IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	Criminal No. 20-cr-10130-FDS
	)	
ELIJAH MAJAK BUOI,	)	
	)	
Defendant	)	

GOVERNMENT'S TRIAL BRIEF

The government respectfully submits this trial brief to describe the evidence it expects to introduce at trial and to address legal issues that are likely to arise during the course of the trial.

I. INTRODUCTION

Between in or around April 2020 through in or around June of 2020, the defendant Elijah Buoi engineered a scheme to fraudulently obtain millions of dollars in emergency economic funds paid out in forgivable loans through the Paycheck Protection Program ("PPP"). The PPP—which was administered by the United States Small Business Administration ("SBA") and through SBA-approved lenders and processors—was intended to enable small businesses to continue operating and to keep their existing U.S. based employees on payroll through the COVID-19 pandemic.

For his conduct, the defendant is charged with four counts of wire fraud, in violation of 18 U.S.C. § 1343, and one count of false statements to a financial institution, in violation of 18 U.S.C. § 1014. The counts in the Indictment relate to the defendant's submission of four fraudulent PPP loan applications to four different SBA-approved lenders and loan processors on behalf of his company, Sosuda Tech, LLC ("Sosuda").[1] In each PPP application, the defendant inflated Sosuda's claimed

[1] The government does not contend it is improper or illegal for a business to submit multiple PPP loan applications, although an entity could ultimately only be approved for and receive a single PPP loan.

number of employees and average monthly payroll. He also provided fraudulent IRS Forms 940 and IRS Forms 941 in support of those misrepresentations. In addition, on each PPP loan application, the defendant falsely certified that the United States was the principal place of residence for all employees—a requirement under the PPP. In reality, Sosuda's paid employees were located in India, and they were paid much less than the defendant claimed. The chart below outlines the four PPP loan applications charged in the Indictment:

APPROX. DATE OF LOAN SUBMISSION	LENDER OR LOAN PROCESSOR	CLAIMED NUMBER OF EMPLOYEES	CLAIMED AVERAGE MONTHLY PAYROLL
April 21, 2020	Bank of America	353	$3,000,000
May 21, 2020	Lendio	18	$150,000
June 7, 2020	Fundbox	96	$800,000
June 9, 2020	Newtek	96	$800,000

The defendant's PPP loan application to Fundbox was approved and on or about June 15, 2020, Fundbox disbursed approximately $2,000,000 into an account at Bank of America in name of Sosuda. The defendant is the sole signatory of the account. That same day, on June 15, 2020, the defendant wired approximately $20,000 in PPP loan funds to a bank account in India and withdrew approximately $7,200 in cash. The government seized the remainder of the loan funds on or about June 19, 2020.[2]

[2] The government intends to elicit narrow but necessary testimony to explain that nearly all of the funds were seized by the government. Absent this testimony, the jury may expect to hear evidence of how the funds were spent.

Trial is scheduled to begin on February 22, 2022. The government expects to call approximately eight witnesses and expects that its case in chief will last approximately three to four days.[3]

II. BACKGROUND AND SUMMARY OF EVIDENCE

In March 2020, in response to the many challenges presented by the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which, among other things, created the PPP. The PPP authorized $349 billion in forgivable loans to small businesses to be used for payroll, mortgage interest, rent/lease payments, or utilities. In April 2020, Congress authorized an additional $310 billion for PPP funding. These funds were designed to address the unprecedented crisis facing Americans—especially business owners and their employees whose livelihoods were threatened by the public health emergency.

The PPP was designed to provide funds quickly and easily to qualifying individuals. To apply, individuals submitted an application to a participating SBA approved lender or loan processor along with supporting documentation as to the business's payroll expenses. The supporting documentation requirement could be satisfied with one years' worth of the company's tax records. If a PPP loan application was approved, the participating financial institution funded the PPP loan using its own monies, which were 100% guaranteed by the SBA.

