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DISTRICT OF HAWAII
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UNITED STATES DISTRICT COURT
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.

CR No. 22-00048-TMB-WRP

UNITED STATES' UNREDACTED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* NO. 12, ECF 344

UNDER SEAL

UNITED STATES' UNREDACTED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* NO. 12

INTRODUCTION

In their twelfth Motion in Limine ("MIL 12"), Defendants admit the unremarkable proposition that concealing evidence of a crime—such as by "flush[ing] narcotics down the toilet when the police knock"—demonstrates consciousness of guilt for the underlying crime. ECF No. 344 at 9. As outlined in the United States' sealed Motion in Limine No. 5 ("Sealed MIL 5"), when the grand jury knocked on the door here, Defendant Tanaka orchestrated a desperate effort to hide the underlying crimes in this case. That included dodging subpoenas, injecting false, scripted speeches to the grand jury, and repeatedly abusing the Fifth Amendment. These acts are relevant for proving consciousness of guilt of the underlying crimes. Defendants claim it is "shocking" that the United States would seek to use invocations of the Fifth Amendment as evidence of obstruction. But corrupt efforts to persuade witnesses to wrongfully invoke the Fifth Amendment, as the evidence supports occurred here, is blackletter obstruction. *See Cole v. United States*, 329 F.2d 437, 443 (9th Cir. 1964) ("[O]ne who . . . advises with corrupt motive the witness to take [the Fifth Amendment], can and does himself obstruct or influence the due administration of justice."). Defendants' MIL 12 should be denied.

BACKGROUND

There was an extensive grand jury investigation in this case. As the Court outlined in its order at ECF No. 315, "over 80 witnesses" testified over a 14-month span. Those witnesses included three defendants in this case—Otani, Fujii, and

McDonald. The United States intends to play recordings of portions of their testimony at trial (admissible as party-opponent statements). The admissibility of their testimony is not the subject of the instant motion.

Nearly two dozen other witnesses employed or affiliated with Mitsunaga & Associates, Inc. ("MAI"), were called to the grand jury to provide testimony. Every single MAI witness—whether executive, employee, spouse, or affiliate—was represented by Defendant Tanaka. The United States' Sealed MIL 5 outlines a range of obstructive acts perpetrated by these witnesses, orchestrated by Tanaka. *See also* Sealed ECF No. 288 (outlining fuller range of obstructive conduct). In sum, led by Tanaka, the MAI machine was activated in force to prevent the grand jury from uncovering the crimes in this case. This evidence—revealing a desperate attempt to hide the truth—is highly probative evidence of consciousness of guilt. *See United States v. Brashier*, 548 F.2d 1315, 1325 (9th Cir. 1976).

That includes the bizarre exchange where MAI employee Steven Wong—on advice of Defendant Tanaka—immediately began reading from a script he admitted was not true that included a directive to "REPEAT ABOVE STATEMENT AGAIN AND AGAIN" in response to any questions. *See* Sealed ECF No. 288 at 11. Wong was not alone in filibustering the grand jury and refusing to answer questions. Joann Fujii (the wife of Defendant Fujii), recited her speech—which began "I hereby invoke my Fifth Amendment right against self-incrimination in good faith"—again and again, to every question asked, including "How are you feeling today," and "Are

you in need of medical attention?" *Id.* at 13. Arnold Koya (MAI vice president), Defendant Otani, and Ryan Shindo (MAI employee; also spouse of Defendant Mitsunaga's daughter, Lois) all read prepared, typed speeches at the beginning of their grand jury sessions. *See* United States' Sealed MIL 5 at 6–7; Sealed ECF No. 288 at 13–15. Mitsunaga's daughter, Lois Mitsunaga, Tanaka's former classmate and friend, also introduced a lengthy statement titled, "STATEMENT TO GRAND JURY REGARDING [L.J.M.] AND THE PROSECUTOR'S OFFICE." Exhibit 3 to Sealed MIL 5. This statement contained various lies. *See* Sealed MIL 5 at 7–8. Every one of these individuals was represented by Defendant Tanaka.[1]

In Sealed MIL 5, the United States also described MAI employee Arnold Koya's dodging of grand jury subpoenas to avoid appearing before the grand jury. Sealed MIL 5 at 9–10. The evidence establishes that Defendant Tanaka was aware of the attempted service efforts and participated in the subpoena dodging: she was talking to Koya throughout the service efforts.[2]

Finally, there is the tactic of multiple MAI witnesses—all represented by Defendant Tanaka—wrongfully invoking the Fifth Amendment. Sealed MIL 5 at 10

[1] Defendant Mitsunaga's wife, Chan Mitsunaga, also appeared before the grand jury. Besides confirming that Tanaka was her attorney, she simply repeated the words "I don't want to talk" in response to every question. Sealed ECF No. 288 at 16 n.11.

