with her attorney, attempted to defeat the interception of her calls by playing talk radio into her phone for hours at a time; (3) former PIA employee Virtue will testify that she was tasked with listening to and transcribing the wiretapped calls, including the calls in which Finn attempted to defeat the program by playing her radio non-stop into the receiver; and (4) documents recovered from Pellicano's computer contain summaries of calls involving Finn, including a call between Finn and her friend Richard Weilburg that states: "At

the end of the call, both parties hear a 'click' and become concerned that Erin's phone might be tapped."

5. The Enterprise's Investigation of Ami Shafrir (Racketeering Act 83; count 97; count 95 ¶ 76)

In the spring of 2000, brothers Daniel and Abner Nicherie hired PIA to investigate Ami Shafrir in connection with a business dispute between the parties. During the course of this investigation, confidential information regarding multiple investigative targets was acquired through, among other means, protected law enforcement database inquiries and illegal wiretaps. For these services, the Nicheries paid PIA $154,000.

Beverly Hills Police Officer Craig Stevens, who has pled guilty in this case to multiple felonies arising from the database inquiries that he conducted on Pellicano's behalf, will testify that he conducted an NCIC database inquiry for information regarding Ami Shafrir at Pellicano's request on February 1, 2000. With respect to the use of illegal wiretaps, admissions by defendant Nicherie, third-party witnesses and PIA employees will establish the use of wiretaps in this investigation. Specifically, during multiple interviews, Abner Nicherie admitted that, after he and his brother Daniel[17] retained the services of PIA, he would go to the offices of PIA to translate intercepted calls involving Ami Shafrir, including

[17] Daniel Nicherie has pleaded guilty to multiple counts of fraud and to aiding and abetting the wiretapping of Ami Shafrir. Specifically, Daniel Nicherie admitted in his guilty plea that Pellicano wiretapped Ami Shafrir with Daniel Nicherie's knowledge and approval, and that he listened to and translated the intercepted conversations at Pellicano's office.

calls between Shafrir and his attorney, that were in Hebrew. Similarly, Sarit Shafrir, who was Ami Shafrir's wife but who at the time was in a relationship with Abner Nicherie, will testify that Abner translated wiretapped calls for Pellicano and that, on occasion, he would play some of the calls for her. In addition, former PIA employee Virtue will testify that she saw the Nicherie brothers listening to wiretapped calls, which she knew to be in a foreign language.

6. The Enterprise's Investigation of Lisa & Tom Gores (racketeering acts 32-33; count 98; count 95 ¶ 78)

At the end of 2000, venture capitalist Alec Gores hired PIA to investigate the nature of his wife Lisa's relationship with his younger brother, Tom. During the course of this investigation, confidential information regarding investigative targets Lisa and Tom Gores was acquired through, among other means, protected law enforcement databases inquiries and illegal wiretaps. For these services, Alec Gores paid PIA at least $160,000.[18]

As was the Enterprise's practice, Pellicano, after being retained, tasked Arneson with conducting criminal history database inquiries on Lisa and Tom Gores. On January 3, 2001, Arneson conducted NCIC database inquiries for information on Lisa

[18] This amount is based upon wire transfers provided by Alec Gores to Pellicano. Gores will testify that, in addition to this amount, he: (1) made several large cash payments to Pellicano during the course of the investigation; (2) paid for a Pellicano family trip to Hawaii at Pellicano's request, as a bonus for his work on the case; and (3) provided Pellicano with a loan of $50,000, which Pellicano never has repaid.

Gores, Tom Gores, Tewisik Gores (a misspelling of Tom Gores' middle name), and Lisa Cobb (Lisa Gores' maiden name). In addition, reformatted California DMV reports for Tom and Lisa Gores, dated January 15, 2001, were recovered from Pellicano's computers.

With respect to the use of illegal wiretaps, Alec Gores will testify that in early 2001, Pellicano confirmed the nature of the relationship between Tom and Lisa, and in connection with doing so, played him wiretapped calls involving these individuals on approximately three separate occasions. In addition, during the November 21, 2002 search of PIA, the FBI seized, among other items, a compact disc containing a recording of a telephone call between Lisa Gores and Tom Gores. Both Lisa and Tom Gores will testify that the recording in question was, in fact, a telephone call between the two that was intercepted without their consent. In addition, Lisa Gores will testify that, after Alec Gores confronted Tom and Lisa with evidence gathered by Pellicano, she received several telephone calls from Pellicano, who advised her, among other things, that he had been listening to her telephone calls from an apartment in the "Valley" which he had set up as a listening post. Additional evidence of the wiretap will come in the form of documents that were recovered from PIA's computer. For example, the government will introduce a one-page list of "phone data" including Alec Gores' contact information and entries for "Lisa's Line," "Cell," "Car," and "Home Line" and a separate one-page cost breakdown with headings for "Tom" and

"House" and itemized entries such as "Rent" ($13,200), "Setup" ($15,000 per line), "1st Line 4 Weeks @ $2500," and "2nd Line 4 Weeks @ $2500," with a total cost of $138,200.

7. The Enterprise's Investigation of Vincent "Bo" Zenga (racketeering acts 34-40, 89; counts 3-9, 34-40, 87, 91, 100; count 95 ¶¶ 80-81)

In July 2000, screenwriter Vincent Bo Zenga sued Brad Grey for breach of contract and fraud. The defense team representing Grey retained PIA in early February 2001.[19] During the course of the subsequent investigation, confidential information regarding multiple investigative targets was acquired through, among other means, protected law enforcement database inquiries and illegal wiretaps. For these services, Grey's attorneys paid Pellicano $25,000, which cost was then passed on to Grey as part of the firm's monthly bill for litigation costs.

Again, Pellicano, at the outset of the investigation, tasked Arneson with obtaining criminal history information on the investigative targets. On February 6, 2001, Arneson conducted an

[19] Grey, upon the advice of his attorneys, previously had hired PIA in January 1999 in connection with a civil proceeding involving former client Garry Shandling. On January 20, 1999, Arneson conducted NCIC databse inquiries for information on Garry Shandling and his personal assistant Mariana Grant, and conducted a DMV database inquiry for information on Shandling's accountant Warren Grant. On February 10, 1999, Arneson conducted an NCIC database inquiry for information on Shandling's private investigator James Nielsen, Nielsen's wife, daughter, and investigative partner. On March 4, 1999, Arneson conducted an NCIC database inquiry for information on Shandling's friends Kevin and Linda Nealon and Shandling's girlfriend Linda Doucett. On March 9, 1999, Arneson conducted an NCIC database inquiry for information on Shandling's friend Gavin DeBecker. These inquiries serve as the foundation for racketeering acts 3-4, 8, 10-13.

NCIC database inquiry on Vincent Zenga and his brother, Jerome Zenga. Notably, a report on Vincent Zenga containing reformatted DMV and criminal history information as of 2/6/00[20] was recovered from Pellicano's computers. In addition, on February 13, 2001, Arneson conducted an NCIC database inquiry for information on Jessica Schutte. The following day, Arneson conducted NCIC database inquiries on Stacy Codikow and Paul Durazzo. Schutte, Codikow, and Durazzo were all associates of Zenga whose depositions were noticed during the litigation, with Codikow's deposition taking place on the very day, February 14, 2001, that Arneson conducted the database inquiry on Codikow. In addition, on February 20, 2001, Arneson conducted an NCIC database inquiry for information on Zorianna Kit, Zenga's wife, who was deposed in March 2001. Finally, on March 13, 2001, Arneson conducted an NCIC database inquiry on Gregory Dovel, Zenga's attorney.

