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10  
 11 UNITED STATES DISTRICT COURT  
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA, ) No. CR 05-1046(E)-DSF  
 )  
 14 Plaintiff, ) TRIAL MEMORANDUM  
 )  
 15 v. ) [18 U.S.C. § 371: Conspiracy;  
 ) 18 U.S.C. § 2511(1)(a):  
 16 ANTHONY PELLICANO, and ) Interception of Wire  
 ) Communications; 18 U.S.C.  
 17 TERRY CHRISTENSEN, ) § 2(a): Aiding and Abetting]  
 )  
 18 Defendants. ) Trial Date: July 16, 2008  
 ) Trial Time: 9:00 a.m.  
 19 )  
 20 )

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

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

3 DATED: July 14, 2008

4 Respectfully submitted,

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I.

STATUS OF THE CASE

A. Trial is set for July 16, 2008, before the Honorable Dale S. Fischer, United States District Court Judge.

B. The estimated time for trial is four weeks.

C. Defendant Anthony Pellicano, who is pro se, currently is in custody. Defendant Terry Christensen, who is represented by retained counsel, is on bond.

D. Trial by jury has not been waived.

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

F. For purposes of trial, the government will use a redacted indictment which renumbers counts 106 and 107 of the Fifth Superseding Indictment as counts one and two. Both defendants are charged in count one with conspiring to intercept wire communications and to knowingly use information obtained from intercepted wire communications. As to count two, defendant Pellicano is charged with interception of wire communications and defendant Christensen is charged with aiding and abetting the interception of wire communications.

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

II.

APPLICABLE STATUTES

A. 18 U.S.C. § 371 (Conspiracy) (count one)

1. Statutory Language

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

1 If two or more persons conspire either to commit any offense  
2 against the United States, or to defraud the United States, or  
3 any agency thereof in any manner or for any purpose, and one or  
4 more of such persons do any act to effect the object of the  
5 conspiracy, each shall be fined not more than \$10,000 or  
6 imprisoned not more than five years, or both.

7 2. Elements

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

16 3. Applicable Law<sup>1</sup>

17 a. The Agreement

18 "[T]he evidentiary requirement for establishment of an  
19 agreement in the conspiracy context is considerably more lax than  
20 in the case of an enforceable contract." United States v.  
21 Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980). To support a  
22 conspiracy conviction, "[t]he agreement need not be explicit; it  
23 may be inferred from the defendant's acts pursuant to a  
24 fraudulent scheme or from other circumstantial evidence." United

25 \_\_\_\_\_  
26 <sup>1</sup> As the government extensively has briefed and the Court  
27 previously has ruled on the application of the law of co-  
28 conspirator statements to the Pellicano-Christensen recordings,  
the government incorporates its prior briefing and the Court's  
rulings into this memorandum.

1 States v. Cloud, 872 F.2d 846, 852 (9th Cir. 1989). See also  
2 United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1991);  
3 United States v. Hernandez, 876 F.2d 774, 777 (9th Cir. 1989).

4 The government need not prove direct contact between co-  
5 conspirators or the existence of a formal agreement; instead, an  
6 agreement constituting a conspiracy may be inferred from the acts  
7 of the parties and other circumstantial evidence indicating  
8 concert of action for the accomplishment of a common purpose.

9 See Garza, 980 F.2d at 552-53; United States v. Hegwood, 977 F.2d  
10 492 (9th Cir. 1992); United States v. Becker, 720 F.2d 1033, 1035  
11 (9th Cir. 1983).

12 It is not necessary for the government to show that the  
13 defendant knew "the exact scope of the conspiracy, the identity  
14 and role of each of the co-conspirators, or the details of the  
15 operations of any particular plan." United States v. Thomas, 586  
16 F.2d 123, 132 (9th Cir. 1978). However, the government must  
17 prove that the defendant was aware of "the essential nature of  
18 the plan." Blumenthal v. United States, 332 U.S. 539, 557  
19 (1947). See also United States v. Krasovich, 819 F.2d 253, 255-  
20 56 (9th Cir. 1987). The key element of proof as to any specific  
21 co-conspirator is the showing that he knew, or had reason to  
22 know, of the participation of others in the illegal plan, and  
23 that he knew, or had reason to know, that the benefits to be  
24 derived from the operation were probably dependent upon the  
25 success of the entire venture. United States v. Abushi, 682 F.2d  
26 1289, 1293 (9th Cir. 1982); United States v. Baxter, 492 F.2d  
27 150, 158 (9th Cir. 1973).

1           b.    Participation in the Conspiracy

2           The government must show that a conspiracy between at least  
3 two people existed and that the defendant was a member of the  
4 conspiracy charged.   United States v. Reese, 775 F.2d 1066, 1071  
5 (9th Cir. 1985) (conspiracy must involve at least two people);  
6 United States v. Murray, 751 F.2d 1528, 1534 (9th Cir. 1985)  
7 (charged defendant must be member of conspiracy).  Once a  
8 conspiracy is proven, evidence establishing beyond a reasonable  
9 doubt the defendant's connection to that conspiracy -- even if  
10 the connection is slight -- is sufficient to convict him of  
11 knowingly participating in the conspiracy.  Hubbard, 96 F.3d at  
12 1227; United States v. Stauffer, 922 F.2d 508, 514-15 (9th Cir.  
13 1990); United States v. Guzman, 849 F.2d 447, 448 (9th Cir.  
14 1988).

15           c.    The Object

16           It is well established that a conspiracy charge may allege  
17 multiple objects.  See United States v. Smith, 891 F.2d 703, 713  
18 (9th Cir. 1989) ("the established rule is that a charge of  
19 conspiracy to commit more than one offense may be included in a  
20 single count without violating the general rule against  
21 duplicity").  See also Braverman v. United States, 317 U.S. 49,  
22 54 (1942); Frohwerk v. United States, 249 U.S. 204, 210 (1919);  
23 United States v. Rabinowich, 238 U.S. at 78, 86 (1915).  In such  
24 cases, the government must prove that the defendant was engaged  
25 in a conspiracy to commit at least one of the alleged objects.  
26 See Luttrell, 889 F.2d at 810-11 ("Where the government charges a  
27 defendant with a conspiracy to commit several substantive crimes,  
28 the government must prove that the defendant was engaged in a

1 conspiracy to violate at least one criminal statute"). Where a  
2 conspiracy with multiple objects is charged, a unanimity  
3 instruction should be given. See Smith, 891 F.2d at 709  
4 (approving instruction that "the jury must unanimously agree upon  
5 the same objective as having been proved beyond a reasonable  
6 doubt"). However, while the defendants must have agreed to  
7 commit at least one of the alleged objects, they need not  
8 actually be successful in achieving the object of the conspiracy.  
9 United States v. Jimenez-Recio, 537 U.S. 270, 274-76 (2003).

10 d. Overt Acts

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

26 To obtain a conviction on a Section 371 conspiracy, the  
27 government need prove only one of the overt acts charged in the  
28

1 indictment. See Luttrell, 889 F.2d at 809; United States v.  
2 Indelicato, 800 F.2d 1482, 1483 (9th Cir. 1986).

3 e. Liability for Co-Conspirator Acts

4 It is a well settled tenet of conspiracy law, known as  
5 Pinkerton liability, that "a party to an unlawful conspiracy may  
6 be held responsible for substantive offenses committed by his co-  
7 conspirators in furtherance of the unlawful project, even if the  
8 party himself did not participate directly in the commission of  
9 the substantive offense." United States v. Vasquez, 858 F.2d  
10 1387, 1393 (9th Cir. 1988). See also Pinkerton v. United States,  
11 328 U.S. 640, 646-47 (1946); United States v. Olano, 62 F.3d  
12 1180, 1199 (9th Cir. 1995). For Pinkerton liability to apply, it  
13 is necessary that the substantive offense was within the scope of  
14 the unlawful agreement, was committed in furtherance of the  
15 conspiracy, and was reasonably foreseeable as a natural  
16 consequence of the unlawful confederation. Pinkerton, 328 U.S.  
17 at 647-48. See also United States v. Lewis, 787 F.2d 1318, 1323  
18 (9th Cir. 1986) ("A co-conspirator is responsible for any act done  
19 in furtherance of the conspiracy unless it could not reasonably  
20 be foreseen as a natural consequence of the agreement"); United  
21 States v. Reed, 726 F.2d 570, 580 (9th Cir. 1984) ("The law is  
22 clear that a defendant may be convicted of the substantive acts  
23 of his co-conspirators, as long as those acts are committed  
24 pursuant to and in furtherance of the conspiracy").

