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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH MITSUYOSHI KANESHIRO (1),
DENNIS KUNIYUKI MITSUNAGA (2),
TERRI ANN OTANI (3),
AARON SHUNICHI FUJII (4),
CHAD MICHAEL MCDONALD (5),
SHERI JEAN TANAKA (6),

Defendants.

Case No. CR-22-00048-TMB-WRP

DEFENDANTS' SEALED RESPONSE TO GOVERNMENT'S SEALED MOTION *IN LIMINE* NO. 5; CERTIFICATE OF SERVICE

Judge: Hon. Timothy M. Burgess
Trial Date: February 27, 2024

[UNDER SEAL]

Defendants Dennis Kuniyuki Mitsunaga, Terri Ann Otani, Aaron Shunichi Fujii, Chad Michael McDonald and Sheri Jean Tanaka ("MAI Defendants") and defendant Keith Mitsuyoshi Kaneshiro hereby respond to United States' Motion *in Limine* No. 5 to Admit Evidence of Grand Jury Obstruction ("Motion").

The government contends that the MAI defendants, individually and collectively, "engaged in a coordinated effort to thwart the investigation into their conduct," which allegedly included "dodging grand jury subpoenas, giving false testimony to the grand jury, reading prepared speeches, instructing witnesses not to testify, and wrongfully invoking the Fifth Amendment." Motion at 1-2. Defendants' Motion *in Limine* Nos. 12 and 16 ("MIL-12" and "MIL-16") sought to preclude this category of evidence, which relates to an alleged third conspiracy that occurred years after the two conspiracies alleged in the First Superseding Indictment ended ("Uncharged Third Conspiracy").

This evidence should be excluded from trial for the reasons previously set forth in Defendants' MIL-12 (ECF 344) and MIL-16 (ECF 347). To the extent that the government raises any arguments that were not anticipated by the earlier defense motions, they are addressed below.

ARGUMENT

The Court should deny the government's Motion for two fundamental reasons:

First, none of the conduct identified by the government, individually or taken as a whole, satisfies the Ninth Circuit's standards for Rule 404(b) admissibility.

Unsurprisingly, the government ignores the exacting four-part test for "other act" admissibility established in *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012). In MIL-12, Defendants explained at length how, under *Bailey,* evidence of the alleged Uncharged Third Conspiracy (1) fails to prove a material point, (2) is too remote in time, (3) does not establish that a particular defendant committed the other act, and (4) is not similar to the crimes charged in the FSI. Defendants incorporate that argument here by reference. *See* MIL-12 at PageID.6885-91.

Second, even if evidence of the Uncharged Third Conspiracy satisfied the *Bailey* standard for the admissibility of "other act" evidence, which it does not, its minimal probative value would be outweighed by the danger of unfair prejudice, wasting time, confusing the issues, and misleading the jury under Rule 403. Defendants made this argument in depth in MIL-12. **Waste of time** would result from a "trial within a trial" focused on whether this supposed Uncharged Third Conspiracy actually occurred. **Undue Prejudice** would result if the government were allowed to imply additional criminal wrongdoing (uncharged "obstruction"), encouraging the jury to find the defendants guilty of that uncharged conduct (while remaining ignorant of its elements), and thereby increase the chances of conviction on the actual charged offenses. **Confusing the Issues** is also likely, because two conspiracies are already charged in the FSI, and permitting the government to argue the existence of the Uncharged Third Conspiracy will create additional grounds for confusion in an already complex case. Defendants' full Rule 403 argument is set

forth in MIL-12 and incorporated by reference here. *See Id.* at PageID.6891-93.

The government's theory of relevance is circuitous, speculative and weak. The government does not contend that any of the conduct it calls "grand jury obstruction" provides *direct* proof of any element of any crime charged in the FSI. Its theory is far more attenuated: that (1) individuals associated with MAI did or said things related to the grand jury proceedings; (2) those acts are proof of a conspiracy by *others*, the MAI Defendants, to obstruct the grand jury; and (3) this Uncharged Third Conspiracy collectively establishes consciousness of guilt for all MAI Defendants.

The government's belt-and-suspenders theory of relevance distinguishes this case from others in which courts have admitted Rule 404(b) evidence to show consciousness of guilt. In those cases, consciousness of guilt *of a defendant* was inferred from the conduct *of that defendant.* For example, in *United States v. Brashier*, 548 F.2d 1315, 1325 (9th Cir. 1976), on which the government relies, defendant Brashier told his secretary to tell the SEC falsely that she knew nothing of his business activities. The Ninth Circuit found that such conduct could "indicate consciousness of guilt" for Brashier himself—but never suggested this could be imputed to his co-defendant. *Id.* at 1325-26. The government cites no case in which a court ever permitted a jury to infer consciousness of guilt for a defendant from the actions or statements of *somebody else*. Nor could it in the wake of the Supreme Court's decision in *Huddleston v. United States*, 485 U.S. 681, 685 n.2 & 689 (1988) (recognizing a series of Circuits "allow the admission of similar act evidence if the

evidence is sufficient to allow the jury to find that *the defendant* committed the act," and explaining that "[i]n the 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred, *and the defendant* was the actor.") Indeed, the whole reason behind admitting "other acts" evidence is to use a defendant's actions to ascertain that defendant's mental state. *Id.*

In its Motion, the government has argued a few points and cited a few authorities that did not appear in its 404(b) Notice. For the reasons set forth below, none of these render this other act evidence admissible under Rule 404(b), nor change the result of the Rule 403 balancing analysis. The evidence should be excluded, and the government's Motion *in Limine* No. 5 should be denied.