With respect to the use of illegal wiretaps, SBC employee Teresa Wright will testify that she accessed the SBC proprietary BOSS database to obtain information on Bo Zenga's telephone number on February 13, 2001. Wright also will testify that she obtained this information for Turner, which is corroborated by the fact that Turner's home phone records reflect that he called Wright twice on that date. In addition, numerous summaries of Zenga's intercepted telephone calls, including calls between Zenga and his attorneys, were recovered from PIA's computers and

[20] The year identifier of 00 appears to be a typographical error.

PIA former employee Virtue will testify that she listened to hundreds of Zenga's phone calls over a two-to-three-month period.

8. The Enterprise's Investigation of Keith Carradine (racketeering acts 42-43; counts 10-11, 41-42, 102; count 95 ¶ 85)

In approximately February 2001, Sandra Carradine hired PIA to investigate her husband in connection with property issues in her then-pending divorce proceedings. During the course of this investigation, confidential information regarding multiple investigative targets was acquired through, among other means, protected law enforcement database inquiries and illegal wiretaps.

Specifically, on April 26, 2001, Arneson conducted an NCIC database inquiry for information on Keith Carradine and his girlfriend, Hayley Dumond.[21] As to the use of illegal wiretaps, Sandra Carradine, who pled guilty to perjury for lying about the existence of PIA-implemented wiretaps when questioned before the grand jury, has since admitted that Pellicano wiretapped Keith Carradine's telephone and that Pellicano played wiretapped conversations for her. Carradine's admissions are corroborated by a telephone conversation recovered from Pellicano's computer, dated May 17, 2001, in which Pellicano told Sandra Carradine that "what I'm hoping to get the next time I go and gather all this stuff that I'm gathering is that there is a conversation between he and Hayley." Pellicano and Carradine then discussed the

[21] On this date, Arneson also conducted a DMV inquiry on Jude Green, who was in divorce proceedings with Pellicano client Leonard Green.

contents of the conversation he had just played for her. In doing so, Pellicano reminded Carradine that he "had to do this twice" because "they cut the f****** cables."

9. The Enterprise's Investigation of Aaron Russo (racketeering acts 50, 66-67, 84-87, 90; counts 18, 49, 75-86, 88, 92, 101; count 95 ¶¶ 83-84)

Hedge fund manager Adam Sender entered into a contract with movie producer and Nevada gubernatorial candidate Aaron Russo that called for the two to create a movie production company. Ultimately, after Sender spent more than $1,000,000 in start-up costs, the production company never materialized and Sender hired attorney Bertram Fields to represent him in a civil suit against Russo. On Fields' recommendation, Sender retained PIA in March of 2001. During the course of the subsequent investigation, confidential information regarding multiple investigative targets was acquired through, among other means, protected law enforcement database inquiries and illegal wiretaps. For these services, Sender paid PIA $500,000.

Of this amount, Sender wired an initial $25,000 payment to PIA on March 30, 2001. On April 2, 2001, SBC employee Wright queried the SBC proprietary BOSS database for information on Aaron Russo and his wife, Heidi Gregg, on behalf of Turner. Two days later, Beverly Hills Police Officer Craig Stevens conducted DMV database inquiries on Russo, Gregg, and Russo's two sons, Maxwell and Samuel. Reformatted DMV reports for Max Russo and Sam Russo (dated April 12, 2001) and for Heidi Gregg (dated April 17, 2001) were recovered from Pellicano's computers. Stevens

further conducted NCIC database inquiries for information on Max Russo on November 9, 2001, and conducted a separate NCIC database inquiry on Adam Sender on December 18, 2001. Stevens, who has pled guilty to multiple felony counts relating to these database inquiries, has admitted that he conducted all of these inquiries for Pellicano.

With respect to the use of illegal wiretaps, Sender will testify that, during the course of the litigation, Pellicano played him five to ten recordings of wiretapped telephone calls between Russo, his sons, and his political contacts. In doing so, Pellicano identified the calls as being recorded telephone calls that he reviewed every twenty-four hours and instructed Sender not to discuss the calls with anyone. In addition, PIA employees will testify that they personally listened to thousands of wiretapped calls involving Russo, his wife, family and political backers. Furthermore, a 78-page report on Aaron Russo recovered from PIA's computers, captioned "RUSSO MATTER Complete Notes as of 08/01/2001," which includes numerous summaries and excerpts of Russo's telephone conversations, will be introduced into evidence.

Moreover, two PIA employees will testify about how this wiretap was used to serve legal process on Russo outside of the Giuseppe Franco Salon in Beverly Hills on April 21, 2001. After learning that Russo would be at this location from the wiretap, the employees traveled to the salon, where they subsequently

chased Russo through several buildings before effecting service on him.

After a default judgment was entered against Russo, Russo claimed that he had never been served with the subpoena. On March 14, 2002, Patrick Theohar, a hairstylist formerly employed at Giuseppe Franco's, signed a declaration for Russo regarding the events of April 21, 2001, in which he stated that he had seen Russo refuse to take the envelope from the process server. On March 15, 2002, Arneson conducted an NCIC database inquiry (as well as DMV, fingerprint, and out-of-state warrant checks) on Theohar. According to LAPD records, officers from LAPD Pacific Division (where Arneson was stationed) went to Theohar's residence the next day to arrest him on an outstanding warrant. Theohar was not at home. On March 18, Theohar filed a second declaration recanting his earlier one. No further attempts were made to arrest him on this outstanding warrant.

10. The Enterprise's Investigation of Prosecution Witnesses in The Murder Trial of Kami Hoss (racketeering acts 44-47; counts 12-15, 43-46)

On trial for murder in connection with the death of Sandra Rodriguez, who plunged to her death from the balcony of the Long Beach Hyatt following a night of partying, Kami Hoss hired PIA to investigate potential prosecution witnesses. During the course of this investigation, confidential information regarding multiple investigative targets was acquired through, among other means, protected law enforcement database inquiries. For these

services, Hoss, who was acquitted of all charges, paid PIA $60,000.

Hoss' first payment consisted of a $25,000 check dated August 14, 2001. Ten days later, Pellicano engaged in a recorded phone conversation with Arneson, in which Arneson discussed criminal history and DMV information he had obtained on victim Sandra Rodriguez. In the same recorded call, Pellicano asked Arneson to conduct checks on Ester Pina, Mirella Lavorin, and Carrie Cagle, who were potential witnesses in the case. On the same date -- August 24, 2001 -- Arneson conducted NCIC database inquiries for information on Ester Pina, Mirella Lavorin, Carrie Cagle, and Sandra Rodriguez. Furthermore, DMV information on all five individuals was recovered from PIA's computers and former PIA employee Denise Ward will testify that, while reviewing the Kami Hoss files to obtain information for Pellicano, she saw that Pellicano had criminal history and DMV information, including photographs, on every person in the case file, with Arneson's name and serial number at the top of every printout.