The CARES Act also authorized the SBA to use the Economic Injury Disaster Loan ("EIDL") program.[4] Under the EIDL, an eligible small business experiencing substantial financial disruption

[3] The government is amenable to conducting one or more extended trial days if the Court would like to do so, especially given the pandemic. Defense counsel has indicated he is amenable to the same.

[4] In the Indictment, the defendant was not charged with submitting a false and fraudulent EIDL. However, as explained below, the government intends to introduce evidence and testimony that the defendant submitted an EIDL application on behalf of Sosuda that also contained misrepresentations as evidence that the PPP loan applications charged in the Indictment were fraudulent.

due to the COVID-19 pandemic could apply for a loan of up to $2 million.[5] To apply, applicants submitted an application directly to the SBA and provided information about the business's operations, including its number of employees and gross revenues for the 12-month period preceding January 31, 2020. In addition, EIDL applicants could qualify for an EIDL Advance of up to $10,000, which was considered a grant that did not have to be paid back. The EIDL Advance was calculated based on the number of employees claimed by the business applicant and was provided even if the business applicant ultimately did not qualify or did not chose to accept an EIDL.

In the face of this unprecedented crisis and government response, the defendant sought to enrich himself by submitting multiple fraudulent PPP loan applications and seeking millions of dollars in pandemic relief funds. The loan applications were supported by fake payroll records and fake tax documents, including IRS Forms 940, which is an employer's annual federal unemployment tax return, and IRS Forms 941, which is an employer's quarterly federal tax return.

The government intends to prove its case against the defendant using the evidence detailed below.

The government will introduce evidence and testimony about approximately six fraudulent PPP loans and one fraudulent EIDL loan sought by the defendant.[6] The evidence and testimony related to the loans will include:

- Testimony from an SBA representative and an SBA-approved lender about their roles in the PPP and the program requirements, including that they would not have approved a PPP application that contained false statements about the number of employees and the average monthly payroll;

[5] This amount was later reduced to approximately $150,000 per business.

[6] The charges in the Indictment only concern four PPP loan applications. However, the government intends to introduce evidence of two additional PPP loan applications and one EIDL application as evidence of the overall scheme to defraud. As explained further below, the government has provided notice to the defendant that it intends to introduce these other loan applications as intrinsic evidence to the crime, or, in the alternative, pursuant to Federal Rule of Evidence 404(b).

- Testimony from an SBA employee about the EIDL program and the program requirements and the defendant's EIDL application, including testimony that the SBA would not have approved an EIDL application that contained false statements about the revenue of the business or the number of employees;

- Records from the SBA approved lenders and loan processors of the approximately six PPP loans sought by defendant, including loan applications, supporting loan documentation, such as tax returns and identification, and email correspondence related to the PPP loan applications for Sosuda; and

- Records obtained from the defendant's residence during the execution of a premises search warrant that include loan applications, supporting loan documentation, such as tax returns, payroll records, and written statements of the defendant.

The government will introduce evidence showing that the payroll and employee numbers listed on the defendant's loan applications were false. This will include evidence showing that Sosuda had not paid federal or state payroll taxes in 2019 and 2020. The government will introduce testimony and records from federal and state agencies including the Internal Revenue Service ("IRS") and the Massachusetts Department of Unemployment Assistance ("DUA"). The government will also introduce the defendant's bank records and the testimony of a financial summary witness, who will testify about relevant financial transactions.

III. EVIDENTIARY ISSUES

Following is a discussion of evidentiary matters relevant to the government's case:

A. Use of Intrinsic Evidence

The government previously provided the defendant with notice that it intends to introduce the following intrinsic evidence at trial: (1) that the defendant submitted two additional PPP loan applications on behalf of Sosuda; (2) that the defendant submitted one EIDL application on behalf of Sosuda and received a $10,000 EIDL advance; and (3) that the defendant applied for and received unemployment benefits while claiming to operate a business with payroll of approximately

$3,000,000 a month. In the alternative, the government submits that each category of evidence is also admissible pursuant to Federal Rule of Evidence 404(b) to show the defendant's motive, intent, knowledge, and absence of mistake. *See United States v. Green*, 698 F.3d 48, 55 (1st Cir. 2012).