25 A conspirator who joins a pre-existing conspiracy is bound  
26 by all that has gone on before in the conspiracy. See United  
27 States v. Umagat, 998 F.2d 770, 772 (9th Cir. 1993) ("One may  
28 join a conspiracy already formed and in existence, and be bound

1 by all that has gone before in the conspiracy, even if unknown to  
2 him"). See also United States v. Biberio, 749 F.2d 586, 588 (9th  
3 Cir. 1984); United States v. Saavedra, 684 F.2d 1293, 1301 (9th  
4 Cir. 1982).

5 f. Proof of Conspiracy

6 The order of proof in a conspiracy case is a matter  
7 committed to the sound discretion of the trial judge. See United  
8 States v. Fleishman, 684 F.2d 1329, 1338 (9th Cir. 1982). As to  
9 the type of proof needed to obtain a conspiracy conviction,  
10 "[t]he government does not have to present direct evidence.  
11 Circumstantial evidence and the inferences drawn from that  
12 evidence will sustain a conspiracy conviction." United States v.  
13 Castro, 972 F.2d 1107, 1110 (9th Cir. 1992) (emphasis in  
14 original).

15 When a defendant is charged with conspiracy, evidence  
16 tending to show the existence of a conspiracy is admissible even  
17 though such evidence does not implicate the defendant, as the  
18 defendant's conviction is conditioned upon proof of the  
19 conspiracy. United States v. Vega-Limon, 548 F.2d 1390, 1391  
20 (9th Cir. 1977). A conspiracy is presumed to continue until  
21 there is affirmative evidence of abandonment, withdrawal,  
22 disavowal, or defeat of the purposes of the conspiracy. United  
23 States v. Bloch, 696 F.2d at 1215; United States v. Krasn, 614  
24 F.2d 1229, 1236 (9th Cir. 1980).

1 B. 18 U.S.C. § 2511 (Interception Of Wire Communications)  
2 (count two)

3 1. Statutory Language

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

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

10 2. Elements

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

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

20 1. Statutory Language

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

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

26 2. Elements

27 For a defendant to be guilty of aiding and abetting an  
28 offense, the government must prove the following: (1) the  
underlying crime was committed by someone; (2) the defendant

1 knowingly and intentionally aided, counseled, commanded, induced  
2 or procured that person to commit the crime; and (3) the  
3 defendant acted before the crime was completed. Ninth Circuit  
4 Model Criminal Jury Instruction No. 5.1 (2003)

5 3. Applicable Law

6 It is not a prerequisite to conviction for aiding and  
7 abetting that the principal be convicted, indicted, or even  
8 identified, although the government must prove that someone  
9 committed the underlying crime. See United States v. Mann, 811  
10 F.2d 495, 497 (9th Cir. 1987); United States v. Barnett, 667 F.2d  
11 at 835, 841 (9th Cir. 1982). Instead, in order to establish a  
12 defendant's guilt as an aider and abetter, the government must  
13 prove that the defendant knowingly associated himself with a  
14 criminal venture and by his participation in that venture sought  
15 to make it succeed. See United States v. Vaccaro, 816 F.2d 443,  
16 455 (9th Cir. 1987); United States v. Vaughn, 797 F.2d 1485,  
17 1492 (9th Cir. 1986); United States v. McKoy, 771 F.2d 1207, 1215  
18 (9th Cir. 1985). Conscious assistance in the planning of a crime  
19 is a sufficient basis for aider and abetter liability. See  
20 McKoy, 771 F.2d at 1216; United States v. Barnett, 667 F.2d 835,  
21 841-842 (9th Cir. 1982).

22 III.

23 STATEMENT OF FACTS

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

26 Prior to the execution of a series of federal search  
27 warrants at Pellicano Investigative Agency in 2002 and 2003,  
28 Pellicano was a private investigator who used the veneer of

1 legitimacy created by his business to shield his widespread  
2 criminal conduct. As the Court is aware, Pellicano has since  
3 been convicted of 78 felonies on charges ranging from RICO to  
4 possession of C-4 explosive. Most notably for purposes of this  
5 prosecution, Pellicano has been convicted of one count of  
6 possession of a wiretapping device, one count of conspiracy to  
7 commit wiretapping, and nine separate counts of wiretapping -  
8 including the Anita Busch and Sylvester Stallone wiretaps that  
9 were committed in 2002 - arising from his unlawful use of his  
10 illegal Telesleuth wiretapping program to intercept the  
11 confidential telephone conversations of his investigative  
12 targets.<sup>2</sup>

13 In March of 2002, Pellicano was retained by Christensen<sup>3</sup> to  
14 wiretap Lisa Bonder Kerkorian in connection with a child support  
15 modification lawsuit<sup>4</sup> in which Bonder Kerkorian sought to have

16 \_\_\_\_\_  
17 <sup>2</sup> As testimony and recordings at Pellicano's RICO trial  
18 established, Pellicano was assisted in implementing the wiretaps  
19 by numerous telephone company employees including, but not  
20 limited to, Rayford Turner, Teresa Wright, and Michelle Malkin.

21 <sup>3</sup> Christensen was assisted in this litigation by Peter  
22 Sheridan of Christensen Glaser and Dennis Wasser and Bruce  
23 Cooperman of Wasser, Cooperman & Carter. Bonder Kerkorian was  
24 represented by Stephen Kolodny, Harlee Gasmer, and Jeff Sturman  
25 of Kolodny & Atneau and Robert Rein of Saphier, Rein and Walden.

26 <sup>4</sup> Within weeks of the January 4, 2002 filing of the Order  
27 to Show Cause in the child support modification case, Christensen  
28 filed a civil suit in a separate court alleging breach of  
contract and rescission based upon Bonder Kerkorian's alleged  
misuse of confidential information relating to Kerkorian's wealth  
and lifestyle in court filed declarations in the child support  
matter. As noted by defendant Christensen in the Pellicano-  
Christensen recordings, the civil suit was filed, at least in  
part, to force Bonder Kerkorian to expend her comparatively  
limited financial resources at the same time when she was  
litigating the child support action. Bonder Kerkorian sought to

1 Christensen client Kirk Kerkorian's monthly child support  
2 payments for four year old Kira Kerkorian increased from \$50,000  
3 to \$320,000.<sup>5</sup> The litigation, to be charitable, was bitterly  
4 contested with hardball tactics and questionable conduct the  
5 norm. For example, the litigation included a state bar  
6 referral,<sup>6</sup> a public pronouncement by Kerkorian that he was not  
7 Kira Kerkorian's biological father, an admission by Bonder  
8 Kerkorian that she had submitted a DNA sample of Kerkorian's  
9 natural born child under Kira's name, the service on Bonder  
10 Kerkorian of DNA testing results showing Steve Bing as the  
11 biological father on Mother's Day weekend, accusations of  
12 neglectful or abusive parenting against each parent, claims of  
13 physical threats,<sup>7</sup> and the interjection of a slew of collateral

14  
15 strike this suit by filing an Anti-Slapp action. On appeal, she  
16 prevailed as to all but two counts and received payment of  
17 attorneys' fees. As this civil proceeding was on-going during  
18 the period of the Bonder Kerkorian wiretap, conversations  
19 regarding this proceeding are intermingled with conversations  
20 regarding the child support action on the Pellicano-Christensen  
21 recordings.

22  
23 <sup>5</sup> Although even the \$50,000 monthly support payment is  
24 exceptionally high, a judicial finding made in the modification  
25 lawsuit established that this amount was \$1.5 million dollars per  
26 month less than the California child support guidelines would  
27 provide for an individual with Kerkorian's annual income. Under  
28 a statutory exception for exceptionally high earning parents, the  
court found that the guideline amount was excessive and further  
found that only a nominal increase to the \$50,000 monthly payment  
was warranted.

29  
30 <sup>6</sup> Bonder Kerkorian's lead attorney, Steven Kolodny  
31 referred Christensen to the state bar for having improper contact  
32 with a represented party -- Bonder Kerkorian. As discussed  
33 below, Christensen's co-counsel, Dennis Wasser, cited this bar  
34 referral to Pellicano when advising him on how to approach  
35 Christensen for work in the Bonder Kerkorian matter.

36  
37 <sup>7</sup> Child services concluded that the alleged threats were  
38 unfounded. Following his indictment, Christensen spokepersons,

1 issues that the court ultimately deemed irrelevant to the  
2 proceedings.

3 By Christensen's own words, he considered this litigation to  
4 be a "war" and was determined, once and for all, to so completely  
5 defeat Bonder Kerkorian that she could never again seek money  
6 from Kerkorian.<sup>8</sup> A central part of this strategy was identifying  
7 the actual biological father of Kira Kerkorian, as this  
8 information could be used to discredit Bonder Kerkorian in the  
9 child support modification proceedings, to obtain financial  
10 contribution from the biological father, and to support either  
11 criminal or civil fraud charges against Bonder Kerkorian.<sup>9</sup>

12 \_\_\_\_\_  
13 including Patricia Glaser, made public comments that Pellicano  
14 was retained to investigate alleged threats against Kerkorian and  
15 Kira Kerkorian. The Pellicano-Christensen recordings show that  
16 this claim is unfounded.