11. The Enterprise's Investigation of Pamela Miller (racketeering acts 53-54, 57, 60-61; counts 21-22, 25, 28-29, 52-53, 56, 59-60)

In April 2002, Canadian publishing heiress Taylor Thomson hired PIA to investigate Pamela Miller, who had served as her child's nanny, and Michael Kolesa, the child's father, after Miller had advised Kolesa about Miller's concerns with the child's care under Thomson. During the course of this investigation, confidential information regarding multiple

investigative targets was acquired through, among other means, protected law enforcement database inquiries. For these services, Thomson paid PIA $50,000.

Pellicano's bank records reflect an initial $25,000 check from Thomson dated April 2, 2002. The following day, Arneson conducted an NCIC database inquiry for information on Pamela Miller. Also on that date, in a recorded conversation recovered from Pellicano's computer, Pellicano tells Jennifer Megarry, Thomson's personal assistant, that "we did a nationwide search for any criminal records, we found her driver's license information from Pennsylvania . . . , no criminal record here, got her driver's license and information here, found where her parents are, got a ton of information."

In another recorded conversation dated April 18, 2002, Pellicano tells Megarry that he needs a retainer of $25,000 to investigate Kolesa, apart from what he was already paid to investigate Miller. Pellicano's bank records reflect a second $25,000 check from Thomson dated April 19, 2002. On that same date, Arneson conducted an NCIC database inquiry for information on Kolesa. Approximately one month later, on May 16, 2002, Arneson conducted NCIC database inquiries for information on Andrew Miller (Pamela's brother) and Richard and Joyce Miller (Pamela's parents)[22] and also requested DMV photographs of Richard and Joyce Miller by Express Mail. Reformatted DMV reports on

[22] These inquiries were conducted at the same time that Arneson also conducted database inquires of Anita Busch and Bernard Weinraub.

Pamela, Andrew, Joyce and Richard Miller subsequently were recovered from PIA's computers.

12. The Enterprise's Investigation of Anita Busch (racketeering acts 55, 56, 58, 59, 92; counts 23-24, 26-27, 54-55, 57-58, 90, 94, 104; count 95 ¶¶ 90-91)

In May of 2002, PIA was retained by attorneys representing Michael Ovitz to assist in separate lawsuits against Ovitz's business, Artists Management Group ("AMG"), by sports promoter Arthur Bernier and sports agent James Casey.[23] During the course of this representation, confidential information regarding multiple investigative targets was acquired through, among other means, protected law enforcement databases inquiries. PIA was paid $25,000 for its services in each case.

In addition to the specific matters for which PIA was retained, Pellicano and Ovitz discussed individuals within the entertainment community who were the source of bad press against Ovitz. During these conversations, Ovitz and Pellicano discussed Ovitz's belief that New York Times writer Bernard Weinraub had been recycling negative stories about him and that, on occasion, he was assisted by Los Angeles Times writer Anita Busch.

AMG billing records reflect that the payments for the Bernier and Casey litigation matters were made on May 10, 2002. On May 9, 2002, Arneson conducted an NCIC database inquiry for information on Arthur Bernier. On May 16, 2002, Arneson

[23] At the same time, PIA was retained in connection with a trademark lawsuit brought by Warner Scott, for which PIA was paid an additional $25,000. No charges have been filed in connection with this retention.

conducted NCIC database inquiries for information on James Casey, Anita Busch, and Bernard Weinraub. On that same day, Arneson also requested DMV photos for Casey, Busch, and Weinraub by Express Mail.[24] Reformatted DMV reports on Bernier, Casey, and Busch, as well as a six-page computer printout showing all of their respective runs, were recovered from Pellicano's computers, with the Casey and Busch reports being dated May 31, 2002.

Also on May 16, 2002, SBC employee Teresa Wright conducted an inquiry on the SBC proprietary BOSS database for information on Anita Busch, entering "ERR" as her reason for access. Wright has pleaded guilty to computer fraud for conducting this inquiry unlawfully, has admitted that she did so on Turner's behalf, and further has stated that she used the term "ERR" (error) to "cover" for the inquiries that she conducted on Turner's behalf. Turner's home telephone records reflect that he called Wright twice on May 16, 2002, and Wright called Turner three times on the same date. Turner had retired from SBC months earlier.

After noticing persistent problems with her telephone line, Busch, on November 5, 2002, contacted SBC and asked the phone company to investigate the problem. Later that day, SBC technician Clifford Shillingford discovered a wiretap on Busch's telephone and further confirmed that there was no court order authorizing the wiretap. Shillingford then had the wiretap

---

[24] As discussed above, Arneson, during this series of inquiries, also obtained information for Pellicano investigative targets in the Taylor Thomson/Pamela Miller investigation and further sought DMV information for Miller's parents.

removed. Shortly thereafter, however, Busch's problems with her telephone line returned, which led Busch to recontact SBC. On November 18, 2002, SBC employee Teresa Henry discovered yet another unauthorized wiretap on Busch's telephone.

C. EFFORTS TO CONCEAL INVOLVEMENT IN, OR EVIDENCE OF, THE ENTERPRISE

1. Arneson False Statement (count 108)

On July 9, 2003, Mark Arneson, who previously had resigned from the LAPD rather than participate in a compelled interview with Internal Affairs regarding his database inquiries, was interviewed at the United States Attorney's Office in the presence of his counsel. The interview was governed by a standard "proffer" agreement providing that Arneson's statements could not be used against him as long as he was completely truthful. He was not.

Specifically, when asked about his inquiries of law enforcement databases on the name "Anita Busch," Arneson affirmatively asserted that his inquiries on Busch were related to a legitimate gambling investigation he was working on in his capacity as a vice squad detective in the LAPD Pacific Division. Arneson stated that as part of that investigation he and other detectives conducted surveillances at previously identified gambling and organized crime hangouts, including Enzo's Pizzeria and Matteo's Restaurant. Arneson recalled seeing a woman he believed to have been Busch at Enzo's and Matteo's on repeated occasions, and said that he conducted inquiries on her in order

to determine whether or not she was involved in gambling or other organized crime activities. Arneson further claimed that no surveillance reports were generated documenting his observations of Busch, and said that whatever documentation he received as a result of his inquiries would have been discarded when Busch was eliminated as a potential suspect in the investigation.

The evidence will show that this Arneson's story regarding Busch was a complete fabrication. For example, Busch will testify that she has never eaten at Enzo's Pizzeria, and did not eat at Matteo's Restaurant on or around May 16, 2002, the date that Arneson conducted his computer inquiries of Busch and his daily report indicated that he spent the day in an alcohol sales decoy operation and in "prostitution" enforcement. Moreover, as noted above, Arneson conducted these database inquiries as part of a series of runs that he conducted on PIA investigative targets, including occasional Busch writing partner Bernard Weinraub.