First, the United States seeks to introduce documentary evidence and elicit testimony that on or about May 29, 2020, the defendant submitted two other uncharged PPP loan applications to Bank of America and Lendio. Like the applications described in the Indictment, these additional applications were submitted on behalf of Sosuda and contained misrepresentations and false statements about the defendant's business.

Specifically, in the charged Bank of America PPP application (Counts 4 and 5 in the Indictment), the defendant represented that Sosuda had 353 employees and an average monthly payroll of $3,000,000. In the second Bank of America application, the defendant claimed that Sosuda had 95 employees and an average monthly payroll of $800,000. The defendant also provided Bank of America with an IRS Form 940 and an IRS Form 941. The numbers in these tax forms were different from the numbers in the tax forms originally submitted with the charged application to Bank of America.

In the charged Lendio PPP application, the defendant represented that Sosuda had 18 employees and an average monthly payroll of $150,000 (Count 1 in the Indictment). In the second Lendio application, the defendant claimed that Sosuda had 95 employees and an average monthly payroll of $800,000. The defendant also submitted an IRS Form 941 that was different from the IRS Form 941 submitted with the charged application to Lendio, and provided Lendio with a list of 108 purported Sosuda employees—all with alleged start dates in 2019.

Second, the United States seeks to introduce documentary evidence and elicit testimony that the defendant applied for EIDL through the SBA on or about March 30, 2020, and thereafter received a $10,000 EIDL advance on or about April 21, 2020. As part of the EIDL application process, the

defendant made misrepresentations regarding Sosuda's number of employees and gross revenue. Specifically, the defendant represented that Sosuda had 18 employees and that Sosuda had $200,000 in gross revenues for the twelve months prior to January 31, 2020. However, in his 2019 state tax filings, the defendant represented that Sosuda paid no wages and had $0 in gross receipts or sales. Bank records from Sosuda's account at Bank of America show that upon receipt of the EIDL advance, the defendant wired approximately $7,300 to India.

Third, the United States seeks to introduce documentary evidence and elicit testimony that the defendant applied for and collected unemployment benefits from the Massachusetts DUA in 2019 and 2020, during the time he was purportedly working for Sosuda. Specifically, records reveal that in or around February 2019, the defendant submitted an application for unemployment benefits. He then collected approximately $26,448 in benefits between on or about March 16, 2019 through on or about September 10, 2019. According to the defendant's PPP and EIDL applications—as well as incorporation records—the defendant started Sosuda in May 2019. As such, he was collecting unemployment benefits for approximately five months while he was the founder and CEO of a company. Further, on or about May 17, 2020, the defendant applied for unemployment benefits again and specifically requested that he receive backpay benefits for part of March 2020 and all of April 2020. In his May 2020 application, the defendant represented that his employer was HTC Global Services Inc. and he had been laid off. Nowhere in the application did the defendant mention Sosuda. The defendant then collected unemployment benefits between on or about June 1, 2020, through on or about December 29, 2020. Further, the government will introduce evidence that while receiving his unemployment benefits, the defendant filled out weekly continued claim forms in which he certified he was not working despite representing he was the owner and CEO of Sosuda and claiming he was involved in the operations of Sosuda on his state tax return.