17 <sup>8</sup> Bonder Kerkorian, a former professional tennis player,  
18 and Kerkorian, a corporate titan 48 years her senior, dated  
19 exclusively throughout the early 1990s and then on-and-off for  
20 the next several years. Over the course of this relationship,  
21 Kerkorian executed a series of contracts with Bonder Kerkorian  
22 through which she received several million dollars for housing  
23 and other personal needs.

24 In 1998, Bonder Kerkorian gave birth to Kira. The following  
25 year, Bonder Kerkorian and Kerkorian entered into a pre-  
26 negotiated 28-day marriage. In connection with these  
27 proceedings, Kerkorian, who was in his 80s, executed a  
28 declaration of paternity claiming Kira as his biological child.  
In 2001, after the relationship between Kerkorian and Bonder  
Kerkorian became mutually corrosive, Kerkorian had DNA testing  
conducted which established that he was not Kira's biological  
father.

<sup>9</sup> As the Court is aware, there is considerable discussion  
on the Pellicano-Christensen recordings about the possibility  
that Steve Bing was the father of Kira Kerkorian. The recordings  
reflect that Christensen was well aware that Bing was a current  
Pellicano client -- in fact, he used Pellicano in efforts to get  
Bing to consent to DNA testing. Ultimately, these efforts failed  
because Christensen insisted on publicly releasing the

1 Through his wiretap, Pellicano attempted to obtain this  
2 information. While unsuccessful in this task, he did succeed in  
3 intercepting conversation-after-conversation in which Bonder  
4 Kerkorian discussed all aspects of her life with her friends,  
5 family and attorneys. Notably, this information included real  
6 time information of Bonder Kerkorian's litigation position in the  
7 child support matter, which was obtained through the interception  
8 of privileged communications between Bonder Kerkorian and her  
9 attorneys. It is known from the 34 recovered Pellicano-  
10 Christensen recordings<sup>10</sup> that Pellicano relayed this information  
11 to Christensen, who eagerly accepted it.

12 Given that the Pellicano-Christensen recordings comprise  
13 almost 6 ½ hours of mutually incriminating conversations between  
14 the two, the government will provide a representative sampling  
15 taken from the time: (1) when the wiretap was implemented; (2)  
16 surrounding a mediation involving mediator Debra Simon; and (3)  
17 leading up to the termination of the wiretap.

18

19

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20 information in the event of a positive match. Ultimately, Steve  
21 Scholl, who is Kerkorian's in-house security  
22 officer/investigator, obtained Bing's DNA by snatching dental  
23 floss from Bing's trash can. Bing's DNA matched that of Kira  
24 Kerkorian; thereby resolving the issue of paternity without any  
25 assistance from Pellicano.

23

24 <sup>10</sup> As described in multiple prior filings, Pellicano used  
25 a scaled-down version of his Telesleuth wiretapping program that  
26 was installed on his office computer to record conversations to  
27 which he was a party. Thirty-four recordings of separate  
28 conversations between Pellicano and Christensen were recovered  
from his office computer. These recordings, which are replete  
with discussions between Pellicano and Christensen regarding the  
wiretap of Bonder Kerkorian, serve as the backbone of the  
wiretapping and conspiracy to wiretap charges that are pending  
against Pellicano and Christensen.

1 A. IMPLEMENTATION OF THE WIRETAP

2 On March 15, 2008, Pellicano was recording a telephone call  
3 with client George Kalta,<sup>11</sup> when he switched over to an incoming  
4 call from Dennis Wasser. During the conversation that ensued,  
5 Pellicano, referencing a prior communication between the two,  
6 advised Wasser that he was "gonna do that on speculation" with  
7 the hope that he would receive payment from Kerkorian at a later  
8 date. Wasser then informed Pellicano that, while he had  
9 discussed the matter with Christensen, he had not yet had a  
10 chance to address it with Kerkorian, which he expected to do the  
11 following day. Pellicano then explained to Wasser that his  
12 actions were driven by his profound dislike of Kolodny. Upon  
13 hearing this, the following conversation ensued:

14 Wasser: Yeah. Well, I'll tell you what the angle is. He  
15 reported Terry to the state bar.

16 Pellicano: Oh, fuck.

17 Wasser: And so Terry hates him.

18 Pellicano: Well then why doesn't Terry let me go after the  
19 cocksucker?

20 Wasser: Well, why don't, you know what you may wanna do?  
21 Why don't you call Terry right now. Tell him that  
22 you and I talked, and that you hate Kolodny so  
23 much, you're gonna go after him on your own and  
24 just wait and see what he says.

25 Pellicano: Okay.

26 Wasser: His number's five five three three thousand.

27 Pellicano: W, wait, wait. Five five three three thousand.

28 Wasser: Yeah, and tell him...

---

29 <sup>11</sup> Kalta pled guilty to conspiring with Pellicano to  
30 wiretap victim Laura Moreno. The wiretapping of Moreno also  
31 served as an overt act in the wiretapping conspiracy count on  
32 which Pellicano was found guilty.

1 Pellicano: I'll call him right now.

2 Wasser: ...tell him that, that you and I talked, and I  
3 said to you that, um, that you said to me would  
4 like to get that fucking Kolodny, and I said talk  
to Terry, he may join you.

5 Three days later, Pellicano and Christensen engaged in a  
6 telephone conversation that was recorded by Pellicano.<sup>12</sup> At the  
7 outset of this conversation, Pellicano and Christensen cautiously  
8 set the parameters under which Pellicano would wiretap Bonder

9 Kerkorian:

10 Christensen: Um, Kirk and I were talking.

11 Pellicano: Yes.

12 Christensen: And we were thinking about this situation and um,  
13 he's out of it right?

14 Pellicano: Of course.

15 Christensen: And um, so I, I was thinking about this situation  
that if, um, it, it's not actually..

16 Pellicano: You don't have to go any further, I, I, I get what  
17 you're doing.

18 Christensen: Yeah. It's not totally a central issue in life,  
but it is important.

19 Pellicano: Okay.

20 Christensen: Whether or not um, um...

21 Pellicano: I got it, I got it.

22 Christensen: ...it's artificial insemination..

23 Pellicano: Yes, I got it.

24 Christensen: Um, so I, I think that it would be worth you know  
25 a reward here.

26 Pellicano: Well, it'd be just, the con- the conversations are  
just between you and I.

---

27 <sup>12</sup> The March 18, 2002, call is the first of the 34  
28 Pellicano-Christensen recordings.

1 Christensen: Right.  
2 Pellicano: Period.  
3 Christensen: Okay.  
4 Pellicano: Period.  
5 Christensen: Right.  
6 Pellicano: Okay.  
7 Christensen: In fact, one, one of the criteria is that no name  
8 ever surfaces anywhere, cause...  
9 Pellicano: Ah you have my word on my children.  
10 Christensen: Alright. The people related to me don't wanna do  
11 this.  
12 As this conversation continued, Christensen again stressed the  
13 need for their actions to be completely secret so that nobody,  
14 not even his fellow attorneys in the child support litigation,  
15 would ever learn of what they had done:  
16 Pellicano: Okay so. What I'm saying to you is the  
17 conversations are only between you and I.  
18 Christensen: Okay.  
19 Pellicano: And I need to be able to trust you too.  
20 Christensen: Well UNT  
21 Pellicano: I'm gon- I'm gonna be feeding you information that  
22 you'd never get in a million years.  
23 Christensen: Let me, let me, um yeah... because I wanna be real  
24 clear with you because um, you and I have known  
25 each other for a long time but as you say, we have  
26 never worked together.  
27 Pellicano: Yes sir.  
28 Christensen: So when you say it's only between you and I, I  
mean I'm not talking to Dennis or anybody about  
this.  
Pellicano: I, I jus- I heard you.

1 Christensen: Okay.

2 Pellicano: I heard that. And I got that. And by the way,  
3 Dennis doesn't need to know and if Dennis were...if  
4 I were to told Dennis, tell Dennis you know, you  
5 don't know nothing, he would know nothing.

6 Christensen: Yeah, no. He's our friend and all that, but  
7 that...

8 Pellicano: But, I got it. Listen to me, I'm a Sicilian.  
9 Okay?

10 After obtaining Pellicano's word that their actions would remain  
11 forever secret and agreeing to pay Pellicano's standard \$25,000  
12 retainer fee, Christensen then informed Pellicano that he could  
13 receive a \$100,000 reward if he succeeded in determining the true  
14 biological father of Kira Kerkorian. The conversation concluded  
15 with Pellicano advising Christensen that, in addition to  
16 obtaining information identifying Kira Kerkorian's biological  
17 father, he would also be providing Christensen with "other  
18 information that may help you in this case," to which Christensen  
19 responded "I'll take it. I'm a good sport that way."