[2] Tanaka and Koya had no phone contact in 2021 before February 24, 2021, the first day the FBI attempted to serve Koya. At around 5:30 p.m., the FBI tried to serve Koya at his home; about 18 minutes later, Koya called Tanaka and they spoke for about nine minutes. At around 6:04 p.m., the FBI called Koya to arrange service; at about 6:51 p.m. Tanaka called Koya and they spoke for over five minutes. Tanaka and Koya exchanged several additional phone calls that evening.

(citing ECF No. 288 at 12–17). In the course of the MAI witnesses' obstructive conduct, Chief United States District Judge Derrick K. Watson and United States District Judges J. Michael Seabright, and Leslie E. Kobayashi each issued orders calling a halt to the wrongful conduct. *See, e.g.,* Sealed ECF No. 288 at 5–12.

ARGUMENT[3]

The coordinated effort to obstruct the grand jury investigation—with Defendant Tanaka as a common thread—is admissible as consciousness of guilt, as argued in the United States' Sealed MIL 5. Defendants' arguments to the contrary in Motion in Limine No. 12 are meritless.

1. Defendants claim the obstructive conduct is inadmissible because no one has been charged with obstruction. That is irrelevant. Rule 404(b) explicitly makes "[e]vidence of any other crime, wrong, or act" admissible for non-propensity purposes. Fed. R. Evid. 404(b). Rule 404(b)'s admissibility test is as follows:

> Such evidence may be admitted if: (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases)[4] the act is similar to the offense charged.

United States v. Bailey, 696 F.3d 794, 790 (9th Cir. 2012) (citation omitted).

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[3] Separately, in Sealed MIL 5, the United States moved to admit evidence that Defendant Otani tried to dissuade her niece—a purported Kaneshiro donor—from testifying against her. Sealed MIL 5 at 2–4. The Defendants have moved to exclude this evidence at their Motion in Limine No. 16. The United States' Sealed MIL 5 already addresses this argument; any further response will be included in our response to Defendants' Motion in Limine No. 16.

[4] Not here. *See United States v. Hadley*, 918 F.2d 848, 851 (9th Cir. 1990) ("[I]f used to prove intent, the prior act must be similar to the offense charged.").

Here, these factors support admission of the grand jury obstruction. First, the evidence of obstruction tends to prove consciousness of guilt. Why would Defendant Tanaka spearhead efforts to prevent the grand jury from getting answers to its questions? Because the grand jury was getting near the truth of the underlying crimes—including Tanaka's role in them. *See Brashier*, 548 F.2d at 1325 ("[T]he concealment of evidence subsequent to a commission of a crime . . . may indicate consciousness of guilt and should be placed before the trier of fact.").

Second, the evidence of obstruction—starting around three-and-a-half years after the end of the charged conspiracies—is not too "remote" in time. For actions of obstruction taken to conceal, the pertinent timing consideration is when authorities are looking for proof of the underlying crime. *See, e.g., United States v. Katakis*, 252 F. Supp. 3d 988, 995 (E.D. Cal. 2017), aff'd, 796 F. App'x 400 (9th Cir. 2020) (unpublished) ("Here, evidence regarding Katakis' attempts to delete emails after learning about the government investigation was highly probative in showing Katakis' consciousness of guilt, which outweighs any dangers of unfair prejudice. … The court also finds that the attempted deletion, one year after the end of the bid rigging conspiracy, was not too remote in time.").