It is well-settled that evidence of other acts that are "intrinsic to the crime for which the defendant is on trial" are admissible without regard for the requirements of Federal Rule of Evidence 404(b). *United States v. Epstein*, 426 F.3d 431, 439 (1st Cir. 2005) (citation and internal quotation marks omitted) (affirming admission of the defendant's tax return because the return was "intertwined with the crime" insofar as it reported some of the income he received from the wire fraud scheme, but not all of it, suggesting knowledge of the fraud); *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40 (1st Cir. 2004) (evidence that defendant threatened his child's mother admissible as "necessary description of the events leading up to the" charged crime of international parental kidnapping, and "intrinsic evidence" of intent, which was an element of the charged offense); *United States v. Taylor*, 284 F.3d 95, 101 (1st Cir. 2002) (affirming admission of reference to defendant's prior drug transaction on consensual recording with cooperating witness "as part and parcel of an on-going conversation taking place during the crime itself," and citing *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994), for the proposition that "Rule 404(b) is not applicable to evidence of crimes that are necessary to complete the story of the charged crime").

i. The Multiple Loan Applications are Intrinsic

Each of the defendant's loan applications, including the additional PPP loan applications to Bank of America and Lendio and the EIDL application provided the defendant with a fresh opportunity to try to obtain money set aside for small business relief during the COVID-19 pandemic. The information contained in the uncharged loans is evidence that the information the defendant submitted in the charged PPP applications was false and was intended to defraud the PPP lenders and loan processors. Furthermore, the PPP and EIDL programs were closely related; in addition to the similarities in their operation and purpose, PPP applications required borrowers to factor in any EIDL money—including advances on their loans—they had received as part of their PPP loan calculation. Therefore, because testimony and evidence concerning the submission of applications for PPP and

EIDL loans are part of the same "criminal episode" charged in the Indictment, they are inextricably intertwined and should be admitted. *See United States v. Souza,* 740 F.3d 74, 84 (1st Cir. 2014)("Intrinsic evidence includes prior acts that are 'part of [the] necessary description of the events leading up to the crime[]"]; *see also, United States v. v. Cooks*, 589 F.3d 173, 182 (5th Cir. 2009) (in mortgage fraud case, district court did not abuse its discretion by admitting extrinsic acts evidence that defendant engineered fraudulent real estate deals substantially similar to those charged in indictment).

ii. The Unemployment Benefits Are Intrinsic

Further, introducing evidence and testimony that the defendant applied for and received unemployment benefits in 2019 and 2020 provides necessary context for the defendant's offenses. Specifically, the fact that the defendant was applying for and receiving unemployment benefits at the same time he was claiming to run a company and claiming to have hundreds of employees and hundreds of thousands, even millions, in average monthly payroll is further evidence of the fraud. In addition, the fact that the defendant did not reference Sosuda in his 2020 application for unemployment benefits and filled out weekly claim forms confirming he was not working is further evidence of his fraud. This evidence "is admissible to 'complete the story of the crime by proving the immediate context of events in time and place.'" *See United States v. Simon*, 12 F.4th 1, 47 (1st Cir. 2021) (evidence of defendant's prior employment was intrinsic to aspects of the charged offense).

iii. If the Evidence Is Extrinsic, It Is Nonetheless Admissible Under 404(b)

If the Court determines that the anticipated testimony and documentary evidence is extrinsic, it should nonetheless be admitted as proof of motive, intent, knowledge and absence of mistake. Specifically, the fact that the defendant received unemployment benefits while he was the CEO of Sosuda and while he was applying for the PPP loans is evidence of motive to engage in the fraud scheme. *See United States v. O'Neil*, 839 F. Supp. 2d 1030, 1036 (S.D. Iowa, 2011) (the defendant's

unemployment history relevant to show motive for the defendant's alleged activities and not unfairly prejudicial to the defendant). It is also necessary to show the absence of any mistake—while applying for PPP loans on behalf of Sosuda and falsely claiming that the company had several employees and hundreds of thousands of dollars in monthly payroll, the defendant failed to list Sosuda on his unemployment application or his weekly claim forms.

