UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. RAHIM SHAFA, NAHID TORMOSI SHAFA, A/K/A NAHID TORMOSI, Defendants	Case No. 4:20-cr-40021-MRG

UNITED STATES' OMNIBUS MOTION IN LIMINE

The United States respectfully moves to preclude testimony or argument regarding several issues that may arise during trial.

FACTUAL BACKGROUND

Defendant Rahim Shafa ("SHAFA") is a Massachusetts psychiatrist charged in a superseding indictment for his role in a scheme to import unapproved drugs into the United States, which he implanted and injected into patients. For this conduct, he is charged with conspiracy to commit international money laundering in violation of 18 U.S.C. § 1956(h) (Count 1); three counts of international money laundering in violation of 18 U.S.C. §§ 1956(a)(2)(A) and (2) (Counts 2-4); conspiracy to defraud the United States in violation of 18 U.S.C. § 371 (Count 5); three counts of importing merchandise contrary to law in violation of 18 U.S.C. §§ 545 and 2 (Counts 6-8); and one count of receipt and delivery of misbranded drugs in violation of 21 U.S.C. §§ 331(c) and 333 (Count 9). He also is charged with conspiracy to commit health care fraud relating to billing for services SHAFA did not render and based on false documentation in violation of 18 U.S.C. § 1349 (Count 10).

Defendant Tormosi Shafa (for clarity, referred herein as "TORMOSI") was SHAFA's wife and the office manager of his medical practice. She was involved in paying for the unapproved drugs and was responsible for billing at SHAFA's clinic. She was charged with SHAFA in the counts relating to conspiracy to commit international money (Count 1) and conspiracy to commit health care fraud (Count 10).

MOTION 1

The Defendants Should Be Precluded from Offering Evidence of Any Legitimate Medical Billings, Legitimate Prescriptions, or Other Good Conduct as a Defense to the Charges in the Superseding Indictment.

The Defendants should be precluded from arguing, eliciting on direct or cross-examination, or offering any evidence at trial of specific acts of good conduct, including evidence of: (1) the provision of legitimate services by SHAFA; (2) legitimate prescriptions by SHAFA; and (3) legitimate billing by the Defendants. Such evidence is not probative of the issues at trial and will serve only to confuse or to mislead the jury. Further, to the extent such evidence might have any probative value, it should nonetheless be excluded under Federal Rule of Evidence 403, because the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, and waste of time.

The Defendants should be precluded from arguing or presenting evidence of good conduct to counter the government's evidence as to the charges against them. SHAFA should not be allowed to present evidence of patients who believe he is a good person, services provided by SHAFA's practice that were supposedly helpful or effective, good conduct unrelated to the charges in this case.

As to the health care fraud conspiracy charge for billing for services not rendered, in a fraud case, evidence of other instances where the defendants did *not* commit fraud is irrelevant to the question of whether he *did* commit fraud in the instances alleged. This is a well-settled

proposition; many circuits have repeatedly held that evidence that a defendant engaged in legal, honest conduct some of the time has simply no bearing on whether the defendant engaged in, or had knowledge of, fraudulent conduct charged by the government. *See United States v. Kinsella*, 545 F. Supp. 2d 158, 161 (D. Me. 2008) (citing the "seminal case on Rule 405, *Michelson v. United States*, 335 U.S. 469, 477 (1948), and stating that defendants are "not permitted to ask questions about specific instances of good conduct or about specific character traits; *United States v. Dimora*, 750 F.3d 619, 630 (6th Cir. 2014) ("For the same reasons that prior 'bad acts' may not be used to show predisposition to commit crimes, prior 'good acts' generally may not be used to show a predisposition not to commit crimes."); *see also United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008) (affirming district court's ruling precluding the defendant from offering evidence of legitimate business activities because "evidence of good conduct is not admissible to negate fraudulent intent."); *United States v. Marrero*, 904 F.2d 251, 260 (5th Cir. 1990) (upholding ruling that excluded defendant psychologist from offering evidence of legitimate billings in false claims act case because it was irrelevant that the defendant "did not overcharge in every instance in which she had the opportunity to do so"); *United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir. 1990) ("A defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on specific occasions."); *United States v. Winograd*, 656 F.2d 279, 284 (7th Cir. 1981) (finding defendant's performance of some legal trades irrelevant to his knowledge of illegal trades).

Here, the government has alleged that the Defendants conspired to execute the fraudulent scheme outlined in the Superseding Indictment, namely by knowingly and willfully submitting claims for services that were *ineligible for payment* because SHAFA did not render them. That SHAFA may have actually provided medical services to some patients during the course of this scheme is irrelevant to the question of SHAFA's guilt with respect to the charges in the

Superseding Indictment. As such, evidence of the medical need for services actually rendered to patients at other times should not be admissible for that purpose.