20 With an agreement to wiretap Bonder Kerkorian in place,  
21 Pellicano, consistent with his prior promises, began feeding  
22 Christensen with the substance of Bonder Kerkorian's  
23 confidential, and often privileged, communications with her  
24 lawyers, family and friends. For example, on April 18, 2002,  
25 Pellicano relayed to Christensen the privileged communications  
26 that Bonder Kerkorian had with attorney Harlee Gasmer<sup>13</sup> following  
27 a recent court hearing:

28 <sup>13</sup> Trial testimony will establish that Bonder Kerkorian  
had little actual in-person contact with her attorneys and that  
the majority of her communications with her attorneys, including  
the communication referenced by Pellicano above, occurred over  
the telephone.

1 Pellicano: You got another hearing this afternoon. Right?

2 Christensen: Yeah. [Judge Edmon] said in her, in her tentative  
3 discussion that um, Lisa's version of a  
4 conversation with me...

4 Pellicano: Uh huh.

5 Christensen: That she couldn't understand it. Okay? That's  
6 putting it kindly.

6 Pellicano: I, I know all of that.

7 Christensen: Right.

8 Pellicano: I know all of that. And because Harlee described  
9 it to her in detail.

10 Christensen: Right. So, oh, Harlee told her that the judge was  
11 questioning her credibility?

11 Pellicano: Yes. So, so Lisa kept saying, well she says, then  
12 she thinks I am a liar, right? She thinks I am a  
13 liar? And Harlee goes, no, she didn't say you  
14 were a liar. Cut it out. But she didn't believe  
15 you. (laughter) She didn't believe you but she  
16 didn't call you a liar. (laughter).

15 Christensen: Geez.

16 Four days later and three days after Bonder Kerkorian's  
17 demurrer and motion to strike were denied in the civil action,  
18 Pellicano advised Christensen at length about the turmoil that  
19 arose between Bonder Kerkorian and her attorneys as a result of  
20 these rulings, as well as other aspects of privileged litigation  
21 strategy that he had learned through the wiretap:

22 Pellicano: Under Bonder, Lisa Bonder. Now, there's, there's  
23 tons of things to say to you, to tell you. So let  
24 me try to get to the, the important things. The  
25 important thing is they're filing other motions,  
26 uh, today.

25 Christensen: (laughter) What did they think about getting their  
26 ass kicked on Friday (laughter)?

26 Pellicano: Oh she's, she's, listen, she, she tried, she tried  
27 t- t- to fire, ah, Kolodny. And Kolodny talked  
28 her back into it. And-and one of the ways he was

1 able to do that, is he talked Sorrell Trope into  
2 not filing the action with Kreiss.<sup>14</sup>

3 Christensen: Oh, he did?

4 Pellicano: Yep. He talked Sorrell into doing it. So  
5 Sorrell's not. And, and you know Kolodny's in  
6 Spain somewhere. Okay?

7 Christensen: Alright.

8 Pellicano: So, so, he talked to her for about, almost an  
9 hour. And, and she's trying, now, now Rein is  
10 going to, wants to, is going to represent Debra  
11 Simon. And they're, and they're concerned  
12 about...

13 Christensen: Oh Rein is going to represent her at the depo?

14 Pellicano: Yeah. So what you gotta do is you got to get him  
15 excluded somehow, because he is going to be a  
16 witness. And it was Rein who got the test done up  
17 at the laboratory. It was at Rein's request and  
18 he got the results. So there is no privilege.  
19 R- Rein requested the, the tests up at the, at the  
20 ah...you got to be careful with this...

21 Christensen: Seattle.

22 Pellicano: Yes. You got to be real careful with this. Now,  
23 in how, in how you approach this.

24 Christensen: Well, we know from the file that Rein's secretary  
25 sent away for a- forms.

26 Pellicano: Well, and, and there's an email. You understand?  
27 Where he communicates with them also. So be very  
28 careful about this, because there's only one way  
for me to know this. And, and he's worried about  
that and he's, and he's talking, he's having  
somebody research the, the, um, ah, attorney-  
client privilege. So they've been, they worked on  
that all day yesterday.

29 Christensen: They did. Who's they?

30 Pellicano: Rein and ah, ah, Harlee Gasner.

31 Christensen: So is Rein going to help ah, Kolodny-  
32 Pellicano: Rein-

33

---

34 <sup>14</sup> Sorrell Trope represented Michael Kreiss, Bonder  
35 Kerkorian's first husband and father to her son Taylor, in child  
36 custody matters.

1 Christensen: -as much as he can?

2 Pellicano: Yes. Well, becau- he's helping Lisa. Lisa is you  
3 know, driving him fucking crazy. So Lisa, he's  
4 helping Lisa. But ah, so that they're, they're  
5 researching the, the attorney-client aspect of  
6 this. Now, let me tell you the other thing.

7 Christensen: Is Kolodny... you go ahead.

8 Pellicano: Here's, here's UNT she, she Kolodny was scared to  
9 death that she was going to fire him.

10 Christensen: After Friday?

11 Pellicano: Yes. So, UNT so, oh, she, she went to, she went  
12 to fucking pieces, man. You did a great job.

13 Christensen: We just kicked-

14 Pellicano: UNT.

15 Christensen: -their booty. It still helps to be a lawyer.  
16 Okay?

17 Pellicano: I wanna tell you something. He fucking hates you,  
18 they both do... This is good because they're  
19 making emotional decisions.

20 Christensen: Right, right.

21 Pellicano: Let me tell you the, the one thing, that, that's,  
22 that's not emotional, that I, I would have done  
23 myself had I been your opponent. Is that what  
24 they're going to do, is they're going to try to  
25 get a guardian ad litem appointed for Kira. So  
26 that, that the lawyer is the one that's going to  
27 take this, this, um this guardian ad litem will  
28 take this forward with the court. And that she'll  
be out of it. But he also told her that...

29 Christensen: And then Lisa will be out of it?

30 Pellicano: Yes. But yes. Well, yeah. That's, that's  
31 UNT...and I agree with that. Don't you? That  
32 she'll be out of it but she still won't be out of  
33 it as-as far as the, the civil case is concerned  
34 and she'll still, it'll still be discoverable.

35 Christensen: Oh my gosh.

36 Pellicano: So, so this is, this is the best that he could do  
37 after a fucking hour of conversation.

38 Christensen: Oh my gosh.

1 Pellicano: And he's also gonna file protective orders.

2 Christensen: But, okay. Well, yeah, that, that we knew though.

3 Pellicano: Yeah well. He's, this is, this is, so their big  
4 plan is filing protective orders and, and ah,  
5 filing and trying to getting to get a guardian ad  
6 litem. Also, he says that they are not...

7 Christensen: Not a guardian, you mean like an attorney for her?

8 Pellicano: UNT no. An attorney for the child. Guardian ad  
9 litem.

10 Christensen: That's two different things though. Guardian ad  
11 litem, is like a guardian for the child.

12 Pellicano: No. Guardian ad litem is an attorney, you got,  
13 ask Dennis about this...guardian ad litem is an  
14 attorney who represents the interests of the  
15 child, in a, in a domestic dispute at any time.

16 Christensen: Right, but, but I think...well okay.

17 Pellicano: Yeah. I'm, I'm right about this. Ask Dennis and  
18 you'll find out. Now the other, the other thing  
19 is that, oh, Kolodny paid somebody thirty-five  
20 hundred dollars, a professional writer, to finish  
21 up the, the declarations and that's what he's  
22 doing now. Thirty-five hundred dollars.

23 Christensen: To finish up what? You mean, new ones or the ones  
24 that, that-

25 Pellicano: The ones...

26 Christensen: -confessions that, the UNT confessions they filed  
27 on the 12th? Which ones?

28 Pellicano: That's, that's, that's...all of those. Okay?  
Thirty-five hundred dollars and she was bitching  
and moaning about that. They, the...she's, she's  
also, you know, trying to figure out why you  
subpoenaed eight people from the lab and you know  
and Rein and Kolodny are trying to tell her why.  
You know, and, and ah, um, she said, she says what  
if I agree to the fifty thousand and just ask him  
to...to, to, to, to not satisfy but uh... the thr-  
the three million dollar loan...uh...the three  
million dollars UNT?

Christensen: Yeah. Forgive the three million.