Third, there is evidence sufficient to support a finding that Defendant Tanaka committed the obstructive acts or aided and abetted in committing them. Koya dodged his subpoena while in direct communication with Tanaka (the first day all year they had communicated by phone); Wong admitted Tanaka added the yellow

highlighting that directed him to "REPEAT ABOVE STATEMENT AGAIN AND AGAIN" to the grand jury; Tanaka represented all of the MAI witnesses, many of whom did the exact same thing when called before the grand jury, including wrongfully invoking the Fifth Amendment. This did not happen organically—it happened at Tanaka's direction, because she knew the underlying crimes—her own—were at risk of being discovered.

2. Defendants claim it is improper to assign certain false statements made by MAI witnesses to the charged defendants. For instance, they point to Michelle McDonald's false testimony, "I don't recall," and claim it is "frivolous" to assign any consciousness of guilt to the conspirators from this testimony. ECF No. 344 at 10. Defendants overlook significant facts. Like the other witnesses, Defendant Tanaka represented Michelle McDonald (Defendant McDonald's wife), who came to the grand jury and responded "I don't recall" to numerous questions. Even when asked, "Did someone tell you just to tell the Grand Jury I don't recall," she responded, "I don't recall." Sealed ECF No. 288 at 18. Later, upon being resummoned, she refused to answer any questions while reciting from this script:

> I think it is absolutely ridiculous that I had to return for a third time. I refuse to pay for bank records when all political contributions are public record. Given that I testified on March 4 and April 1, I hereby invoke my Fifth Amendment right and therefore I decline to answer all further questions.

Sealed ECF No. 288 at 14.

The collective weight upends the scales. It is inconceivable that witnesses—all represented by the same attorney—came to the grand jury and by happenstance

started engaging in the same obstructive conduct. Rather, Defendant Tanaka orchestrated the MAI witnesses' conduct in the grand jury, seeking to use them to prevent discovery of her and her conspirators' crimes.

3. The United States is not calling into question the ability of witnesses to invoke the Fifth Amendment. That is a given and well-enshrined. But in this case, in coordinated fashion, multiple witnesses—represented by Tanaka—flagrantly abused the Fifth Amendment, using it as a sword to cripple the grand jury's inquiry. The law is capable of discerning proper Fifth Amendment invocations and wrongful invocations designed to delay and obstruct. For instance, the Supreme Court has stated that "there may be instances where advice to plead the Fifth Amendment could be given in bad faith, or could be patently frivolous or for purposes of delay . . . ." *Maness v. Meyers*, 419 U.S. 449, 470 n.19 (1975). That is what occurred here.[5]

Defendants claim it is "shocking" that an invocation could be used as evidence of obstruction—but that has been true for decades. In *Cole v. United States*, 329 F.2d 437 (9th Cir. 1964), the Ninth Circuit affirmed the obstruction conviction of an individual who had pressed a grand jury witness to stand mute by invocation of the

[5] While the United States does not seek to introduce their rulings, the comments of the Court are illuminating here. Judge Watson ruled that Arnold Koya's conduct was "clearly improper"; Judge Seabright ordered Joann Fujii to cease her "clearly abusive invocation of the privilege"; Judge Kobayashi found Steven Wong had "made a mockery" of the grand jury "in bad faith" (and cautioned Tanaka that she was facing a "redline day," with "serious consequences" to flow if Tanaka had "clients who continue[d] to show up on your advice at the grand jury and read these general statements and take general blanket raising of Fifth Amendment privilege"). *See* Sealed ECF No. 288 at 16–17.

Fifth Amendment. According to the prosecution, the defendant's motive "was to protect both himself and a close friend from the slings and arrows of a pending grand jury investigation." *United States v. Cintolo*, 818 F.2d 980, 992 (1st Cir. 1987) (summarizing *Cole*). The Ninth Circuit stated that "the constitutional privilege against self-incrimination is an integral part of the due administration of justice, designed to do and further justice, and to the exercise of which there is an absolute right in every witness." *Cole*, 329 F.2d at 443. Nevertheless, while "[a] witness violates no duty to claim it, ... one who bribes, coerces, forces or threatens a witness to claim it, or advises with corrupt motive the witness to take it, can and does himself obstruct or influence the due administration of justice." *Id.*

In *Cintolo*, the First Circuit relied on *Cole* to find the following:

> *Cole*, to be sure, did not involve a lawyer-client relationship. Yet the case explicitly suggested that an attorney who *corruptly* advised a client to wind the toga of the fifth amendment about him could well be subject to obstruction of justice liability notwithstanding any 'privilege' he might claim to have in rendering such advice. After all, the highminded purposes which underlie the constitutional protection are disserved, not furthered, if a third party—lawyer or not—has carte blanche to manipulate an individual's use of the privilege corruptly to impede the due administration of justice.