At the same time, the other acts evidence is not unfairly prejudicial. None of the evidence involves conduct that is "unduly inflammatory." *United States v. Van Horn*, 277 F.3d 48, 48 (1st Cir. 2002). *Cf. United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir 1990) (in prosecution for conspiracy to distribute drugs, evidence of defendant's prior drug dealing with co-conspirator was not unduly prejudicial insofar as it "did not involve conduct any more sensational or disturbing than the crimes" charged). Put simply, the unemployment evidence and the other loans at issue concern the same company and the same types of misrepresentations. Accordingly, given the highly probative value of the evidence, any prejudicial impact is, by comparison, insufficient to justify its exclusion. Moreover, any such prejudice can be mitigated by a cautionary instruction that limits the jury's consideration of other acts evidence to the specific purposes for which it is admitted.

B. Introduction of Business Records and Public Records

The government intends to introduce business records—specifically, loan applications, supporting documents submitted with the loan applications, and bank account records, under Fed. R. Evid. 803(6) and 902(11) and anticipates filing stipulations concerning the same. As is required by Fed. R. Evid. 902(11), the government provided counsel for the defendant with copies of these records. Copies of certifications obtained pursuant to Fed. R. Evid. 902(11) were also previously provided, alongside notice of the government's intent to introduce the exhibits without the need for the testimony of a records custodian.

The government also requested the defendant's stipulation to the records' admissibility. Business records may be admissible as self-authenticating, non-hearsay evidence "if certified according to Fed. R. Evid. 902(11). *See Federal Trade Comm. v. Direct Marketing Concepts, Inc*., 624 F.3d 1, 16 (1st Cir. 2010). Rule 902(11) provides for the admissibility of "[t]he original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court." Fed. R. Evid. 902(11). The declaration under rule 902(11) must establish that:

> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; [and]
>
> (C) making the record was a regular practice of that activity ....

Id. R. 803(6). The court should admit the offered records as business records under rule 803(6) that are properly certified as authentic copies of domestic records under 902(11). Because these records were created automatically in the ordinary course of their business operations, and not created for the purpose of this prosecution, their admission without a live witness does not present Confrontation Clause issues of the type underlying the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *See United States v. Cameron*, 699 F.3d 621, 641-42 (1st Cir. 2012) (Yahoo! and Google subscriber records not created for the purpose of the prosecution are non-testimonial). The underlying records are accordingly admissible pursuant to Fed. R. Evid. 803(6) and 902(11). *See also Crawford*, 541 U.S. at 56 (noting that business records are non-testimonial "by their nature").

The government also intends to introduce public records—specifically incorporation documents, under Fed. R. Evid. 803(8) and anticipates filing stipulations concerning the same. Rule

803(8) provides an exception to the hearsay rule for public records from a public agency or office, relating to an activity of the office. "Records kept . . . [b]y public agencies may be admissible under the business records exception, Fed. R. Evid. 803(6), as well as under the public records exception, Fed. R. Evid. 803(8)." *United States v. Bohrer*, 807 F.2d 159, 162 (10th Cir. 1986) (internal citations omitted).

C. Statements of the Defendant

As previously indicated in the government's notice, at this time, the government does not intend to introduce audio recordings of the defendant in its case-in-chief. Dkt. 127. However, the government expects to offer the defendant's email communications and loan applications prepared by the defendant. Some of these written statements were obtained from lenders and others were obtained from the defendant's house in connection with a premises search warrant. These statements are not hearsay. *See* Fed. R. Evid. 801(d)(2).

The government will offer emails with defendant as business records authenticated through Rule 902(11), as these emails were obtained from lender and loan processors. Some of the emails from the defendant include responses to email chains where the entire chain is needed for context. Again, these statements are not hearsay when offered by the government against the defendant. Fed. R. Evid. 801(d)(2).

The government will also offer records that were obtained from the search of the defendant's residence in connection with his arrest. These records include loan applications signed by the defendant, supporting documents for those loan applications, email communications, and handwritten notes. The government intends to authenticate these records through a federal agent who was present for the arrest. The government has filed a stipulation to the same.