Pellicano: Forgi- that's right. Forgive the three million,  
and so Rein says, well what if we can get you

1                   seventy-five thousand a month and forgive the  
2                   loan. He says, you shouldn't back down. She was,  
3                   she was fucking through Friday, man. She was  
4                   through. She was through with everybody. She was  
5                   yelling at everybody. You understand?  
6  
7 Christensen:     Yeah.  
8  
9 Pellicano:        She was done. And Kolodny talked her back into it  
10                   by saying that he got Kolod- uh, he got Sorrell  
11                   not to file.  
12  
13 Christensen:     Mmm hmm.  
14  
15 Pellicano:        So that kind of softened her up.  
16  
17 Christensen:     But she, I, I knew, I knew that she'd be in orbit  
18                   after Friday's results.  
19  
20 Pellicano:        Oh God, absolutely, abso- and, and she still  
21                   realizes that she's still gonna have to go through  
22                   all this scrutiny and that you're gonna keep her  
23                   in litigation for two years.  
24  
25 Christensen:     Yeah. And by the way, how does she expect to pay  
26                   for the attorney's fees in Santa Monica?  
27  
28 Pellicano:        Uh, she, she thinks that- that he's going to have  
29                   to pay some of them. So Rein, Rein tells her,  
30                   wait a minute, you know, he says, you know, Kirk  
31                   may pay three million and you may have to pay one  
32                   million. You know what I mean?  
33  
34 Christensen:     Right.  
35  
36 Pellicano:        In other words, no matter even if Kirk pays the  
37                   majority of the fees she is still going to have to  
38                   pay (laughter).  
39  
40 Christensen:     He could pay you know...that's right. He could  
41                   pay three-fourths and she's still out a million.  
42  
43 Pellicano:        So, so, so she's, you know she's claiming that  
44                   she's going to be destitute and all this other  
45                   shit. Well, anyway...the, the, um...  
46  
47 Christensen:     Who's going to represent her in Santa Monica?  
48  
49 Pellicano:        Well, he, Kolodny is trying to find a civil lawyer  
50                   for her.  
51  
52 Christensen:     (laughter) Well, wait a minute.  
53  
54 Pellicano:        I know, I know.

1 Christensen: What do you mean a civil lawyer? How, how's she  
going to come in- how, how's she gonna do that?

2 Pellicano: By the way, they do- they do not want the- the...  
3 Kolodny is scared to death about the, the, the  
4 Santa Monica Court for some reason. Why- why is  
he afraid of Santa Monica court?

5 Christensen: Well, I don't know. But we smashed him down to  
earth pretty good, okay?

6 Pellicano: They also said something about the judge had to go  
7 to some, some meeting because some thing with her  
son so she couldn't hear things.

8 Christensen: Uh, that was yeah, Judge Edmon, the other day.

9 Pellicano: Yeah, yeah. I think there's so much...hold on a  
10 second. There is one other point that I wanted to  
11 make with you. Oh, I got the identity of the drug  
dealer.

12 Christensen: Really?

13 Pellicano: I got, I got a-

14 Christensen: UNT.

15 Pellicano: -photograph of him too. He's got black hair and  
16 blue eyes. Is that a little suggestive to you,  
an olive complexion?

17 Christensen: (laughter) He looks like, he looks like Kira  
right?

18 Pellicano: Yep. (laughter)

19 Christensen: So you have Joey's last name?

20 Pellicano: Yep.

21 Christensen: What's Joey's last name?

22 Pellicano: Campana.

23 Christensen: Oh, come on.

24 Pellicano: C-A-M-P-A-N-A.

25 Christensen: Really?

26 Pellicano: Absolutely.

27 Christensen: Campana. With a little, whatever those little-

28

1 Pellicano: No, no.  
2 Christensen: -things over the N or something.  
3 Pellicano: No, no, no. He's Italian.  
4 Christensen: So it's not a Spanish name.  
5 Pellicano: No. Joey Campana. Campana. C-A-M-P-A-N-A. And  
6 he's got a record.<sup>15</sup>  
7 Christensen: So Kolodny almost got fired again.  
8 Pellicano: Yeah.  
9 Christensen: Figures.  
10 Pellicano: Oh my God. On-  
11 Christensen: But now Rein is all over this thing, I guess.  
12 Pellicano: Well, she, she, yes.  
13 Christensen: Rein's in the middle of it again.  
14 Pellicano: Rein, Rein is UNT...  
15 Christensen: Because I'd heard that Kolodny with, you know, you  
16 had told me that Kolodny-  
17 Pellicano: Yeah.  
18 Christensen: -was just-  
19 Pellicano: Yes, yeah.  
20 Christensen: -shoving Rein down the drain.  
21 Pellicano: Yes, yes. That's right. That's right, that's  
22 right.  
23 Christensen: But Kolodny has made a comeback now.  
24 Pellicano: Yes. He made a comeback, he made a comeback.  
25 Boy, you could hear the sigh of relief in his  
26 voice too. And he says, now I got you back on  
27 center again. Huh? And she says, yeah, okay.  
28 I'm back on center again.

---

26 <sup>15</sup> Mark Arneson, who has been convicted of forty-six  
27 felonies, including RICO and RICO Conspiracy, for having served  
28 as Pellicano's paid LAPD source of information, conducted  
unauthorized federal and state criminal history inquiries of  
Joseph Campana on April 16, 2002.

1 Christensen: Hmm...

2 Pellicano: And then she rips into Rein for, for two hours.

3 Christensen: This is uh, we, we seem to be giving them some  
4 rugged weekends.

5 Pellicano: Oh yeah. And I'll tell you something, if, you,  
6 you know if we continue to, to, to get this kind  
7 of information with their strategy, we're, we're  
8 really killing them.

9 As the conversation continued, Pellicano advised a gleeful  
10 Christensen of the strategy that Kolodny and Bonder Kerkorian had  
11 devised for her upcoming deposition:

12 Pellicano: Right. Oh that's, that's what I wanted to remind  
13 you about. He, he said...

14 Christensen: Who's he?

15 Pellicano: This is Kolodny, saying, telling her that there's,  
16 that, that, that she wants, she does not want the  
17 depo to go forward. He says he wants it to go  
18 forward, because the minute they start talking  
19 about any...you know what he calls these  
20 collateral issues, he is going to stop the  
21 deposition and they're going to walk out.

22 Christensen: She does, she doesn't want her depo?

23 Pellicano: Yes.

24 Christensen: Right?

25 Pellicano: Yes- she doesn't want her depo. Which Kolodny  
26 says, we- he wants it to go forward because he  
27 wants, you know, to have, you know, a showing of  
28 clean hands but the minute you start asking her  
29 these questions, he's going to shut it down. He's  
30 going to walk out. So that's what's going to  
31 happen on her depo date.

32 Christensen: He's a big shot.

33 Pellicano: Huh?

34 Christensen: He's a big shot.

35 Pellicano: Yeah, right...I know.

36 Christensen: He is such an asshole.

1 Pellicano: Oh.

2 Christensen: It's so much fun beating him Anthony.

3 Later in the conversation, Christensen, who was continuing his  
4 efforts of building a fraud case against Bonder Kerkorian and was  
5 aware from prior discussions with Pellicano that Bonder Kerkorian  
6 had told Kolodny assistant Nancy Wolff that Kerkorian did not  
7 know at the outset that he was not the biological father of her  
8 child, advised Pellicano that he would receive an additional  
9 reward should he obtain "useable" proof of this fact:

10 Christensen: Okay. That's your job. And there is a second job  
that will have an equal, equal reward. Okay?

11 Pellicano: What's that?

12 Christensen: Well, maybe not equal because, but certainly the  
13 reward is on the table. And that is, Kirk did not  
14 know, okay? He was in fact deceived by her.  
Okay?

15 Pellicano: Yes.

16 Christensen: He was not part of some knowing plot that well,  
17 it's not my baby but, you know, go ahead, let's  
18 publicize it and it'll let me look good to the  
world. Okay?

19 Pellicano: He doesn't give a fuck.

20 Christensen: That's a fucking lie. It's fucking bullshit.

21 Pellicano: Yeah well, why, why would he give a shit?

22 Christensen: Right. And you already have proof of that-

23 Pellicano: Absolutely.

24 Christensen: -but you can't use it, because she already told  
Nancy Wolff he didn't know.

25 Pellicano: That's right.

26 Christensen: Okay, but you can't use that. So I want to be  
27 really clear, Anthony. To give you a second path  
here to glory, which is I also want to know...I  
28 also want usable proof that he did not know. That  
she was in fact deceiving him.