MOTION 2

The Defendants Should Be Precluded from Blaming U.S. Customs and Border Protection, the Food and Drug Administration, or Medicare for His Conduct.

The Defendants should be precluded from making any argument that because Customs and Border Protection ("CBP") and the federal Food and Drug Administration ("FDA") did not detect his importation of unapproved drugs and Medicare paid the claims at issue or failed to detect his fraud, his conduct was proper. These kinds of "blame the victim" defenses are irrelevant, improper, and should be excluded.

In the context of criminal fraud, even where a "victim is also guilty of negligence," the perpetrator is "no less guilty of fraud" because of such negligence. *United States v. Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009). "'If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts.'" *United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000) (quoting *United States v. Brien*, 617 F.2d 299, 311 (1st Cir. 1980)).

In recognition of the fact that victims' negligence is irrelevant—as well as prejudicial—courts have taken precautionary measures such as, for example, giving jury instructions, and limiting witness examinations and arguments attempting to excuse criminal conduct on that basis. *See United States v. Thomas*, 377 F.3d 232, 243-44 (2d Cir. 2004) (affirming restrictions on cross-examination of victim; rejecting defendant's argument that victim's foolishness vitiated defendant's fraudulent intent); *United States v. Davis*, 226 F.3d 346, 358-59 (5th Cir. 2000) (affirming jury instruction that "the naiveté, carelessness, negligence, or stupidity of a victim does not excuse criminal conduct, if any, on the part of a defendant"); *see also United States v. Allen*,

201 F.3d 163, 167 (2d Cir. 2000) ("The victim's negligence in permitting a crime to take place does not excuse the defendant from culpability for her substantive offenses."); *see also United States v. Curran*, Case No. 05-cr-102, 2011 WL 1598170, at *7 (D.R.I. Apr. 26, 2011) (in trial of individual who posed as a doctor, "the fact that some of [the defendant's] patients may have been pleased with his services he rendered does not negate his intent to deceive them").

This Court should similarly take steps to prevent the Defendants from blaming CBP, the FDA, or Medicare for his conduct. The Defendants should be prohibited from arguing to the jury or presenting evidence suggesting that (a) CBP and the FDA's failure to detect his importation of unapproved drugs and (b) Medicare's failure to detect or prevent his fraud is somehow a defense to the charges in the Superseding Indictment. It is no defense for a bank robber to argue that the bank should have had a more effective security system. Nor can a home invader argue that he committed no crime because the homeowners left their front door unlocked. Such contributory negligence theories simply have no place in criminal law, and the Defendants should not be permitted to suggest otherwise to the jury.

This prohibition should extend to any suggestion that CBP or the FDA should have discovered the Defendants were importing unapproved drugs, intercepted the packages, taken any other action to prevent the Defendants from receiving the unapproved drugs, or that CBP or FDA's failure to take any of the aforementioned actions led Defendants to believe that their fraudulent claims and actions were legitimate. This is particularly true because the Defendants and their co-conspirators took steps to conceal the shipments of the drugs, including by using false descriptions and valuations on the shipping documentation.

Likewise, this exclusion should cover any suggestion that Medicare should have discovered the fraud, denied fraudulent claims, or barred the Defendants and/or their corporate

entities from submitting claims to Medicare, or that Medicare's failure to take any of the aforementioned actions led the Defendants to believe that the fraudulent claims and actions were legitimate. Such evidence would be irrelevant, immaterial, prejudicial, confusing to the jury, and is in no way probative of a legitimate defense to the charged fraud scheme.

MOTION 3

The Court Should Preclude the Use of Law Enforcement Agent Interview Reports or Rough Notes for Impeachment of Government Witnesses.

A. Interview Reports Are Not Statements of the Witness Under the Jencks Act.

Defense counsel may not use interview reports prepared by government agents to cross-examine witnesses that were the subjects of these memoranda, because they are not "statements" made by those witnesses under the Jencks Act. A "statement" is defined within the Jencks Act as either (1) "a written statement made by said witness and signed or otherwise adopted or approved by [the witness]," (2) a recording or transcription that "is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously," or (3) a statement made by a witness to the grand jury. 18 U.S.C. § 3500(e)(1)-(e)(3). The Jencks Act is intended to restrict a defendant's use of discoverable statements to impeachment; accordingly, the Supreme Court has held that Jencks "statements" are limited to those that can "properly be called the witness' own words." *Palermo v. United States*, 360 U.S. 343, 352 (1952). The requirement to produce does *not* extend to summaries of oral statements evidencing "substantial selection of materials," or summaries prepared post-interview that "rest on the memories of the agent," or those that "contain the agent's interpretations of impressions." *Id.* at 352-53. Such documents would not constitute "statements" under the Jencks Act.