As provided in more detail in the government's omnibus motion *in limine*, Dkt. 104, these statements remain inadmissible hearsay when offered by the defendant. *See United States v. Rivera-*

Hernandez, 497 F.3d 71, 80 (1st Cir. 2007) (citing Fed. R. Evid. 801, 802); *see also, United States v. Palow*, 777 F.2d 52,56 (1st Cir. 1985) (holding that Rule 801(d)(2)(A) was "designed to exclude the introduction of self-serving statements by the party making them"). Indeed, the defendant is not permitted to circumvent this rule by eliciting the defendant's statements through the cross-examination of other witnesses. *United States v. Bauzo-Santiago*, 49 F. Supp. 3d 155, 157 (D.P.R. 2014) (prohibiting defendant from eliciting defendant's "out-of-court statement during cross-examination of government witnesses to impeach the witnesses") (citing *Bemis v. Edwards,* 45 F.3d 1369, 1372 (9th Cir. 1995) and *United States v. Hudson,* 970 F.2d 948, 956 (1st Cir. 1992)).

D. Summary Charts

Three types of summaries and charts are typically used in criminal cases: (1) summaries of voluminous records which may be admissible pursuant to Fed. R. Evid. 1006; (2) summaries created by a witness which may be admitted pursuant to Fed. R. Evid. 611(a); and (3) demonstratives or pedagogical charts that are used as testimonial aids, but which are not themselves introduced into evidence. The government may seek to use summaries and charts falling within all three categories.

i. Fed. R. Evid. 1006 Summary Schedules

Federal Rule of Evidence 1006 allows the "contents of voluminous writings . . . which cannot conveniently be examined in court [to] be presented in the form of a chart, summary, or calculation." *See* Fed. R. Evid. 1006; *United States v. Milkiewicz*, 470 F.3d 390, 396 (1st Cir. 2006). The underlying records used to prepare Rule 1006 summaries are not usually admitted into evidence although they can be. The proponent must show that the voluminous source materials are what the proponent claims them to be, and that the summary accurately summarizes the source materials. *Milkiewicz*, 470 F.3d at 396.

The government will offer into evidence summaries of bank account records of the defendant and his company, Sosuda, as well as summaries of the multiple loan applications and supporting

documentation submitted by the defendant. The bank record summaries will be offered through Special Agent Lauren Munoz, a Certified Public Accountant, who reviewed and summarized the bank account records. The loan record summaries will be offered through Special Agent Jeff Thomson, who reviewed and summarized the loan records.

The records on which the summaries are based are routinely kept in the normal course of business and fall within the hearsay exception of Rule 803(6). The underlying records have been made available to the defense.

ii. Fed. R. Evid. 611(a) Summary Testimony and Schedules

Federal Rule of Evidence 611, addressing the Mode and Order of the Interrogation of Witnesses, gives the Court great discretion in what a witness may use during testimony so as to "(1) make the presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time." Fed. R. Evid. 611(a); *see Milkiewicz*, 470 F.3d at 396 (explaining that a trial judge may allow use of a chart or other summary tool under Rule 611(a)). Such summaries are typically used to clarify and simplify complex information or to assist counsel in the presentation of argument to the court jury. *Id.* (quoting *United States v. Bray,* 139 F.3d 1104, 1111 (6th Cir. 1998)).