1 B. INTERCEPTED COMMUNICATIONS RELATING TO THE SIMON MEDIATION

2 Over the next several days, Pellicano and Christensen  
3 engaged in a series of recorded conversations, during which time  
4 they discussed discord between Bonder Kerkorian and her attorneys  
5 over the adverse rulings in the civil case and Bonder Kerkorian's  
6 intention to proceed without Kolodny<sup>16</sup> in a mediation that was to  
7 be conducted by mediator Debra Simon.<sup>17</sup> Throughout these  
8 conversations, Christensen and Pellicano again openly discuss the  
9 information being obtained from the wiretap. For example, in a  
10 conversation that took place on April 26, 2002, Christensen,  
11 after informing Pellicano that he did not file a fraud count  
12 against Bonder Kerkorian earlier that day, was advised by  
13 Pellicano that he had yet to attempt to learn any new information  
14 that day. In response, Christensen stated "Oh, I see, you've  
15 been waiting to see if you had a fraud count to talk about or, to  
16 listen about." In a separate conversation later that same day,  
17 Christensen probed Pellicano about rumors that Kolodny had  
18 threatened to resign as Bonder Kerkorian's attorney, to which  
19 Pellicano responded "Well, he didn't say that to her directly.  
20 You know, at least I haven't . . ." In yet another call later  
21 that same day, Pellicano became distressed when he learned that  
22 Christensen already was aware of the information that he was  
23 going to provide about Bonder Kerkorian proceeding to the  
24 mediation without Kolodny. After being reassured by Christensen  
25

---

26 <sup>16</sup> At the time, Kolodny was in Spain.

27 <sup>17</sup> In 2002, Simon resided in Florida. She arrived in Los  
28 Angeles to conduct the mediation on April 27, 2002.

1 that confirmation of known information is also helpful, Pellicano  
2 ended the conversation by stating "Okay, let me call you back  
3 after I hear some more."

4 On the morning of April 27, 2008 (prior to Simon's arrival  
5 in California), Pellicano advised Christensen that Kolodny was  
6 attempting to intercede in the mediation by advising Bonder  
7 Kerkorian not to proceed without counsel:

8 Pellicano: Jesus, [Lisa] tells one person one thing,  
9 completely reverses herself when she talks to the  
other person.

10 Christensen: Really?

11 Pellicano: Oh my God, it's horrible.

12 Christensen: Like what's, what's an example?

13 Pellicano: Well, in other words, she'll, she'll tell ah, ah,  
14 that you know, she'll side with ah, Debra and  
15 Kolodny's a piece of shit, and all that, and then  
16 she'll get on the phone and say that, you know,  
that she told Debra that she would never do  
anything without Kolodny's per-permission.

17 Christensen: Right, so she-

18 Pellicano: Out and out, out and out bold ass no question  
about it, fucking lying.

19 Christensen: Like two complete, like to Debra she says forget  
20 Kolodny he's an ass, he's terrible.

21 Pellicano: Right, right.

22 Christensen: And then to Kolodny's people he says, she says...

23 Pellicano: Kol-Kolodny came, Kolodny comes in.

24 Christensen: Has Kolodny arrived now?

25 Pellicano: Yes, Kolodny comes... Well they, they called him.

26 Christensen: Right.

27 Pellicano: And by the way, she's out shopping right now with  
28 Nancy Wolff. Remember what I told you what  
happens?

1 Christensen: Right.

2 Pellicano: Okay, so, you know, so now Nancy's got her raced  
3 again and they're out shopping right now in  
4 Beverly Hills. So the, the point is, you can't  
5 write this man. So, so Kolodny calls and says, I,  
6 you know, I, I thought I'd better come back, I  
7 heard that something was going on, you know what I  
8 mean?

9 Christensen: Mmm hmm.

10 Pellicano: And then, and then, you know, she talks to him and  
11 then she says, first thing out of her mouth,  
12 almost, is, will you come with me tomorrow?

13 Christensen: So she asked him to come.

14 Pellicano: Yes.

15 Christensen: Right, okay.

16 Pellicano: After, after telling everybody else-

17 Christensen: Right.

18 Pellicano: -that she didn't want him there and tell-

19 Christensen: Right.

20 Pellicano: -and she, I mean Debra, you know, she called, she  
21 called Debra and Debra says, you gotta stop  
22 calling me. I wanna be there.

23 Christensen: Right.

24 Later in the conversation, Christensen specifically asked  
25 Pellicano what he had learned about Bonder Kerkorian's settlement  
26 strategy and the potential impact of Kolodny's return from Spain  
27 on the possibility of settlement:

28 Christensen: Now are they talking about what they now want out  
of this?

Pellicano: Oh yeah.

Christensen: They're probably ah...

Pellicano: Mass, massive detail.

Christensen: And they're probably up like in, you know, plenty  
big numbers and all kinds of bullshit.

1 Pellicano: Yep. Absolutely. And, and ah, absolutely. And  
2 all kinds of restrictions and she can move and she  
3 can, you know, she can get married and, you know  
4 and you know, Kirk says that, you know, that ah,  
5 ah, that ah, you know, why should he pay her all  
6 this money if she's gonna be married to another  
7 man and...  
8 Christensen: Right.  
9 Pellicano: All, all of these things.  
10 Christensen: Right.  
11 Pellicano: So-  
12 Christensen: What kind of money are they talking about now?  
13 Pellicano: I think she'd take a hundred and twenty five grand  
14 now.  
15 Christensen: The same old one twenty five?  
16 Pellicano: Yeah. Right.  
17 Christensen: Well, screw her.  
18 Pellicano: I got it. I got it. I understand.  
19 Christensen: Right, and the right to move, right?  
20 Pellicano: But, but, what, what I'm saying to you is that  
21 everything was fine up until nine o'clock this  
22 morning.  
23 Christensen: Yeah, yeah.  
24 Pellicano: Now, now Deb- Debra's gonna come in and she's  
25 gonna get fucking, you know, you know, side-  
26 swiped.  
27 Christensen: She sure is. Oh is she gonna be caught off guard.  
28 Pellicano: Well, it's ah... I gotta tell you something, pa-  
pal. If I, if I wasn't in tune with everything  
that's going on, I would have said that this was  
planned, but it wasn't.  
Christensen: Ah, yeah. You know I mean...  
Pellicano: If Kolodny, if Kolodny didn't call her...  
Christensen: If you were looking at it from way outside right?

1 Further along in the conversation Pellicano, after noting that  
2 Bonder Kerkorian was approaching the mediation with "whiskey  
3 strength," cited Bonder Kerkorian as stating: "Okay, he wants to  
4 see Kira and he wants me to stay in town," and further stated  
5 "this is her exact words by the way, 'how much money is he  
6 willing to pay me to get that?' That's her exact words by the  
7 way."

8 In a follow-up call later that day, Pellicano informed  
9 Christensen that he would be checking to see whether Simon was  
10 truthfully relaying Kerkorian's settlement position to Bonder  
11 Kerkorian:

12 Pellicano: You think she told the truth?

13 Christensen: Well I know that she, what choice does she have  
14 but to tell the truth about what Kirk would be  
willing to do, right? So-

15 Pellicano: I'm not so sure but go ahead. I, I'm gonna find  
16 out for sure.

17 Christensen: Yeah you will. So...

18 Pellicano: Oh without any question.

19 Christensen then informed Pellicano that much of the discussion  
20 of the last day focused on Steve Bing's status as the biological  
21 father of Kira Kerkorian. Aware that Bing also was a Pellicano  
22 client, Christensen expressly warned Pellicano about what he was  
23 likely to hear when he listened to the day's wiretapped  
24 conversations:

25 Christensen: So there is, I mean, I, I don't know, well now, I  
26 don't know whether you wanna, how comfortable you  
27 will stay in this process because ah, there is  
28 talk about Steve Bing. As I told you, Lisa  
apparently, according to Debra, told Kolodny that  
Steve Bing is the father. Kolodny then gets all  
geared up about how well, ah you know, maybe Steve  
Bing should put up, you know, thirty million bucks

1 or something. So there's talk about pursuing  
2 Steve Bing. So, I don't know whether you're  
3 comfortable, I mean, no one's asking you to do  
anything or take sides but I don't know whether  
you're comfortable reporting on all this.

4 \* \* \* \*

5 Christensen: All I'm telling you is what you're gonna find.  
6 Okay? That's what you're gonna find. Discussions  
7 about Steve Bing. And I'm only giving you a heads  
up because I think that's a, you know, I think  
that's a respectable thing on my part to say-

8 Pellicano: Of course it is.

9 Christensen: -you know, to give you a heads up, there's gonna  
10 be talk about Bing, about going after Bing and  
he's your client and your friend, so...

11 Towards the end of this conversation, Pellicano asked  
12 Christensen what settlement agreement was presented during the  
13 course of the mediation:

14 Pellicano: Oh UNT well the thing is. To settle with Kirk,  
15 she continues to get fifty grand and she, if she  
pays him back the three million.

16 Christensen: Well yeah.

17 Pellicano: Well, well, well. What is the, what's the fin-  
18 I'm gonna hear it for myself but what's the final  
deal?

19 Christensen: Well I don't know. I don't know what happened on  
20 the three million.

21 The following day, Pellicano and Christensen had another  
22 conversation, during which time Christensen advised Pellicano  
23 that the biological father would be expected to make a financial  
24 contribution to Kira Kerkorian, which led to the following  
25 exchange:

26 Pellicano: -then what I heard is the truth then.

27 Christensen: What did you hear?  
28

1 Pellicano: I heard that, that she said that Kirk said that  
2 he's going to squeeze Bing to, to get as much  
3 money as he can from Bing and that that that he'll  
4 pay the fifty and he'll squeeze the rest of the  
5 money from Bing.