Law enforcement agent interview reports or rough notes do not fit the definition of "statements" in the Jencks Act. Rather, they fit into the category specifically excepted by the

Supreme Court in *Palermo*. The reports are drafted by law enforcement personnel after the fact, drawing on the agent's memories (in addition to written notes) and both the reports and notes reflect the agents' selection of information to include or exclude. They likewise inevitably reflect the thought processes, interpretations, and impressions of the authoring agents. Accordingly, they do not constitute "statements" under the Jencks Act and provide insufficient basis for impeachment.[1]

Although the government is not required to produce these reports under the Jencks Act, it has nevertheless made a practice of turning the reports over to the defense in advance of trial. This practice should not be taken as a concession by the government that the documents constitute proper impeachment materials. The documents remain outside the realm of impeachment; they have not been adopted by the witnesses, and instead memorialize the statements of the authoring government agents, summarizing the substance of a witness interview through the lens of the agents' own thought processes, interpretations, and impressions. It would be unfair and improper to cross-examine the government's witnesses based on summaries created by another individual, which the witness has never adopted. Accordingly, defense counsel should be precluded from doing so.

In addition to a prohibition on direct impeachment of a witness using interview reports or notes, defense counsel should also be precluded from publishing the contents of interview reports to the jury, holding up the interview report, reading portions of the interview report before the jury in the form of a question posed to the witness, or otherwise suggesting to the jury that the interview

[1] Although interview reports *may* be considered Jencks "statements" where a witness has reviewed and adopted that report by, for example, signing it, *Goldberg v. United States*, 425 U.S. 94, 110 n.19 (1976), no witness in this case has done so and accordingly the exception is not applicable here.

report is a statement of the witness. To permit such tactics before the jury would subvert the meaning of the Jencks Act and thwart the Supreme Court's decision in *Palermo*, which held that it would be "grossly unfair" to permit the defense to impeach a witness with a statement "which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations." *Palermo*, 360 U.S. at 350.

B. Proper Use of the Reports at Trial

Of course, the defense may properly use the agent interview reports to inform its own questioning of a witness. Defense counsel is free, for example, to ask a witness whether he or she made a statement that is reflected in the report. This is distinct from the impermissible use of publishing the report to the jury or introducing the contents of the report as a prior inconsistent statement. *See United States v. Connolly*, 504 F.3d 206, 216 (1st Cir. 2007) (denying motion for new trial based in part on newly discovered FBI interview report because "there has not been a credible argument put forth as to how the hearsay account contained in the FBI 302 report could be introduced into evidence"); *United States v. Brika*, 416 F.3d 514, 529 (6th Cir. 2005), *abrogated on other grounds by United States v. Booker*, 543 U.S. 222 (2005) (deeming interview reports inadmissible for impeachment on cross-examination); *see also United States v. Leonardi*, 623 F.2d 746, 757 (2d Cir. 1980) (rejecting use of agent's written statement as a prior inconsistent statement of the witness); *United States v. Hill*, 526 F.2d 1019, 1026 (10th Cir. 1975) (affirming decision not to allow interview report to impeach witness where witness did not prepare, sign, or adopt it).

MOTION 4

The Court Should Exclude Any Out of Court Statements Made by the Defendants if Offered *by the Defendants* to Prove the Truth of the Matter Asserted.

When a defendant offers his or her out of court statement to prove the truth of the matter asserted, the statement is hearsay, and inadmissible. Fed. R. Evid. 801(c), 802. Therefore, the

Defendants may not introduce such hearsay statements through any other witness, regardless of whether that witness is presented by the United States or by either Defendant. To do so would permit the Defendants to elude cross-examination.

MOTION 5

The Defendants Should Be Precluded from Offering Evidence or Presenting Argument Regarding Compounding

The Defendants should be precluded from making any argument that the naltrexone implants or the disulfiram implants and injectables in this case were lawfully compounded pursuant to FDA laws, rules, and regulations and thus were exempt from FDA approval requirements and the requirement that their labeling bear adequate directions for use.[2] This includes any argument that the Defendants' actions were protected by 21 U.S.C. § 353a (pharmacy compounding) and 21 U.S.C. § 353b (compounding in an outsourcing facility). Argument or evidence that the naltrexone and disulfiram products were exempt from approval or labeling requirements because they were lawfully compounded under 21 U.S.C. § 353a or 21 U.S.C. § 353b should be excluded because, in accordance with Fed. R. Evid. 403, it would be irrelevant, confuse the issues, and mislead the jury.[3]

A compounded drug product is exempt from certain requirements – including FDA approval requirements under 21 U.S.C. § 355 and the requirement that its labeling bear adequate directions for use under 21 U.S.C. § 352(f)(1) – if it is compounded in accordance with 21 U.S.C.