2. Turner False Statement (count 109)

On January 28, 2003, Turner was interviewed by the FBI. During the interview, Turner denied assisting Pellicano in wiretapping telephones or in making telephone company information on subscribers available to Pellicano. Turner further maintained that his outside work for Pellicano was limited to sweeping Pellicano's telephones for bugs about three times a year and working in Pellicano's forensic lab identifying voices. Turner's statements are flatly contradicted by former SBC employees Teresa

Wright and Michelle Malkin, who both will testify that they provided proprietary SBC customer information to Turner,[25] including at times when Turner no longer worked at SBC, so that such information could be provided to Pellicano. In addition, several former Pellicano employees will testify that Turner was Pellicano's source for SBC phone company information who provided PIA with confidential SBC customer information and assisted Pellicano with the implementation of wiretaps. According to these witnesses, Pellicano would regularly instruct them to page Turner with a code, at which time they would provide Turner with lists of names or telephone numbers provided by Pellicano. Shortly thereafter, Turner would fax toll records or other confidential telephone company information to Pellicano's office.

3. Kachikian's Destruction of the Telesleuth Wiretapping Program (count 110)

Kachikian was subpoenaed to appear before the grand jury on April 17, 2003. Pursuant to the terms of the subpoena, Kachikian was directed to produce "all documents related to the creation and/or utilization of the 'Telesleuth' software program, including software, source codes, manuals, encryption data, correspondence, etc." Kachikian brought none of the requested materials to the grand jury, stating that he had returned the materials to Pellicano or destroyed them after the search warrant was executed at PIA in November 2002 and Pellicano was arrested on explosives charges. Kachikian then proceeded to explain that,

[25] Both women were fired for doing so.

in approximately December 2002 or January 2003, acting out of paranoia, he deleted the entire Telesleuth program from his computer and used a Norton wipe program to ensure that the code could not be recovered with retrieval software. Kachikian further explained that, in connection with wiping the code from his drive, he also broke and threw away his CD backup to this program, thereby leaving him with none of the Telesleuth materials responsive to the grand jury subpoena.

IV.

EVIDENTIARY ISSUES

A. ADMISSIBILITY OF PHYSICAL EVIDENCE

1. Authentication and Identification/Chain of Custody

Federal Rule of Evidence 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." As such, issues of authenticity and identification are treated under Rule 901 as simply "a special aspect of relevancy." Fed. R. Evid. 901(a) (Advisory Committee Notes).

Rule 901(a) only requires the government to make a prima facie showing of authenticity or identification "so that a reasonable juror could find in favor of authenticity or identification." United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991); see also United States v. Blackwood, 878 F.2d 1200, 1202 (9th Cir. 1989); United States v. Black, 767 F.2d

1334, 1342 (9th Cir. 1985). Once the government meets this burden, "the credibility or probative force of the evidence offered is, ultimately, an issue for the jury." Black, 767 F.2d at 1342.

The authenticity of proposed exhibits may be proven by circumstantial evidence. United States v. Natale, 526 F.2d 1160, 1173 (2d Cir. 1975); United States v. King, 472 F.2d 1, 9-11 (9th Cir. 1973). Moreover, the prosecution need only prove a rational basis from which the jury may conclude that the exhibits did, in fact, belong to the defendant. Federal Rule of Evidence 401(a); United States v. Blackwell, 694 F.2d 1325, 1330 (D.C. Cir. 1982); United States v. Sutton, 426 F.2d 1202 (D.C. Cir. 1969).

To be admitted into evidence, a physical exhibit must be in substantially the same condition as when the crime was committed. The court may admit the evidence if there is "a reasonable probability the article has not been changed in important respects." United States v. Harrington, 923 F.2d 1371, 1374 (9th Cir. 1991). This determination is to be made by the trial judge and will not be overturned except for clear abuse of discretion. Factors the court may consider in making this determination include the nature of the item, the circumstances surrounding its preservation, and the likelihood of intermeddlers having tampered with it. See United States v. Kaiser, 660 F.2d 724, 733 (9th Cir. 1981); Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960).

In establishing chain of custody as to an item of physical evidence, the government is not required to call all persons who may have come into contact with the piece of evidence. Reyes v. United States, 383 F.2d 734 (9th Cir. 1967); Gallego, 276 F.2d at 917. Moreover, a presumption of regularity exists in the handling of exhibits by public officials. Kaiser, 660 F.2d at 733; United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc); Harrington, 923 F.2d 1371, 1374 (9th Cir. 1991). Therefore, to the extent that alleged or actual gaps in the chain of custody exist, such gaps go to the weight of the evidence rather than to its admissibility. Gallego, 276 F.2d at 917.

a. Photographs

Photographs may be authenticated by a witness who "identif[ies] the scene itself [in the photograph] and its coordinates in time and place." See Lucero v. Stewart, 892 F.2d 52, 55 (9th Cir. 1989).

b. Recorded Conversations[26]

Audio recordings are admissible upon a showing that "the recording is accurate, authentic and generally trustworthy." United States v. King, 587 F.2d 956, 961 (9th Cir. 1978). The Ninth Circuit has held that recordings:

---

[26] Transcripts of recorded English language conversations, such as the ones that will be introduced by the government at trial, may be used to assist the court and the jury in identifying speakers and in following the recordings and do not constitute evidence. United States v. Taghipour, 964 F.2d 908, 910 (9th Cir. 1992) (transcripts may be used during trial and may be used by juries in deliberation); United States v. Tornabene, 687 F.2d 312, 317 (9th Cir. 1982); United States v. Turner, 528 F.2d 143, 167 (9th Cir. 1975).

> [a]re sufficiently authenticated under Federal Rule of Evidence 901(a) if 'sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification. [Citing cases.] This 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.

United States v. Matta-Ballesteros, 71 F.3d 754, 768 (9th Cir. 1995), modified, 98 F.3d 1100 (9th Cir. 1996) (allowing into evidence recordings of the torture of DEA Special Agent Camarena which were in the possession of a co-defendant).

Rule 901(b)(5) sets a low threshold for voice identifications offered to determine the admissibility of recorded conversations. Under this rule, audio recordings may be authenticated by persons who are not parties to the recorded conversation, as long as the person can identify the voices on the recording. Fed. R. Evid. 905(b)(5); Torres, 908 F.2d at 1425; United States v. Thomas, 586 F.2d 123, 133 (9th Cir. 1978). A witness's opinion testimony in this regard may be based upon his having heard the voice on another occasion under circumstances connecting it with the alleged speaker. Fed. R. Evid. 901(b)(5); Torres, 908 F.2d at 1425 ("Testimony of voice recognition constitutes sufficient authentication."); United States v. Bassey, 613 F.2d 198, 202 n.2 (9th Cir. 1979); United States v. Turner, 528 F.2d 143, 163 (9th Cir. 1975). If the identifying witness is "'minimally familiar' with the voice he identifies, Rule 901(b) is satisfied." United States v. Plunk, 153 F.3d 1011, 1022-23 (9th Cir.), amended, 161 F.3d 1195 (9th Cir. 1998).