4 Christensen: We're not squeezing any money, if Lisa UNT-

5 Pellicano: I'm telling you what's....I'm telling you what was  
6 said. I'm not telling you-

7 Christensen: Right.

8 Pellicano: -what the truth is.

9 Christensen: Right.

10 Pellicano: This has been...I'm gonna tell-

11 Christensen: UNT.

12 Pellicano: -you something this makes me absolutely sick to my  
13 stomach because you know what she tells Kolodny?

14 Christensen: What?

15 Pellicano: She doesn't say to Kolodny, he's the biological  
16 father, she said there's another candidate for the  
17 biological father. That's the word she uses.  
18 There's another candidate and his name is Steve  
19 Bing and you might have heard of him. And Kolodny  
20 says no, I don't, she says, she says he's  
21 embroiled in another lawsuit like this with  
22 Elizabeth Hurley. Now UNT you gave her even  
23 further whiskey strength by telling her that you  
24 know whatever the, the amount of money you get  
25 from, from Kirk, he's going to squeeze Steve Bing  
26 for the rest so you're still going to get the  
27 three hundred twenty thousand dollars a month.  
28 And, and, and she lies and she says Steve Bing was  
afraid that his name was gonna get in the papers  
so he went to, so he went to uh, uh to Kirk. See  
this woman just lies her motherfucking ass off.

23 Christensen: She told Kolodny that?

24 Pellicano: That's exactly what she said. And she also told  
Nancy Wolff that.

25 Christensen: Such lies.

26 Pellicano: She didn't say, she didn't say to Kolodny the, he  
27 is the biological father, she said there's another  
28 candidate.

1 Christensen: Great.

2 Later in the conversation, Pellicano, yet again, vividly relayed  
3 to Christensen another conversation between Bonder Kerkorian and  
4 Kolodny before noting that he had recently intercepted calls to  
5 which Kerkorian was a party.<sup>18</sup>  
6

7 Christensen: Alright so we know that about her that everything  
8 is a scheme okay? And we know that Kolodny is the  
greediest piece of garbage that ever lived.

9 Pellicano: Well, you want to know something? He wasn't  
10 tonight. As a matter of fact, he acted almost  
bored.

11 Christensen: How do you mean?

12 Pellicano: Cause he said, "okay then we'll go into court  
13 tomorrow." He was bored. He was bored with the  
whole thing. I swear to you on my children the  
14 fucking guy was absolutely fucking bored.

15 Christensen: Well, why not? He had already you know, screwed  
up everything beyond-

16 Pellicano: Yeah, and and he knew that this-

17 Christensen: -um repair.

18 Pellicano: -he knew this was going nowhere.

19 Christensen: Right, right so he creates a situation that goes  
nowhere.

20 Pellicano: Well, he didn't create the situation that goes  
21 nowhere...Debra Simon created a situation that  
goes nowhere.

22 Christensen: Well, yeah, but you know Kolodny.

23 Pellicano: And then Debra Simon's lying to fucking Kirk. By  
24 the way, I'm hearing both sides you know, I'm  
hearing her talk to Kirk, too.

25 Christensen: Yeah.  
26

---

27 <sup>18</sup> The mediation took place at the individual residences  
28 of Bonder Kerkorian and Kerkorian, with Simon shuttling between  
the two homes.

1 Pellicano: Now that's not for attribution. I mean, for, for,  
2 you know, for distribution but-

3 Christensen: Yeah.

4 Pellicano: I'm hearing both of them. I'm hearing all of it.  
5 The whole nine yards. Then she gets on with  
6 Nancy, she is such a fucking liar. It's just  
7 incredible.

8 \* \* \* \*

9 Pellicano: [Bing's] got, he's got, he can afford to pay this  
10 fucking child support up the ass. If she thought  
11 it was him in the first place, why didn't she go  
12 after him? You're talking about six years now?  
13 Six years later? She's gonna go after him? What  
14 are you kidding me? She's just lying. And, and,  
15 and, and, and Debra says that, that and I know  
16 that there's no way that Kirk said this, cause I  
17 heard what he said. You understand, there's no  
18 way he said that he was going to squeeze Steve  
19 Bing.

20 Christensen: No, he did not. Hold on one second.

21 C. TERMINATION OF THE WIRETAP

22 After the wiretap of Bonder Kerkorian had been ongoing for  
23 approximately two months, defendant and Pellicano engaged in a  
24 series of recorded conversations over the six-day period from May  
25 10, 2002 to May 16, 2002, in which they ultimately agreed to  
26 terminate the wiretap.

27 On May 10, 2002, Pellicano and Christensen had a telephone  
28 conversation in which Pellicano advised Christensen that Bonder  
Kerkorian had been talking to her lawyers about the specific  
income figures addressed on Kerkorian's tax returns but further  
noted that "I don't have first hand knowledge because she was  
with them, you understand?" Upon hearing this information,  
Christensen, incensed that confidential information had been  
disclosed but aware that he had obtained this information through

1 illegal methods, stated "I don't know how, I don't know how to  
2 bust 'em for it but I, that is totally a violation of ah- Edmon's  
3 most important order." Later in the conversation, Pellicano,  
4 after referencing how a new call from Kerkorian to Simon once  
5 again gave Bonder Kerkorian "whiskey strength," informed  
6 Christensen that he wanted to stop doing "this" as it consumed a  
7 tremendous amount of time and he felt frustrated that Kerkorian,  
8 by continuing to contact Simon, was not taking into proper  
9 account the information that Pellicano had been providing to  
10 Christensen regarding Simon's loyalty to Bonder Kerkorian. In  
11 response, Christensen advised Pellicano that he would address  
12 this issue with Kerkorian.

13 On May 14, 2002, Christensen and Pellicano had a  
14 conversation in which they discussed the parentage of Kira  
15 Kerkorian, whether they should "dirty-up" Bonder Kerkorian  
16 through a negative publicity campaign, and the fact that  
17 Pellicano was awaiting an outstanding payment from Christensen.  
18 Towards the end of this conversation, Pellicano again broached  
19 the subject of discontinuing the Bonder Kerkorian wiretap.  
20 Christensen, however, advised Pellicano that the wiretap should  
21 remain on for at least another day so that Christensen could  
22 obtain, for one last time, the privileged communications between  
23 Kolodny and Bonder Kerkorian regarding an in-chambers court  
24 hearing that occurred earlier that day:<sup>19</sup>

25 Pellicano: No. No. Yeah, but you haven't given me a decision  
26 yet, pal.

---

27 <sup>19</sup> An OSC was scheduled to be heard that day on the issue  
28 of custody. While the OSC was taken off calendar, an in chambers  
conference with counsel was held.

1 Christensen: On what? Decision on what?

2 Pellicano: Ah, the, continuation?

3 Christensen: (Sigh) You know, I was thinking maybe we'd knock  
4 it off for a while and then see what happened when  
we came back. Does that make sense? Or does that  
not work?

5 Pellicano: Ah.

6 Christensen: You're constantly having to do this, dig this and  
7 chase this. You know, I want to let you off the  
hook.

8 Pellicano: How you gonna do that? I either stop or I don't.

9 Christensen: Uh huh.

10 Pellicano: That doesn't mean that I have to report to you.  
11 Unless there's something interesting.

12 Christensen: Yeah, but I don't want you to have to work this  
hard.

13 Pellicano: Well what do you, what, you're the boss. Tell me  
14 what you want me to do. I'm a, I'm a . . .

15 Christensen: Well, there's gonna be . . .

16 Pellicano: I'm a sol - I'm a soldier. I told you that. Tell  
me what you want me to do.

17 Christensen: I mean today, they're gonna be, ah, you know,  
18 bitching and moaning about what happened, right?

19 Pellicano: (Laughing)

20 Christensen: And Kolodny will have lied to her about what went  
on.

21 Pellicano: Some other fucking catastro -- lie you know?

22 Christensen: Yeah, now that, that is, it will be interesting to  
23 see what he told her about what went on in  
chambers cause this time I was in there.

24 Pellicano: Okay.

25 Christensen: OK? So I know what went on.

26 Pellicano: Cool, that's really fucking cool.

27 Christensen: So, let's - that'll be interesting, ah, because  
28 they told her, you know, no way, we're screwed.

1 You know, by the end of the day we have, you know,  
2 she has sole custody of Kira, right? That was  
their, what they promised her right?