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[2] Moreover, even if the drugs were lawfully compounded pursuant to FDA's laws, rules, and regulations, the drugs would still be misbranded for other reasons alleged in the Superseding Indictment—namely, the label does not state "Rx only" and does not identify the manufacturer, packer, or distributor, or the location of manufacturing.

[3] In fact, because the alleged conspiracy period began in July 2008 and 21 U.S.C. § 353b did not become law until November 2013, argument or evidence under these provisions would be even more irrelevant, confusing, and misleading.

§ 353a. To qualify for these exemptions, a compounded drug product must, among other things, be "compounded for an identified individual patient based on the receipt of a valid prescription order or notation approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient." 21 U.S.C. § 353a(a). Furthermore, the drug product must also be compounded by a licensed pharmacist in a state-licensed pharmacy or a federal facility, or by a licensed physician. 21 U.S.C. § 353a(a)(1).

In this case, these drugs were not compounded for identified individual patients. SHAFA did not write prescriptions to obtain these drugs. Instead, the Defendants obtained the naltrexone and disulfiram implants and injections in large batches. Moreover, these drugs were not compounded by a "licensed pharmacist in a state-licensed pharmacy." They were obtained from a distributor in Hong Kong and shipped to the Defendants. The labels provide no indication that the drugs were compounded in a state-licensed pharmacy; in fact, many of the labels suggest they were made in China. The government is also not aware of any admissible evidence that SHAFA or TORMOSI knew who actually created the implants and injections they purchased. Therefore, the Defendants cannot argue that a compounding exemption under 21 U.S.C. § 353a applies.

In addition, sterile drugs compounded in compliance with the requirements of 21 U.S.C. § 353b are also exempt from the FDA new-drug approval requirements and the adequate directions for use requirement. 21 U.S.C. § 353b(a). To qualify for these exemptions, the drug must be compounded in an outsourcing facility that is engaged in the compounding of sterile drugs, is registered as an outsourcing facility with the FDA, and complies with all of Section 353b's requirements. 21 U.S.C. § 353b(a), (d)(4)(A). First, the Defendants, the co-conspirators who sent them the unapproved and misbranded drugs, or the facilities that manufactured the drugs were not registered with the FDA at any time as outsourcing facilities. Second, for a drug to qualify for the

exemptions under 21 U.S.C. § 353b, the drug's label must prominently identify the drug as a compounded drug and include the name, address, and phone number of the outsourcing facility where the drug was made, among other things. 21 U.S.C. § 353b(a)(10). The labels of the implants and injectables purchased by the Defendants did not include this required information. Therefore, the drugs at issue do not fall under this provision either.[4]

MOTION 6

The Defendants Should Be Precluded from Presenting Evidence or Argument that Some Exemption or Exception Allowed Them to Import Naltrexone Implants and Disulfiram Implants

The Defendants should be precluded from arguing that the naltrexone and disulfiram implants could be lawfully imported under the FDA's personal importation guidance in accordance with the FDA's Regulatory Procedures Manual, Chapter 9-2. This guidance does not apply for several reasons.

First, the product at issue must be for personal use, not for commercial distribution. The Defendants were not importing the naltrexone and disulfiram implants for personal use; they were importing the implants for commercial distribution to SHAFA's patients. Indeed, there is no evidence that the factors considered by the FDA to determine if the personal use exception applies were present. Specifically, there is no written affirmation contained with any shipment at issue in this case that the contents were for the patient's own use. Further most of the shipments contained

[4] To the extent that the Defendants intend to argue that they had a good faith belief that the unapproved and misbranded drugs they were importing had been legally compounded, they should be precluded from raising this in opening statements or otherwise absent a sufficient foundation of admissible evidence that such good faith belief existed. *Cf. United States v. Maxwell*, 254 F.3d 21, 26-29 (1st Cir. 2001) ("when the proffer in support of an anticipated affirmative defense is insufficient as a matter of law to create a triable issue, a district court may preclude the presentation of that defense entirely" (citations omitted)).

far more than a 3-month supply for a single patient. *See* FDA Reg. Proc. Manual, § 9-2-5 (Apr. 2022).

Second, becuase the Defendants concealed the contents of their shipments from CBP and the FDA there can be no argument that defendants met the requirements of the personal importation policy, which requires FDA inspection and review according to its guidance. As described in the FDA's Regulatory Procedures Manual, Chapter 9 (Import Operations and Actions), Section 9-2, FDA personnel must determine if, on a case-by-case basis, the particular individual will be permitted to import a particular drug. No such determination occurred here because the Defendants never advised the FDA that they were importing the naltrexone or disulfiram implants.