The speaker's identity also can be established by circumstantial evidence. Fed. R. Evid. 901(b)(5), (6). Such evidence may include: (1) defendant's identification of himself during the conversation either by surname, first name or nickname (United States v. Vento, 533 F.2d 838, 864 (3d Cir. 1976); United States v. Turner, 528 F.2d 143, 163 (9th Cir. 1975); Palos v. United States, 416 F.2d 438, 440 (5th Cir. 1969)); (2) listing of the telephone in the defendant's name or the location of the telephone at the defendant's residence (Federal Rule of Evidence 901(b)(6) (call placed to phone number assigned to defendant plus self-identification of recipient of call is sufficient to identify defendant as recipient)); (3) the speaker's revelation of information particularly known to the person he purports to be (United States v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1977); United States v. Ross, 321 F.2d 61, 69 (2d Cir. 1963)); (4) the giving of directions which prove to be correct, or returning a call and referring to what was said in a previous conversation (Sawyer, 607 F.2d at 1193); or (5) visual surveillance of the defendant after the conversation doing what he said he would do (United States v. McMillan, 508 F.2d 101, 105 (8th Cir. 1974); United States v. Bonanno, 487 F.2d 654, 659 (2d Cir. 1973); see also Van Ripper v. United States, 13 F.2d 961, 968 (2d Cir. 1926) ("[T]he substance of the communication may itself be enough to make prima facie proof [of identity]")).

Although the overwhelming majority of recordings to be introduced are clear in sound quality, recorded conversations can

serve as competent evidence even when they are partly inaudible provided that the unintelligible portions are not so substantial as to render the recording as a whole untrustworthy. United States v. Rrapi, 175 F.3d 742 (9th Cir. 1999); United States v. Carlson, 423 F.2d 431, 440 (9th Cir. 1970).

c. Handwriting

A lay witness may authenticate handwriting on a document by stating how he or she became familiar with the handwriting in question. Hall v. United Insurance Company of America, 367 F.3d 1255, 1260-61 (11th Cir. 2004). In laying the requisite foundation, the witness should describe the instruments on which the witness previously had observed the handwriting, and provide information concerning the witness' relationship with the signatory. Id. at 1261. For example, co-workers possessing sufficient familiarity with a defendant's handwriting have been permitted to authenticate the defendant's handwriting. See United States v. Tipton, 964 F.2d 650, 654-55 (7th Cir. 1992); United States v. Whittington, 783 F.2d 1210, 1214-15 (5th Cir. 1986); United States v. Barker, 735 F.2d 1280, 1283 (11th Cir. 1984).

2. Items Found In A Defendant's Possession

Documents or items found in a defendant's possession are admissible, either as adopted admissions or to show the circumstantial relationship of the defendant to the documents. United States v. Ospina, 739 F.2d 448, 451 (9th Cir. 1984). For instance, a calendar or ledger may be a party admission or co-conspirator statement, depending upon the circumstances, if the

identity of the author of the ledger is reasonably certain. United States v. Smith, 893 F.2d 1573, 1576 (9th Cir. 1990).

3. Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) under the circumstances, it would be unfair to admit the duplicate instead of the original. Fed. R. Evid. 1003; United States v. Smith, 893 F.2d 1573, 1579 (9th Cir. 1990); United States v. Leal, 509 F.2d 122, 125-26 (9th Cir. 1975); United States v. Pacheco-Lovio, 463 F.2d 232, 233-34 (9th Cir. 1972); see also United States v. Skillman, 922 F.2d 1370, 1375 (9th Cir. 1990) (photocopy bearing extraneous handwriting not connected to the defendant is admissible).

4. Business Records

Fed. R. Evid. 803(6) excepts from the hearsay rule "a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." If evidence meets the requirements for admission under Rule 803(6), no further showing is necessary for

admission under the Confrontation Clause. See Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980); United States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990).

A document is admissible under Rule 803(6) if two foundational facts are established: (i) the document was made or transmitted by a person with knowledge at or near the time of the incident recorded, and (ii) the document was kept in the course of a regularly conducted business activity. See Ray, 930 F.2d at 1370; Kennedy v. Los Angeles Police Dept., 901 F.2d 702, 717 (9th Cir. 1989), overruled on other grounds, Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993). These foundational facts may be established either through a custodian of records or "other qualified witness." The phrase "other qualified witness" is broadly interpreted to require only that the witness understand the record keeping system. See Ray, 930 F.2d at 1370; United States v. Franco, 874 F.2d 1136, 1139-1140 (7th Cir. 1989); United States v. Hathaway, 798 F.2d 902, 906 (6th Cir. 1986). In determining whether the foundational facts have been established, the court may consider hearsay and other evidence not admissible at trial. See Fed. R. Evid. 104(a), 1101(d)(1); Bourjaily, 483 U.S. at 178-79.

The government need not establish precisely when or by whom the document was prepared; all the rule requires is that the document be made "at or near the time" of the act or event it purports to record. See United States v. Huber, 772 F.2d 585, 591 (9th Cir. 1985); United States v. Bassey, 613 F.2d 198, 201 n.1

(9th Cir. 1979). Similarly, challenges to the accuracy or completeness of the business records ordinarily go to the weight of the evidence and not its admissibility. See, e.g., La Porta v. United States, 300 F.2d 878, 880 (9th Cir. 1962).

5. Self-Authenticating Records

In order to accelerate the pace of this trial and to avoid the need to call dozens of witnesses who would be called to testify to matters that are beyond dispute, the government intends to introduce a number of business records, including phone records, and bank records, pursuant to Federal Rule of Evidence 902(11). The Federal Rules of Evidence provide that business records may be admitted into evidence without a live witness if they are accompanied by a written declaration from a custodian of the records certifying that the records were made in accordance with the requirements of Rule 803(6) of the Federal Rules of Evidence. See Securities Exchange Commission v. Franklin, 348 F.Supp.2d 1159 (S.D. Cal. 2004); Rules 803(6) and 902(11), Federal Rules of Evidence.

Specifically, Amended Rule 902 of the Federal Rules of Evidence provides, in pertinent part:

> 902 Self Authentication: Extrinsic evidence of authenticity as a condition precedent to admissibility is **not required** with respect to the following:
> . . .
> (11) The **original or a duplicate of a domestic record of regularly conducted activity** that would be admissible under Rule 803(6) **if accompanied** by a written **declaration** of its custodian or other qualified person . . . **certifying** that the record-
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information

> transmitted by, a person with knowledge of those matters;
>
> (B) was kept in the course of the regularly conducted activity; and
>
> (C) was made by the regularly conducted activity as a regular practice.
>
> A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Fed. R. Evid. 902(11) (emphasis added).

6. Charts and Summaries

In an effort to reduce the length of the trial, the government intends to make use of summary witnesses and summary charts to reduce otherwise voluminous records and testimony into a format that is succinct and understandable. Federal Rule of Evidence 1006 provides that:

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

The Advisory Committee Notes to Rule 1006 add that: "[t]he admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognized this practice, with appropriate safeguards."

A chart or summary may be admitted as evidence where the proponent establishes that the underlying documents are voluminous, admissible and available for inspection. See United States v. Myers, 847 F.2d 1408, 1411-1412 (9th Cir. 1988); United States v. Johnson, 594 F.2d 1253, 255-1257 (9th cir. 1979). While the underlying documents must be "admissible," they need not be admitted." See Meyers, 847 F2d at 1412; Johnson, 594 F.2d 233, 239 (7th Dir. 1983); Barsky v. United States, 339 F.2d 180 (9th Cir. 1964).