A. The Court Should Exclude Any Evidence for Which the Government Failed to Provide Required Rule 404(b) Notice.

Judge Seabright had set January 16, 2024 as the government's deadline for providing notice of its intent to use "other act" evidence, pursuant to Rule 404(b)(3). In its Notice (ECF 336) the government failed to identify several items of evidence that it now seeks to admit in its Motion. Based on this failure, the Court should exclude the following evidence from trial. Although these acts were not performed by any of the Defendants, this "other act" evidence is subject to Rule 404(b) because the government contends that the acts were done at the direction of the MAI Defendants—that is, as part of the Uncharged Third Conspiracy to obstruct.

The non-noticed acts are as follows:

1. Arnold Koya's alleged efforts to avoid being served with grand jury subpoenas.

2. Contents of alleged "prepared statements." The government previously gave notice that it would seek to introduce evidence of "prepared speeches conveying false information about the lead prosecutor to the grand jury." ECF 336, PageID.6273-74. It now seeks to introduce additional information from those statements unrelated to the lead prosecutor, such as criticism of the FBI by witness Steven Wong.

3. Written Statement by Lois Mitsunaga. The government previously gave notice it would seek to introduce a statement by Ms. Mitsunaga, that she believed that the "prosecutor was going to appeal the decision, but for some reason, that was never done." It now seeks to introduce at least three other statements by her. Motion at 7-8.

The Court should exclude this evidence, together with any and all 404(b) evidence that was not specifically mentioned in the government's Notice or for which the government failed to provide the permitted purpose for which the evidence is offered and "the reasoning that supports the purposed." Rule 404(b)(3)(B). [1]

B. Invocation of the Fifth Amendment by Grand Jury Witnesses Cannot Establish "Consciousness of Guilt."

The government seeks to introduce the fact that defendant Otani, as well as witnesses Wong, Koya, and Joann Fujii invoked their Fifth Amendment rights before the grand jury. Motion at 10. The introduction of such evidence is plainly improper,

[1] In its Notice, the government repeatedly argued that the alleged grand jury "obstruction" was probative of the *modus operandi* of the MAI Defendants. The government appears to have abandoned this rationale and now argues solely that this "other act" conduct tends to prove consciousness of guilt.

and the government fails to articulate *any* theory of relevance to support its position. As previously discussed in Defendants' MIL-12, it would be unconstitutional for a jury to rely on such 404(b) evidence to establish "consciousness of guilt," even if asserted in an allegedly "blanket" fashion. *Id.* at PageID.6887-88; *see, e.g., Griffin v. California,* 380 U.S. 609 (1965) (forbidding instruction by court that criminal defendant's silence is evidence of guilt); *United States v. Tillman*, 470 F.2d 142 (3d Cir. 1972) (comment on defendant's silence effectively forces defendant to testify against himself).

C. "Prepared Speeches" of Grand Jury Witnesses.

The government seeks to introduce the content of "prepared speeches" made to the grand jury by four non-defendant individuals, specifically Steven Wong, JoAnn Fujii, Arnold Koya, and Ryan Shindo. Motion at 4-5. These "prepared speeches" do not satisfy the Ninth Circuit's standard for admissibility under Rule 404(b), and should also be excluded under Rule 403 because their non-existent probative value is outweighed by the risks of waste of time, unfair prejudice, misleading the jury, and confusion of issues. *See* MIL-12 at PageID.6687-93.

The government argues that the speeches are probative of the alleged Uncharged Third Conspiracy and defendants' consciousness of guilt, because they "falsely denigrated the prosecutor assisting the grand jury investigation." Motion at 6-7. For example, the statement of Ryan Shindo contended that the FBI, at the direction of Special Attorney Michael Wheat, "harassed, terrorized and endangered

myself and my children" in the course of a rush-hour traffic stop, that Mr. Wheat engaged in "appalling conduct" that was "an abusive tactic," and that his conduct was "unethical" and an "abuse of power." *See* Govt. Sealed Exh. 2.

Saying mean things about the FBI or a federal prosecutor, however, is not obstruction of the grand jury. Although Mr. Wheat is plainly upset that witnesses called him names, the Court should remind the prosecution team that this case is not about them. Moreover, given that Mr. Wheat will be in the courtroom prosecuting this case, allowing such evidence would be far more prejudicial than probative under Rule 404. Upon hearing such strongly-worded accusations, the jury may feel sorry for Mr. Wheat and therefore sympathize with the prosecution team as individuals. Permitting the government to play to the jury's emotions in this way is plainly improper and extremely prejudicial. This evidence should be excluded.