Moreover, to import drugs under this guidance, the product cannot "present an unreasonable risk to the user." FDA Reg. Proc. Manual, § 9-2, at 9-13 (Apr. 2013 ed.).[5] In this case, the evidence will show that the disulfiram and naltrexone pellet implants and injections were dangerous. First, their risks include hepatotoxicity, depression, local tissue reactions—sometimes severe—and fatal opioid overdoses. Second, SHAFA's patients did in fact have serious health consequences. The government expects such evidence to include testimony from patients regarding scarring and infections.

MOTION 7

The Government Moves to Introduce Summary Charts

Under Federal Rule of Evidence 1006, a party "may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006. The government moves to introduce

[5] Prior and subsequent versions of this section contain the same limitation.

summary charts of the Defendants and SHAFA's business's bank accounts and of SHAFA's health care claims data.

The financial records summary charts are directly relevant to the money laundering counts in the Superseding Indictment (Counts One through Four) and the health care fraud conspiracy (Count Ten). The Defendants and SHAFA's business's bank accounts are relevant because the Defendants used funds in furtherance of the international money laundering scheme by sending money overseas to purchase the naltrexone and disulfiram implants. Moreover, the bank accounts are relevant to the health care fraud charge because the false and fraudulent claims resulted in Medicare reimbursements into the Defendants' bank accounts to which they were not entitled.

The claims data summary charts are directly related to the health care fraud conspiracy count (Count Ten) and summarize voluminous data not readily understood by a layperson or easy to examine in court.

The First Circuit has repeatedly endorsed the use of summary charts consistent with Rule 1006. *United States v. Appolon*, 695 F.3d 44, 61 (1st Cir. 2012) ("As we have explained, various summary tools may be used to clarify complex testimony and evidence for a jury.") (citing cases) (internal quotations omitted); *see also United States v. Millán-Machuca*, 991 F.3d 7, 27 (1st Cir. 2021) (upholding government's use of summary charts to display drug quantities trafficked by the defendant); *United States v. Milkiewicz*, 470 F.3d 390, 396 (1st Cir. 2006) (stating that "[we] explicitly hold that summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence").

MOTION 8

The Defendants Should Be Precluded from Presenting Evidence or Argument that Defendants' Actions Were Commonplace

The Defendants should not be permitted to suggest that their conduct is excusable because it was commonplace. Such argument or evidence could include theories that the illegal implants SHAFA used were used by other doctors and therefore the Defendants are not liable because others were committing the same crimes. Such argument and evidence would be irrelevant and confusing. *See generally* Fed. R. Evid. 402 (noting that irrelevant evidence is inadmissible); Fed. R. Evid. 403 (permitting court to exclude relevant evidence where it risks "confusing the issues," "misleading the jury," or "wasting time"). Whether every felon in a neighborhood has a gun has no bearing on whether any of those gun-owning felons is breaking the law. Whether it is commonplace for other psychiatrists to import illegal naltrexone and disulfiram implants and deliver them to patients is not relevant to whether the Defendants' conduct is illegal. The government has limited resources and the inability to investigate and charge all instances of misconduct by doctors.

Any such argument or evidence by the Defendants would be motivated by a purpose to say that what the Defendants did is not a crime. Such argument and evidence would be improper. *See* Fed R. Evid. 403 advisory committee's notes (recognizing that evidence is excludable if it has "an undue tendency to suggest decision on an improper basis").

MOTION 9

The Defendants Should Be Precluded from Presenting Improper Evidence or Argument Regarding Criminal History

The government moves to preclude the Defendants from presenting any improper evidence or making improper argument regarding the criminal histories of government witnesses. Under

Fed. R. Evid. 609(a)(1), evidence of a conviction for a crime that was punishable by death or by imprisonment for more than one year "must be admitted" subject to Rule 403. Fed. R. Evid. 609(a)(1). In addition, regardless of the punishment, evidence of a crime "must be admitted if the court can readily determine that establishing the elements of the crime require proving . . . a dishonest act or false statement." Fed. R. Evid. 609(a)(2).

Under Fed. R. Evid. 609(b), such evidence is limited "if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later." Fed. R. Evid. 609(b). Evidence of any such criminal convictions is only admissible if the probative value substantially outweighs the prejudicial effect, and the proponent gives an adverse party reasonable written notice of its intent to use it so that the party has a fair opportunity to contest its use. *Id.* Accordingly, the Defendants should be restricted to introducing evidence or making argument regarding any witnesses' criminal records consistent with the restrictions of Fed. R. Evid. 609.