Summary charts may be used by the government in opening statement. Indeed, "such charts are often employed in complex conspiracy cases to provide the jury with an outline of what the government will attempt to prove." United States v. De Peri, 778 F.2d 963, 979 (3rd Cir. 1985) (approving government's use of chart); United States v. Rubino, 431 F.2d 284, 290 (6th Cir. 1970)(same).

Summary charts need not contain the defendant's version of the evidence and may be given to the jury while a government witness testifies concerning them. See United States v. Radseck, 718 F.2d 233, 239 (7th Cir. 1983); Barsky, 339 F.2d at 181. In addition, summary charts are admissible under Federal Rule of Evidence 611(a), which permits a court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from

harassment or undue embarrassment." United States v. Poschatta, 829 F.2d 1477, 1481 (9th Cir. 1987); United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980).

Typically, charts used under Rule 611(a) for "pedagogical purposes," or as "testimonial aids," should "not be admitted into evidence or otherwise be used by the jury during deliberations." United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991) ("We have long held that such pedagogical devices should be used only as a testimonial aid, and should not be admitted into evidence or otherwise be used by the jury during deliberations."); see also United States v. Abbas, 504 F.2d 123 (9th Cir. 1974) (better practice is that charts used as testimonial aids not be submitted to jury). However, charts may be used under Rule 611(a) and then subsequently admitted into evidence in those instances in which the defense has had opportunity to challenge the information contained in the chart. For example, in Gardner, the district court admitted, over defense objection, a chart used by a government witness as a testimonial aid that summarized facts and calculations already in evidence. Gardner, 611 F.2d at 776. The Ninth Circuit held that the use of this chart as a testimonial aid was appropriate under Rule 611(a), and that the chart was properly admitted into evidence under Rule 1006: "Having thus utilized the chart without objection with a full opportunity for the defendant to challenge the facts, figures, calculations and underlying documents upon which the chart was based, it was not reversible error to admit the chart in evidence." Id. at 776; see also

United States v. Olano, 62 F.3d 1180, 1204 (9th Cir. 1995); United States v. Baker, 10 F.3d 1374 (9th Cir. 1993) (charts admitted after court examined them outside presence of jury, defendants had opportunity to review charts and cross-examine witness, and court gave limiting instruction that charts were not themselves substantive evidence).

Summary charts of information contained in ledgers and other documents are admissible where the ledgers are available to defendant for inspection. United States v. Catabran, 836 F.2d 453 (9th Cir. 1982). Similarly, a chart summarizing unavailable documents is admissible under Fed. R. Evid. 1004 if the underlying materials are "lost or destroyed" or "not obtainable." Fed. R. Evid. 1004(1) and 1004(2).

A summary witness may properly testify about, and use a chart to summarize, evidence that has already been admitted. As the Ninth Circuit has recognized, the court and jury are entitled to have a witness "organize and evaluate evidence which is factually complex and fragmentally revealed." United States v. Shirley, 884 F.2d 1130, 1133-34 (9th Cir. 1989)(agent's testimony regarding her review of various telephone records, rental receipts, and other previously offered testimony held to be proper summary evidence, as it helped jury organize and evaluate evidence; summary charts properly admitted); United States v. Lemire, 720 F.2d 1327, 1348(D.C. Cir. 1983). A summary witness also may rely on the analysis of others as the use of others in the preparation of summary evidence goes to the weight and not the admissibility of

the evidence. United States v. Soulard, 730 F.2d 1292, 1299 (9th Cir. 1984); see Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co., 466 F.2d 722, 727 (7th Cir. 1972) ("It is not necessary . . . that every person who assisted in the preparation of the original records or the summaries be brought to the witness stand.").

B. ADMISSIBILITY OF WITNESS TESTIMONY

1. Direct And Adopted Admissions By Party Opponent

A statement is not hearsay, but rather constitutes an admission by a party opponent, if the statement is offered against a party and is the party's own statement in either an individual or representative capacity. Fed. R. Evid. 801(d)(2)(A); Burreson, 643 F.2d at 1349. Similarly, a statement made by a party-opponent and offered against that party is not hearsay if it is a "statement of which the party has manifested an adoption or belief in its truth." Fed. R. Evid. 801(d)(2)(A). With respect to adoptive admissions, the Court must find sufficient foundational facts that a jury could reasonably conclude that the defendant actually heard; understood and acceded to the statement(s). Ospina, 739 F.2d at 451 (writings in residence of defendant and acted upon by defendant are adoptive admissions and therefore non-hearsay); United States v. Valles-Vallencia, 811 F. 2d 1232, 1237 (9th Cir. 1987) (handwriting on ledgers are adoptive admissions).

When the government admits a portion of a defendant's prior statement under Rule 801(d)(2)(A), the defendant may not put in additional out-of-court statements by him because such statements

are hearsay when offered by the defendant. Fed. R. Evid. 801(d)(2); United States v. Nakai, 413 F.3d 1019, 1022 (9th Cir. 2005) (recognizing that exculpatory out-of-court statements that a defendant makes to a witness constitute inadmissible hearsay) (citing Williamson v. United States, 512 U.S. 594, 598-601 (1994)); United States v. Ortega, 203 F.3d 675, 681-82 (9th Cir. 2000) (defendant prohibited from eliciting his own exculpatory statements during cross examination of government agent because to permit otherwise would be to put such statements "before the jury without subjecting [defendant] to cross-examination, precisely what the hearsay rule forbids."); United States v. Fernandez, 839 F.2d at 639, 640 (9th Cir. 1988)(same).

The only potential limitation of this principle is the "rule of completeness" set forth in Federal Rule of Evidence 106, which has been applied by some courts to require that all of a defendant's prior statements be admitted where it is necessary to place an admitted statement in context or to avoid misleading the trier of fact. It is entirely proper, however, to admit segments of a statement without including everything, and adverse parties are not entitled to offer additional statements just because they are there and the proponent has not offered them. United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996); United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982). Furthermore, Rule 106 does not render admissible evidence which is otherwise inadmissible under the hearsay rules. See Collicott, 92 F.3d at 983 (hearsay not admitted regardless of Rule 106).

2. Confession of a Co-Defendant/*Bruton* Considerations

While a defendant's own admissions may be offered against him under Rule 801(d)(2)(A), a defendant is deprived of his Sixth Amendment right to confrontation when a non-testifying co-defendant's confession that implicates the defendant is introduced in a joint trial, even if the jury is instructed to consider that confession only against the co-defendant. Bruton v. United States, 391 U.S. 123, 135-36 (1968). However, a mutually inculpatory confession by a non-testifying defendant can be introduced in a joint trial provided that a proper limiting instruction is given and "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." Richardson v. Marsh, 481 U.S. 200, 211 (1987). In addition, a confession by a non-testifying co-defendant may properly be considered by the trier of fact if it does not expressly implicate another defendant but rather becomes incriminating only after it is linked with other evidence introduced at trial. Id. at 208-09.

3. Expert Testimony.

If specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. An expert may provide opinion testimony even if it embraces an ultimate issue to be decided by the trier of fact. Fed. R. Evid 704; Fleishman, 684 F.2d at 1335.