D. Written Statement of Lois Mitsunaga

The government seeks to introduce a written statement that non-defendant Lois Mitsunaga provided to the grand jury at the start of her testimony on April 1, 2021. Motion at 7-8; Govt. Exh. 3. The government contends that part of this statement is properly offered for the truth of the matter asserted under Rule 801(d)(2)(D), on the theory that Ms. Mitsunaga was "speaking as an agent and employee of MAI and, ultimately, her father and CEO Dennis Mitsunaga." Motion at 8.

The government's rationale withers under scrutiny. It is true that Ms. Mitsunaga was an employee and agent of the *corporation*, and that her statements to

the grand jury established this. Ms. Mitsunaga's statement in these capacities would likely be admissible as non-hearsay *against MAI*—but the corporation is not a party to this case.

The government therefore argues (in fact posits) that, simply because Ms. Mitsunaga was acting as an agent and employee of MAI, she is "ultimately" an agent and employee of her father. Motion at 8. The government, however, cites no other evidence to establish an employer/employee or principal/agent relationship between Dennis Mitsunaga as an individual and Lois Mitsunaga. A daughter does not become a father's agent or employee simply by virtue of the family tie. "To form an agency relationship, both the principal and the agent must manifest assent to the principal's right to control the agent." *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) (citing Restatement (Third) Agency § 1.01). There is zero evidence to support such a relationship nor does the government provide any. Therefore, this is insufficient under Rule 801(d)(2)(D).

Moreover, even if the statement were admissible under Rule 801(d)(2)(D), it would only be admissible against defendant Dennis Mitsunaga. The government does not argue, and there is no basis for finding, that Lois Mitsunaga was the employee or agent of any other defendant.

For these reasons, the Court should preclude the government from offering Lois Mitsunaga's written statement for the truth of the matter asserted.

E. Service of Subpoena on Arnold Koya

The government had difficulty serving non-defendant Arnold Koya with a grand jury subpoena, and it appears that he was a reluctant witness. Nevertheless, his situation was unique: none of the other 17 MAI-affiliated witnesses were hauled before the grand jury via an arrest warrant after allegedly ignoring subpoenas.

This incident has no probative value for the purposes of this case. First, Mr. Koya is not a defendant, and there is no evidence that his conduct was directed by the MAI Defendants as a whole. Second, avoiding service of a subpoena does not constitute grand jury obstruction or consciousness of guilt, even if it creates extra work for the FBI. Courts have typically found obstructive conduct to raise an inference of consciousness of guilt only in situations involving conduct such as "threatening or bribing a witness, fleeing from prosecution, and destruction or suppression of evidence." *See, e.g., United States v. Skeddle,* 981 F. Supp. 1074, 1076 (N.D. Ohio 1997) (collecting cases). The government cites no authority for the proposition that an individual's efforts to avoid a subpoena can be imputed to another individual. *See* Defendants' MIL-12 at PageID.6887-89, incorporated herein by reference.

The government asserts that "Tanaka's fingerprints are all over" Mr. Koya's alleged efforts to avoid subpoenas and obstruct the grand jury, and emphasizes that phone records show that she was in contact with him during this time period. Motion at 9-10. Mr. Koya was represented by Ms. Tanaka at the time, and the fact that a

client was talking to his lawyer after becoming aware of grand jury proceedings involving himself is hardly unusual. To the contrary, what *would* be unusual is the absence of any such calls. At no time did the government ever approach Ms. Tanaka to ask about Mr. Koya's whereabouts or if she could accept service on his behalf.

Mr. Koya's conduct, therefore, is not probative of the alleged Uncharged Third Conspiracy or the consciousness of guilt of any Defendant. Its probative value under Rule 403 is greatly outweighed by the dangers of unfair prejudice, waste of time and confusion of issues. *See* Defendants' MIL-12 at PageID.6891-93.

F. Defendant Otani's Communications with J.H.

The government seeks to elicit testimony from R.A. and J.A., relatives of defendant Otani, that Ms. Otani tried to influence the grand jury testimony of J.H. Motion at 2-4.

The government relies on *United States v. Brashier*, 548 F.2d 1325 (9th Cir. 1976) to argue that this evidence of Ms. Otani's conduct is admissible. *Brashier*, however, was decided 36 years before the Ninth Circuit's decision in *United States v. Bailey*, which establishes the four-part standard for the admission of Rule 404(b) evidence. Under that standard, the "other act" evidence is clearly inadmissible, for the reasons previously set forth in Defendants' MIL-16. *See Id.* at PageID.7156-58.

CONCLUSION

For the foregoing reasons, the Court should deny the government's Motion *in Limine* No. 5.

Respectfully submitted,

DATED: February 2, 2024

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