MOTION 10

The Defendants Should Be Precluded from Discussing Topics and Facts Not Expected to Be Proven at Trial in Jury Addresses

The government moves to preclude the Defendants from making statements in their jury addresses that may cover topics that will not ultimately be proven at trial, including statements relating to the Defendants' family upbringing, personal background, motivations, and intent. Such argument—when the principal source of such information is the Defendants, and it is unknown if either will ultimately testify at trial—would be improper. The same holds true to any inadmissible hearsay that the Defendants may seek to offer during opening statements to cast themselves in a positive light when they do not yet know if they will take the stand.

The First Circuit instructs that opening statements are to "state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the

evidence and testimony to the whole." *United States v. Hersehnow*, 680 F.2d 847, 857-58 (1st Cir. 1982) (internal citations and quotations omitted); *see also United States v. McCabe*, 1997 WL 753348, at *4 (9th Cir. 1997) ("Opening statement should not refer to matters that are not to be presented as evidence."); *United States v. Millan-Colon*, 836 F. Supp. 1007, 1014 (S.D.N.Y. 1993) (holding that collateral and irrelevant matters should not be part of opening statement; holding "the purpose of an opening statement is to describe those matters that a litigant intends to prove during trial").

Likewise, closing arguments are limited to evidence introduced at trial. *See United States v. Auch*, 187 F.3d 125, 129 (1st Cir. 1999) (The law is clear that a prosecutor's reliance (or apparent reliance) upon matters not in evidence is improper").

The Defendants should not be allowed to open on impermissible topics like their backgrounds, professional experiences, family life, motivation or intent, policies and procedures in their office, or SHAFA's track record in seeing patients for long periods of time. Such topics are not appropriate where it is unclear if the Defendants (the believed source of all such information) will testify at trial and be subjected to cross-examination on such topics.

Thus, consistent with the Rules of Evidence, the government moves for an order to limit the Defendants' jury addresses to topics that they expect in good faith to be proven at trial or based on evidence introduced at trial.

MOTION 11

Motion to Apply Disjunctive Standard to Jury Instructions

The government moves to apply the disjunctive standard to the jury instructions in this case. For example, in the international money laundering counts (Counts Two through Four), SHAFA is alleged to have "transported, transmitted, and transferred, and attempted to transport,

transmit and transfer a monetary instrument." Superseding Indictment ¶ 35, Dkt. 69. In addition, in the smuggling counts (Counts Six through Eight), SHAFA is alleged to have illegally imported and brought into the United States merchandise contrary to law." Superseding Indictment ¶ 41, Dkt. 69. A defendant can be convicted of these charges whether he imports the merchandise **or** brings into the United States the merchandise contrary to law. Therefore, the jury instructions should read in the "**or**."

In accordance with First Circuit law, even though the allegation is written in the "and," a defendant can be found guilty whether he commits the substantive offense **or** attempts to commit the offense. *See United States v. Pena*, 24 F.4th 46, 64 n.14 (1st Cir. 2022) ("[W]hen an indictment uses the conjunctive 'and' in a charge, it operates as a disjunctive 'or'."); *United States v. Garcia-Torres*, 341 F.3d 61, 66 (1st Cir. 2003) (stating "the law is well established that where an indictment charges in the conjunctive several means of violating statute, a conviction may be obtained on proof of only one of the means, and accordingly the jury instruction may properly be framed in the disjunctive"); *United States v. Howard*, 742 F.3d 1334, 1349 n.3 (11th Cir. 2014) ("Prosecutors can and frequently do . . . charge alternative elements in the conjunctive and prove one or more of them in the disjunctive, which is constitutionally permissible.").

The law routinely accepts that an indictment may charge "conjunctively with alternative means or alternative mental states, any one of which will satisfy an element of the crime," while the "jury instruction may properly be framed in the disjunctive without a constructive amendment taking place." *United States v. Mozie*, 752 F.3d 1271, 1284 (11th Cir. 2014) (quotation omitted) (describing the act of charging conjunctively but proving and/or instructing disjunctively as "not only a permissible practice but also a common one"); *see also Simpson*, 228 F.3d at 1300 ("where an indictment charges in the conjunctive several means of violating a statute, a conviction may be

obtained on proof of only one of the means, and accordingly the jury instructions may properly be framed in the disjunctive.").[6]

MOTION 12

The Defendants Should Be Precluded from Offering Evidence or Presenting Argument Regarding Other Administrative Proceedings or Trial Proceedings

The government moves to exclude any argument or evidence as to other administrative proceedings or trial proceedings. Such proceedings could include other cases, including the matter of *United States v. Lance Gooberman*, Case No. 20-cr-10025 (C.D. Cal.). Defendant Gooberman was charged with import/export violations relating to naltrexone pellet implants that he compounded in the United States. He was ultimately acquitted. Such evidence and argument would be prejudicial and irrelevant. First, this evidence is not relevant under Fed. R. Evid. 401 and 402. Setting aside relevancy, under Fed. R. Evid. 403, it is not admissible because it confuses the issues and misleads the jury, and it is also unfairly prejudicial against the government, also contrary to Fed. R. Evid. 403.