In the event the summaries described in the above section are not considered to summarize voluminous records under Rule 1006, they should be admissible under Rule 611. Such summaries themselves can also be properly admitted into evidence. *See Milkiewicz*, 470 F.3d at 398 (noting that such "pedagogical devices may be sufficiently accurate and reliably that they, too, are admissible in evidence, even though they do not meet the specific requirements of Rule 1006"). *See also, United States v. McElroy,* 587 F.3d 73, 92 (1st Cir. 2009)(upholding the trial court's admission of summary charts and summary testimony under Rule 1006 and 611(a)).

iii. Demonstrative Charts

The government also intends to use various demonstrative charts during its opening statement, examination of witnesses, and in closing argument. Such charts include, for example, diagrams showing the flow of the loan proceeds. The government does not intend to offer these charts into evidence. Courts have repeatedly allowed use of charts similar to those the United States intends to use in this case. *See, e.g., United States v. Scales*, 594 F.2d 558, 561-562 (6th Cir. 1979) (summary of indictment); *United States v. Stephens*, 779 F.2d 232, 238 (5th Cir. 1985) (simple flow charts tracing the defendant's use of loan proceeds).

E. Stipulations

In addition to the stipulation concerning business records, the government and the defendant have filed a second stipulation as evidence in this case. Dkt. 109. The stipulation provides the following: (1) that the Internet Protocol address 24.147.239.156 was subscribed to by the defendant Elijah Buoi and his wife; (2) that the defendant transmitted the Lendio PPP application identified in Count 1 in interstate commerce; (3) that the defendant transmitted the Fundbox PPP application identified in Count 2 in interstate commerce; (4) that the defendant transmitted the Newtek PPP application in Count 3 in interstate commerce; (5) that Fundbox transmitted $2,000,000 in loan funds in Count 4 in interstate commerce; and (6) that Bank of America is a financial institution whose deposits were insured by the Federal Deposit Insurance Corporation. The government will offer this stipulation at trial.

F. The Use of Documents Authored by Law Enforcement to Impeach Witnesses

The defendant should not be permitted to use documents authored by law enforcement, including but not limited to summaries of witness interviews commonly referred to as "302s" or "MOIs," to impeach interviewees on the basis of inconsistent statements if they are called by the government as witnesses at trial.

Witnesses may only be impeached with their own prior statements, and law enforcement interview summaries are not the statements of the witnesses themselves. The Supreme Court has recognized that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations." *Palermo v. United States*, 360 U.S. 343, 350 (1959).

In taking notes and preparing 302s or similar summaries, investigating agents necessarily exercise discretion by including their characterization of only those segments of a witness's interview to which the agents assign importance and relevance. As a result, the memoranda are not the "statements" of the interviewee. *United States v. Foley*, 871 F.2d 235, 239 (1st Cir. 1989) ("It is plain that the 302s are not substantially verbatim recitals . . . . and recorded contemporaneously.")

In this circumstance, the defense should be limited to using the interview summaries in a manner that does not lead the jury to believe that the interview summaries are the witnesses' prior statements. To allow otherwise would subvert the meaning of the Jencks Act and the Supreme Court's decision in *Palermo,* 360 U.S. at 350. The defendant, of course, may ask a witness whether he or she made a statement reflected in an interview summary. However, if the defense is not satisfied with the witness's answer, the defense should not be allowed to suggest to the witness or to the jury that the interview summary is the witness's prior statement or to publish or to introduce the contents of the interview summary as a prior inconsistent statement, absent a showing that the witness adopted the interview summary as his or her statement.

G. Defendant's Proposed Exhibits

On February 10, 2022, counsel for the defendant provided the government with the defendant's first exhibit list via e-mail. The list was not filed on the docket. Counsel informed the government that he was still waiting for the actual exhibits and would forward them as soon as a possible. The defendant's exhibit list indicates that the defendant intends to produce documents

related to the defendants' company that were "prepared by Mr. Buoi during the course of normal business operations." The government anticipates challenging the authenticity and admissibility of those documents. However, until the government receives the records, it cannot properly put those challenges before the Court.

Conclusion

The United States respectfully reserves the right to address legal and evidentiary issues that may arise during the course of trial.

Respectfully Submitted,

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Certificate of Service

I, Mackenzie A. Queenin, hereby certify that this document was this day filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing ("NEF").

Date: February 10, 2022

/s/ Mackenzie A. Queenin
Mackenzie A. Queenin