Cintolo, 818 F.2d at 992 (citation omitted).

The conduct of Defendant Tanaka and the MAI witnesses fit squarely within the confines of *Maness*, *Cole*, and *Cintolo*. The MAI witnesses did not all spontaneously start doing the same thing—reading scripted speeches and wrongfully invoking the Fifth Amendment. These were actions coordinated by Defendant Tanaka. The full context proves this. Zooming in does too—such as where Wong

admitted Tanaka highlighted his script and encouraged him to read it "AGAIN AND AGAIN." The law rightly recognizes this as obstruction, a "prostitut[ion] [of] one of the great cornerstones of our freedom under law." *Cole*, 329 F.2d at 440.

This evidence is admissible, at a minimum, to show the consciousness of guilt of Defendant Tanaka, who acted as MAI's representative throughout all relevant proceedings and as the defendants' liaison to Kaneshiro's office during the charged conspiracies. It is also connected to each of the MAI defendants. During the grand jury investigation, Tanaka was acting as the agent of Defendants Mitsunaga, Otani, Fujii, and McDonald—she represented all of them. Her obstructive efforts were designed to shroud them all from the grand jury's inquiries.

4. Defendants claim Rule 404(b) requires the United States to prove the "other act" evidence was "committed by *all* of the MAI defendants." ECF No. 344 at 11 (emphasis added). They do not cite authority for that position. Nor is it true. Even where "other act" evidence only implicates one defendant, not the case here, the proper approach is to issue a limiting instruction. *See United States v. Williams*, 989 F.2d 1061, 1070 (9th Cir. 1993) ("Even if portions of Dreier's testimony could be categorized as 'other crimes' evidence, the district court would not have abused its discretion in admitting it. The additional acts predating the conspiracy pertained to Allen only, and the court issued a cautionary instruction as to Allen.").

5. Rule 403 does not exclude the obstructive conduct. The varied and bizarre efforts to obstruct the grand jury is highly probative of the conspirators'—at

least Tanaka's—knowledge of the underlying crimes. Why else so strenuously fight to keep the grand jury from doing its work? The jury should be permitted to weigh that evidence. Nor is the obstructive conduct "substantially outweighed" by any Rule 403 concern. It is not confusing—the concept of obstructing an investigation to conceal the truth is a simple concept. Nor is there a concern that the jury would somehow "find the defendants guilty of th[e] uncharged conduct." That is not a plausible outcome; the Court's instructions will clearly outline the elements of the charged offenses, and the United States recommends an instruction confining the jury's consideration of the obstructive conduct to consciousness of guilt. Finally, there is no "waste of time" in presenting this evidence, much less "waste of time" "substantially outweighing" the probative value of the evidence. Defendants claim the United States will have to call numerous witnesses to prove the conduct—but they ignore that *all* of the witnesses identified throughout are already on witness lists previously provided to the Court and accounted for in the trial estimate. Moreover, Defendants are wrong that "hearsay" objections would require proving these events through numerous witnesses. The transcripts and recordings of MAI witnesses reading speeches and wrongfully invoking the Fifth Amendment are not hearsay at all, as they would *not* be offered "to prove the truth of the matter asserted in the statement," both because many of the statements are either not true or cannot be true/false and because the statements demonstrate obstructive conduct independent of truth or falsity. Fed. R. Evid. 801(c)(2).

Dated: February 2, 2024

Respectfully submitted,

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/s/ Colin M. McDonald
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UNITED STATES DISTRICT COURT
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.	CR No. 22-00048-TMB-WRP CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Colin M. McDonald, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, CA 92101-8893.

I am not a party to the above-entitled action. Upon lodging on February 2, 2024, I will cause service of the United States' Unredacted Response to Defendants' Motion *in Limine* No. 12 upon the following via e-mail communication and/or an electronic file transfer service:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 2, 2024.

s/ *Colin M. McDonald*
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