[6] The *Howard* decision included a collection of cases from every circuit when noting that "every federal circuit allow[ed] prosecutors to" charge in the conjunctive but prove in the disjunctive. *See, e.g., United States v. Pacchioli,* 718 F.3d 1294, 1300–01 (11th Cir. 2013) ("Moreover, although the government charged this crime in the conjunctive, the government needed to prove only, in the disjunctive, one of the three charged acts."); *United States v. DeChristopher,* 695 F.3d 1082, 1095 (10th Cir. 2012) ("It is hornbook law that a crime denounced in the statute disjunctively may be alleged in an indictment in the conjunctive, and thereafter proven in the disjunctive.") (quotation marks omitted); *United States v. Coughlin,* 610 F.3d 89, 107 n. 10 (D.C. Cir. 2010) ("The correct method of pleading alternative means of committing a single crime is to allege the means in the conjunctive.") (quotation marks and alteration omitted).

MOTION 13

The Defendants Should be Precluded from Eliciting Testimony or Otherwise Producing Evidence on the Following Topics:

A. The presence or absence of any particular person on the government's witness list or the government's plans or decisions to call or not call a particular witness

For various reasons, the government may elect not to call a witness on its list. For example, a witness may become unavailable, or may develop a credibility issue. Perhaps the witness's testimony may become cumulative or irrelevant due to the development of other evidence at trial. There may be any number of reasons that a witness is not called. If a jury is informed, in a vacuum, that a person was on the government's witness list but was ultimately not called, the jury could easily become confused. Thus, the Defendants should not be permitted to discuss the contents of the government's witness list before the jury.

Further, if the Defendants intend to discuss or ask the jury to draw any negative inference from the government's decision not to call a witness (regardless of whether that witness appeared on the government's witness list), he must first show that the witness was "is either 'favorably disposed' to testify on behalf of the government by virtue of status or relationship or 'peculiarly available' to the government. Once past that point, the court must consider the explanation (if any) for the witness's absence and whether the witness, if called, would be likely to provide relevant, non-cumulative testimony." *United States v. Anderson*, 452 F.3d 66, 81 (1st Cir. 2006) (quotations and citations omitted); *see United States v. St. Michael's Credit Union*, 880 F.2d 579, 597 (1st Cir. 1989); *United States v. Currier*, 454 F.2d 835, 839 (1st Cir. 1972).

Further, to the extent such evidence might have any probative value, it should nonetheless be excluded under Federal Rule of Evidence 403, because the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, undue delay, and waste of time.

B. Disputes over discovery, including the volume, nature, and timing, and use of federal resources

Any attempt by Defendants to comment on discovery, including the volume, nature, and timing, or the allocation of federal resources is irrelevant and unduly prejudicial. Fed. R. Evid. 401, 402, 403.[7] Such argument or testimony creates an undue risk that the jury will be diverted from "its duty to decide the case on the evidence" and to apply the law. *See United States v. Young*, 470 U.S. 1, 7-10, n.5 (1985). Instead, such arguments and testimony invite the jury to improperly consider its feelings toward the government and the government's decision-making about how to allocate resources.

C. Any argument that encourages jurors to ignore the law, not to follow this Court's instructions, or to otherwise violate their oaths as jurors

The Defendants should be precluded from arguing or seeking to admit evidence for the purpose of encouraging the jury to nullify its verdict. Jury nullification "is, by definition, a violation of a juror's oath to apply the law as instructed by the court—in the words of the standard oath administered to jurors in the federal courts, to 'render a true verdict *according to the law and the evidence*.'" *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (internal citation omitted; emphasis in original). It is inappropriate for defense counsel to "encourage jurors to exercise this power." *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993).

[7] Fed. R. Evid. 401 provides that evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Fed. R. Evid. 402 provides that "relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court." Fed. R. Evid. 402 further provides "[i]rrelevant evidence is not admissible." Fed. R. Evid. 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

This Court can and should refuse a defendant's request to inform the jury of its power to nullify a law or sentence through the mechanism of jury nullification. *United States v. Garcia-Rosa*, 876 F.2d 209, 226 (1st Cir. 1989). "[J]urors may have the power to ignore the law, but their duty is to apply the law as interpreted by the court, and they should be so instructed." *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969). As the Sixth Circuit has held, to give such an instruction would "undermine[] the impartial determination of justice based on law." *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988).