4. Opinion Testimony of Non-Experts

Fed. R. Evid. 701 allows lay witnesses to provide opinion testimony as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' 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.

To that end, an experienced government agent may provide opinion testimony even if that opinion is based in part on information from other agents familiar with the issue. United States v. Andressan, 813 F.2d 1450, 1458 (9th Cir. 1987); United States v. Golden, 532 F.2d 1244, 1248 (9th Cir. 1976). An experienced government agent also may testify as to his opinions and impressions of what he observed. As the court stated in United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982), "opinions of non-experts may be admitted where the facts could not otherwise be adequately presented or described to the jury in such a way as to enable the jury to form an opinion or reach an intelligent conclusion."

5. Hearsay

a. Definition

Federal Rule of Evidence 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

b. Statements Not Introduced for the Truth of the Matter Asserted (e.g., Effect on Hearer)

Statements offered for the effect they have on the hearer (e.g., to show a party's knowledge) are not hearsay. United States v. Castro, 887 F.2d 998, 1000 (9th Cir. 1987); Orsini v. O/S Seabrooke O.N., 247 F.3d 953, 960 n.4 (9th Cir. 2001). A witness also may testify to what he or she understood a declarant to mean with respect to a statement made by the declarant to the witness. United States v. Brooks, 473 F.2d 817, 818 (9th Cir. 1973) (per curiam).

c. State of Mind Exception

Federal Rule of Evidence 803(3) provides that the hearsay rule does not exclude a "statement of the declarant's then existing state of mind." Fed. R. Evid. 803(3). The three factors bearing on the foundational inquiry on admissibility under Federal Rule of Evidence 803(3) are contemporaneousness, chance for reflection, and relevance. United States v. Miller, 874 F.2d 1255, 1264 (9th Cir. 1989) (upholding exclusion of defendant's statement about his state of mind two hours prior to the statement because of chance for reflection and opportunity to fabricate).

d. Prior Inconsistent Statements

Prior inconsistent statements of a non-defendant witness are admissible for impeachment purposes under Federal Rule of Evidence 613. See Fed. R. Evid. 613(a), (b). In addition, such statements are admissible as substantive evidence offered for the truth of the matter asserted provided that the foundational requirements set forth in Federal Rule of Evidence 801(d)(1) are satisfied.

United States v. Armijo, 5 F.3d 1229, 1232 (9th Cir. 1993). Under Rule 801(d)(1), a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Fed. R. Evid. 801(d)(1).

e. Prior Consistent Statements

Under Federal Rule of Evidence 801(d)(1)(B), an out-of-court statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Rule 801(d)(1)(B); see United States v. Bao, 189 F.3d 860, 864 (9th Cir. 1999); United States v. Frederick, 78 F.3d 1370, 1377 (9th Cir. 1996); United States v. Stuart, 718 F.2d 931, 934 (9th Cir. 1983). However, "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because [the witness] has been discredited . . . . The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." Tome v. United States, 513 U.S. 150, 157-58 (1995). For example, in Tome, the Supreme Court held "that prior consistent statements made after the date of the alleged motivation to lie are inadmissible." Frederick, 78 F.3d at 1377; see Tome, 513 U.S. at 167.

To establish the admissibility of a prior consistent statement under Rule 801(d)(1)(B), the following foundational factors must be satisfied: "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." Collicott, 92 F.3d at 979.

6. Hostile Witnesses

The government may seek permission to use leading questions in addressing certain witnesses who have close ties to, or who otherwise are aligned with, certain defendants. Under Federal Rule of Evidence 611(c), "when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Although prior to Rule 611(c)'s adoption, a party wishing to ask leading questions on direct examination had to show "actual hostility" by the witness or that the witness was an adverse party, Rule 611(c) "significantly enlarged the class of witnesses presumed hostile, and therefore subject to interrogation by leading questions without further showing of actual hostility." Haney v. Mizell Memorial Hosp., 744 F.2d 1467, 1477-78 (11th Cir. 1984) (internal quotation marks omitted). A trial court has broad discretion in

determining whether a particular witness should be deemed a hostile witness for purposes of this rule. See United States v. Goode, 814 F.2d 1353, 1355 (9th Cir. 1987).

7. Witness Invocation Of The Fifth Amendment Right Against Self Incrimination

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. Amend. V. The Fifth Amendment protects a defendant from making statements that are: (1) compelled; (2) testimonial; and (3) self-incriminating. The Supreme Court has held that compelled testimony, such as sworn trial testimony, is self-incriminating if reasonable cause exists to believe that the testimony either would support a conviction or would provide a link in the chain of evidence leading to a conviction. United States v. Hoffman, 341 U.S. 479, 486 (1951). If, however, the threat of future prosecution is "remote, unlikely or speculative, the privilege does not apply." United States v. Antelope, 395 F.3d 1128, 1134 (9th Cir. 2005) (citing Brown v. Walker, 161 U.S. 591, 596-97 (1896) for proposition that Fifth Amendment protection does not properly extend to offenses for which the statute of limitations has run); see also United States v. Vavages, 151 F.3d 1185, 1192 (1998) (noting that "fear of perjury can typically form a valid basis for invoking the Fifth Amendment only where the risk of prosecution is for perjury of the witness' past testimony" and finding "a witness may not claim the privilege of the Fifth Amendment out of fear that he will be prosecuted for perjury for what he is about to say. The shield against self-incrimination in

such a situation is to testify truthfully, not to refuse to testify on the basis that the witness may be prosecuted for a lie not yet told.").

Non-defendant witnesses cannot avoid testifying at trial through a blanket invocation of the Fifth Amendment privilege against self-incrimination. Antelope, 395 F.3d at 1134. Instead, in instances in which the witness has provided the government with advance notice of the intent to invoke the Fifth Amendment privilege against self-incrimination, the witness should be questioned on the stand, but outside the presence of the jury, to determine whether the invocation is appropriate. Vavages, 151 F.3d at 1192. Moreover, in the event that a non-defendant witness properly invokes the Fifth Amendment, the government can compel the witness to testify through the issuance of use immunity to that witness. U.S. v. Doe, 125 F.3d 1249, 1252, 1254 (9th Cir. 1997).

8. Privilege Waiver Issues

It is well established that the attorney-client privilege can be waived when a party places privileged matters in controversy. See, e.g., United States v. Amlani, 169 F.3d 1189, 1194-95 (9th Cir. 1999) (finding that defendant waived privilege by affirmatively raising issue in attorney-disparagement claim and as enforcement of the privilege would deny the opposing party access to information vital to the defense of the claim). In an effort to challenge the government's evidence on count one-hundred-eight, which charges Arneson with having made a false statement, it is

the government's understanding that defendant may attempt to introduce testimony from the three attorneys who represented Arneson at his failed proffer: Jeffrey Eglash, Thomas Holliday, and Stephen Miller. Depending of the subject matter of their testimony, it is possible that such testimony will constitute a waiver of the attorney-client privilege as to Arneson's discussions with counsel on, at a minimum, issues such as: (1) whether he conducted law enforcement database inquires on Pellicano's behalf; (2) the number of such database inquiries that Arneson performed on Pellicano's behalf; (3) Arneson's reason for conducting such inquiries; (4) whether Arneson understood that he was not permitted to provide Pellicano with such information; and (5) whether Arneson received payment, in whole or in part, for providing Pellicano with such information.

9. Cross-Examination of Defendant

A defendant who testifies at trial waives his right against self-incrimination and subjects himself to cross-examination concerning all matters reasonably related to the subject matter of his testimony. The scope of a defendant's waiver is co-extensive with the scope of relevant cross-examination. United States v. Cuozzo, 962 F.2d 945, 948 (9th Cir. 1992); United States v. Black, 767 F.2d 1334, 1341 (9th Cir. 1985) ("What the defendant actually discusses on direct does not determine the extent of permissible cross-examination or his waiver. Rather, the inquiry is whether 'the government's questions are reasonably related' to the subjects covered by the defendant's testimony").

While Federal Rule of Evidence 404(b) "restricts the use of evidence solely for purposes of demonstrating a criminal proclivity, [i]t does not proscribe the use of other act evidence as an impeachment tool during cross-examination." United States v. Gay, 967 F.2d 322, 328 (9th Cir. 1992). Furthermore, Federal Rule of Evidence 609(a) permits the credibility of a defendant to be impeached by evidence of felony convictions of the defendant or any crimes involving dishonesty or false statements, provided that the conviction was sustained or the defendant was released from prison on the conviction within the past ten years.

10. Cross Examination - General Witnesses

Under Federal Rule of Evidence 608, the credibility of a witness may be supported or attacked by evidence in the form of: (1) prior fraud convictions; (2) prior felony convictions sustained within the past ten years; and (3) opinion or reputation testimony provided that the testimony refers only to the witness' character for truthfulness or untruthfulness. Fed. R. Evid. 608. Moreover, reputation or opinion evidence relating to truthfulness may only be admitted if the witness' character for truthfulness has been attacked. Fed. R. Evid. 608(a). Similarly, specific instances of conduct of a witness may, in the court's discretion, be inquired into on cross-examination of the witness only if the conduct concerns his character for truthfulness or untruthfulness. Such conduct, however, may not be proved by extrinsic evidence. Fed. R. Evid. 608(b).

11. Defendant's Character Witnesses

The Supreme Court has recognized that character evidence -- particularly cumulative character evidence -- has weak probative value and great potential to result in confusion of the issues and prejudice the jury. Michelson v. United States, 335 U.S. 469, 480, 486 (1948). The Court has thus given trial courts wide discretion to limit the presentation of character evidence. Id. at 486.

Rule 404(a) of the Federal Rules of Evidence governs the admissibility of character evidence. Rule 404(a) permits a defendant to introduce evidence of a "pertinent" trait of character. For example, evidence of defendant's family or employment status is irrelevant to whether defendant is believable and law-abiding, and is thus inadmissible. See United States v. Santana-Camacho, 931 F.2d 966, 967-68 (1st Cir. 1991) (testimony of defendant's daughter purportedly showing that defendant was a good family man was inadmissible character evidence inasmuch as such character traits were not pertinent to charged crime of illegally bringing aliens into the United States).

Moreover, the form of the proffered character evidence must be proper. Federal Rule of Evidence 405(a) sets forth the sole methods by which character evidence may be introduced. It specifically states that where evidence of a character trait is admissible, proof may be made in two ways: (1) by testimony as to reputation; and (2) by testimony as to opinion. Thus, defendant may not introduce specific instances of his good conduct through

the testimony of others. Michelson, 335 U.S. at 477 ("The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits.").

On cross-examination of a defendant's character witness, however, the government may inquire into specific instances of a defendant's past conduct relevant to the character trait at issue. See Fed. R. Evid. 405(a). In particular, a defendant's character witnesses may be cross-examined about their knowledge of the defendant's past crimes, wrongful acts, and arrests. See Michelson, 335 U.S. at 481. The only prerequisite is that there must be a good-faith basis that the incidents inquired about are relevant to the character trait at issue. See United States v. McCollom, 664 F.2d 56, 58 (5th Cir. 1981).

12. Defendant's Testimony Regarding Character/Impeachment By Contradiction

Unlike character witnesses, who must restrict their testimony to opinion or appraisal of a defendant's reputation, a defendant-witness may cite specific instances of conduct as proof that he possessed a relevant character trait. United States v. Giese, 597 F.2d 1170, 1190 (9th Cir. 1979). However, "[o]nce a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case." Id. at 1190 (citation omitted). Thus, if defendant testifies to specific instances of conduct supportive of

good character, he opens the door to rebuttal evidence on all reasonably related matters, be they "collateral" or not.[27] Giese, 597 F.2d at 1190.

C. MISCELLANEOUS

1. Judicial Notice

Federal Rule of Evidence 201 provides that, if requested by a party and supplied with the necessary information, a court must take judicial notice of facts that are not subject to reasonable dispute in that they are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Judicial notice may be taken at any stage of the proceedings. For example, the Ninth Circuit has ruled that materials from proceedings in another tribunal are appropriate for judicial notice under Federal Rule of Evidence 201. Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th Cir. 2003) (The court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed). Fed. R. Evid. 201).

---

[27] The distinction between the proper use of extrinsic evidence to impeach by contradiction under Rule 607 and the impermissible use of extrinsic evidence under Rule 608 was explained by the Ninth Circuit in United States v. Castillo, 181 F.3d 1129 (9th Cir. 1999). As the Castillo Court noted, Rule 608(b) prohibits the use of extrinsic evidence of conduct to impeach a witness' credibility in terms of his general veracity. In contrast, the concept of impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence.

2. Reciprocal Discovery

The government has requested reciprocal discovery and the Court has ordered all parties to produce all Rule 16 materials in their possession. Virtually no reciprocal discovery has been provided. To the extent that there exists reciprocal discovery to which the government is entitled under Rules 16(b) and 26.2 of the Federal Rules of Criminal Procedure and which the defense has not produced prior to trial, the government reserves the right to seek to have such documents precluded should a defendant attempt to introduce or use them at trial. See United States v. Young, 248 F.3d 260, 269-70 (4th Cir. 2001) (upholding exclusion under Rule 16 of audiotape evidence defendant did not produce in pretrial discovery where defendant sought to introduce audiotape on cross-examination of government witness not for impeachment purposes, but as substantive "evidence in chief" that someone else committed the crime).

3. Waiver of Rule 12(b) Motions

Federal Rule of Criminal Procedure 12(b)(3) requires that defenses and objections based on defects in the institution of the prosecution, defenses and objections based on defects in the indictment or information, motions to suppress evidence, and requests for discovery under Rule 16 be raised prior to trial. A defendant's failure to raise any such motions prior to trial constitutes waiver, and the Court should not allow any such motions to be brought after jeopardy has attached. Fed. R. Crim. Pro. 12(e); United States v. Quintero-Barraza, 78 F.3d 1344, 1348

(9th Cir. 1996); United States v. Miller, 984 F.2d 1028 (9th Cir. 1993).

DATED: February 28, 2008

Respectfully submitted,

THOMAS P. O'BRIEN
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

/s/
DANIEL A. SAUNDERS
KEVIN M. LALLY
Assistant United States Attorneys
Violent & Organized Crime Section