The government moves this Court to do so here, excluding evidence and precluding argument designed to convince the jury to acquit—not based on the government's failure to prove its charge, but because a guilty verdict would be contrary to the jury's sense of justice, morality, or fairness. *See Washington v. Watkins*, 655 F.2d 1346, 1374 n.54 (5th Cir. 1981) (courts "have almost uniformly held that a criminal defendant is not entitled to an instruction that points up the existence of that practical power [of jury nullification] to his jury."); *United States v. Lucero*, 895 F. Supp. 1421, 1426 (D. Kan. 1995) ("[D]efendants are not entitled to present evidence which is irrelevant for any purpose other than to provoke the finder of fact to disregard the law.").

Such arguments might include references to SHAFA's focus on patients with addiction issues, the location of his clinics in underserved areas, the Defendants as hard-working immigrants, and SHAFA's earning potential had he decided to focus on a different patient population.

D. Plea negotiations, plea offers, or the Defendants' rejection of a plea offer

The substance of plea negotiations, plea offers, or the Defendants' rejection of a plea offer is irrelevant and should not be permitted to be presented to the jury in any form.

E. Potential punishment or any other consequences that might result from a conviction

References to possible punishment, including but not limited to incarceration and loss of the ability to practice medicine, would be an impermissible appeal to the jury's sympathy and is

irrelevant. This would include suggestions to the effect that a guilty verdict would ruin the Defendants' lives or that their lives are in the jury's hands. This Court should preclude any such references before the jury.

F. Defense counsels' personal opinion of, or relationship with, the Defendants

Defense counsels' personal opinion of or relationship with the Defendants is irrelevant and would constitute impermissible testimony on behalf of counsel unless defense counsel takes the stand as a witness.

G. Which other persons have, or have not, been charged in this or other cases

This Court should prohibit the Defendants from presenting evidence that other individuals or entities could have been charged in a like manner as the Defendants. The government's charging decisions are not proper subjects for cross-examination and argument. *United States v. Re*, 401 F.3d 828, 832-33 (7th Cir. 2005); *United States v. Reed*, 641 F.3d 992, 993–94 (8th Cir. 2011) (collecting cases); *see also United States v. Candelaria-Silva*, 166 F.3d 19, 35 (1st Cir. 1999) (appropriate to exclude evidence about charges being dismissed, noting that the "introduction of evidence of a dismissal could well mislead the jury into thinking that a defendant was innocent of the dismissed charge when no such determination has been made").

The identity and number of individuals charged in connection with the Defendants' conduct, the reasons behind the government's individualized charging decisions, and the comparative culpability of the Defendants versus others involved in the conduct are all irrelevant and unfairly prejudicial subjects that should not be aired before the jury. *See, e.g.*, *United States v. Thompson*, 253 F.3d 700, 2001 WL 498430, *16 (5th Cir. 2001), *unpublished* (affirming grant of motion in limine to prevent defense counsel from comparing defendants' conduct with that of

uncharged or immunized witnesses); *see also, e.g., Re*, 401 F.3d at 832-33 (government's exercise of prosecutorial discretion not a proper subject for cross-examination).

The First Circuit suggests this same position in its Pattern Jury Instructions in instructing the jury that a cooperator's guilty plea may not be considered as evidence against a defendant. Pattern Jury Instructions 2.08 ("You may consider [cooperators'] guilty pleas in assessing their credibility, but you are not to consider their guilty pleas as evidence against this defendant in any way."). The jury needs to independently assess the Defendants' crimes, without regard to others' guilt. And for good reason; evidence that the government could have charged other individuals with committing similar violations is irrelevant to the jury's deliberation in this case.

The particular charging decisions made by the government are informed by a variety of factors, unique to each prospective defendant. Critically, the charging decisions made regarding one individual do not necessarily implicate the guilt or innocence of another. *See United States v. Chugay*, 2022 WL 1782583, *2 (S.D. Fla. June 1, 2022) (granting Government's motion in limine to preclude argument that defendant "is not liable because some other person is also liable for the same crime but was not charged"). If the Defendants here seek to introduce evidence of these charging decisions, they would be merely distracting from the true issue in this trial: whether *these Defendants* committed the crimes in the Superseding Indictment. Such argument or examination before the jury would serve no other purpose than to prejudice the jury against the government by raising issues of prosecutorial discretion that have nothing to do with the crimes charged or the evidence presented *in this case.* Indeed, courts recognize this kind of argument as a type of jury nullification argument, which is prohibited. *Thompson*, 2001 WL 498430 at 16.

Accordingly, the Defendants should be precluded from making arguments or comments to the jury and from eliciting statements on cross-examination that are irrelevant to the record

evidence and crimes charged that are, instead, designed to encourage a verdict in disregard of the law.

H. Any suggestion or accusation that a prosecutor or agent engaged in misconduct

Allegations of misconduct should be handled outside the presence of the jury so that the Court can determine whether the allegation has both a factual foundation and probative value.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

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Date: January 12, 2024