3 Pellicano: Yeah, and they didn't get that.

4 Christensen: They didn't even get a hearing.

5 Pellicano: They didn't even get nothing. Ok.

6 Christensen: So, you know, I guess it would be interesting to  
7 know what they told her today.

8 Pellicano: Ok.

9 Christensen: And then tomorrow, they'll be nothing and ok.  
Let's do this. Let's find out what they told her,  
10 what went on today.

11 Pellicano: Ok.

12 Christensen: Tomorrow, let's plan to do nothing and tomorrow we  
will decide if we keep going.

13 Pellicano: Ok.

14 The two ended the conversation by discussing information obtained  
15 from the wiretap, with Christensen expressing how both he and  
16 Kerkorian were extremely pleased with the results:

17 Pellicano: Alright, tell me. Just, just make me feel good.  
18 Tell me that the old man has a smile on his face.

19 Christensen: He does, okay? He's..

20 Pellicano: Is he happy?

21 Christensen: He's happy. I mean, come on. Look what, look  
22 what's been done here in the last week UNT great.

23 Pellicano: Look, look what we've been doing for him. Man,  
Jesus.

24 Christensen: Yeah, yeah.

25 Pellicano: He's got, he's got the best fucking outfit he, he  
could have.

26 Christensen: Our jaw's still hanging down. You know, over ah,  
27 stuff, some stuff that doesn't even count. It  
still blows your mind. Do you know what I mean?  
28

1 Pellicano: Oh sure it does.

2 Christensen: Like, I still can't-

3 Pellicano: You talking about the Debra stuff?

4 Christensen: Yeah. I don't even know why yet. Okay? I can't  
even figure out why.

5 Pellicano: You know, you know.

6 Christensen: Except that it's fun to do.

7 Pellicano: After, after we hung up last night, I, I started  
8 packing up and to go. You know, to, to, to pack  
up everything?

9 Christensen: Right.

10 Pellicano: And I just had to go back and, and, and review  
11 that again. The one before that?

12 Christensen: Right.

13 Pellicano: There was, there was nothing in that conversation,  
there was nothing!

14 Christensen: Anthony, there's, it makes no sense. Okay?

15 Pellicano: Jesus fucking Christ.

16 Christensen: It makes no sense. Well, I don't even know what  
17 it was, except to ingratiate herself but you  
know...

18 Pellicano: It, it, it is, it is an absolute co-dependent, you  
19 know, this, this is a, a absolute psychological  
20 phenomena. This is actual, this is no question  
co-dependency, double-edged sword.

21 Christensen: Yeah.

22 Pellicano: She, she cuts in both directions. She cuts  
23 against those that are with her and those that are  
with her.

24 Christensen: Yeah.

25 Pellicano: Do you understand what I mean?

26 Christensen: Yeah.

27 Pellicano: Everybody's against her but she cuts the two  
28 people that are with her. She lies to both of  
them.

1 Christensen: God. I mean it was like phenomenal. Just  
phenomenal.

2 Pellicano: Did you tell him about that?

3 Christensen: Yeah, oh sure.

4 Pellicano: He must have got a, he must have pissed his pants  
5 over that.

6 Christensen: He just couldn't believe it and, you know, neither  
7 of us. We both were saying what? What?

8 As previously agreed, Christensen and Pellicano revisited  
9 the issue of discontinuing the wiretap the following day (May 15,  
10 2002):

11 Pellicano: All right. Now you got one question, last  
12 question to answer, that you said you'd do this  
afternoon.

13 Christensen: What's that?

14 Pellicano: Do I continue or not?

15 Christensen: Um, let's um, let's end it, um, I'm getting on a  
plane tomorrow.

16 Pellicano: Good.

17 Christensen: Ok?

18 Pellicano: Great.

19 Christensen: And so is Kirk.

20 Pellicano: It's somewhere, where I can't find you, I hope.

21 Christensen: Right.

22 Pellicano: Ok.

23 Christensen: So we're done. Let's just say that tonight is the  
end of it.

24 Pellicano: Ok.

25 Christensen: And even then, don't report to me unless you have  
26 to, until the morning. You know what I mean.

27 Pellicano: I won't report to you at all.

28

1 Christensen: No, no, but let's just finish, do today, let's see  
2 what happens today and then tomorrow morning,  
we'll wra-that'll be the wrap up.

3 During another call later that same day, the two again discussed  
4 the termination of the wiretap:

5 Pellicano: Well, I've gotta have an adventure tonight and  
then we'll find out.

6 Christensen: Alright, then we're, then we're off duty.

7 Pellicano: Okay.

8 Christensen: Okay?

9 Pellicano: For good.

10 Christensen: Probably for good, yeah, but certainly, certainly.  
11 Well.

12 Pellicano: Aw, don't say probably. It's too difficult to  
redo this.

13 Christensen: Alright, well, then we're off duty. Screw it.

14 Pellicano: Okay. I, I just want to make this clear to you.  
15 It's gonna be too difficult to do this again. I,  
16 I was able to do it because I, I'm smart and I'm  
the best. You understand? But it would be too  
dangerous.

17 Christensen: Alright, but I mean, we don't wanna just keep  
18 going forever, do we?

19 Pellicano: (sighs) I'm not (UNT)

20 Christensen: I mean, whatta you trying to do, talk yourself  
into going forever here?

21 Pellicano: Who me? What are you fucking crazy?

22 Christensen: (laughs)

23 Pellicano: Nuh, nothing would make me happier as if you, if  
24 you would say, "That's it. Thank you Anthony.  
You did a very nice job. Now, bye-bye."

25 Christensen: Umm.

26 Pellicano: So just say that and make me happy.  
27  
28

1 Christensen: No. I'm saying the, I'm saying, you know, if  
2 you're telling me that, that uh, well, I don't  
wanna keep going into this anyway, okay?

3 Pellicano: Okay.

4 Christensen: We'll stay with it.

5 Pellicano: We'll stay with what?

6 Christensen: We'll stay with the decision.

7 Pellicano: The decision, good.

8 Christensen: Yeah.

9 The call then ended with Christensen instructing Pellicano that  
10 he had to listen to the wiretapped calls one last time:

11 Pellicano: I have to, I have to have an adventure tonight,  
12 right?

13 Christensen: Yeah.

14 Pellicano: Okay, I was trying to get out of that.

15 Christensen: No, one more.

16 Pellicano: (laughs).

17 Christensen: One more adventure.

18 Pellicano: I was tryin' to scheme my way outta this (laughs).

19 Christensen: That's okay, you know, I- I got it. I get the,  
you know, I get it.

20 Pellicano: (laughs) I'm just, you know, I just don't wanna  
21 go through, you know, that, that, uh, episode one  
22 more time. I just like, you know, you've been  
eating fucking spinach for, you know, three months  
now, and I only have one more fucking spoonful.

23 Christensen: That's true, at a certain point you can only have  
so much.

24 Pellicano: UNT gagging on me, gagging on me, you know what I  
25 mean?

26 Christensen: Yep.

27 Pellicano: Well, I just hope that I've proved my loyalty to  
28 you. And, and I also, that you see the kind of

1 soldier I am. I hope that that's all come  
2 forward.

3 Christensen: It sure has.

4 Pellicano: Okay pal.

5 Christensen: Okay, talk to you in the morning.

6 The following day (May 16, 2002), Christensen and Pellicano  
7 spoke again. At the outset of the conversation, Christensen  
8 inquired about hiring Pellicano for a second time to "destroy" an  
9 opponent -- with the adversary this time being Roy Olofson, a  
10 whistle blower who provided damaging information against a  
11 Christensen client in matters related to the Global Crossing  
12 accounting scandal. As the conversation continued, Christensen,  
13 in response to a question from Pellicano, advised Pellicano that  
14 the matter, like the Bonder-Kerkorian matter, should be kept  
15 "under the covers." Pellicano then addressed the issue of  
16 whether Christensen wanted him to "do the same thing as here?  
17 Because that's when it gets really expensive." In response,  
18 Christensen noted that, unlike the Bonder Kerkorian matter, he  
19 was not concerned with real time information but rather wanted to  
20 learn about Olofson's past.<sup>20</sup> As this call was about to  
21 conclude, Pellicano referenced back to the previous day's  
22 agreement to discontinue the Bonder Kerkorian wiretap:

23 Pellicano: Alright, pal.

24 Christensen: Alright.

25 Pellicano: So the switch gets shut?

26 Christensen: Ok.

27  
28 <sup>20</sup> Mark Arneson conducted unauthorized criminal history  
database inquiries on Olofson on July 9, 2002.

1 Pellicano: Ok.

2 IV.

3 EVIDENTIARY ISSUES<sup>21</sup>

4 A. ADMISSIBILITY OF PHYSICAL EVIDENCE

5 1. Authentication and Identification/Chain of Custody<sup>22</sup>

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

14 Rule 901(a) only requires the government to make a prima  
15 facie showing of authenticity or identification "so that a  
16 reasonable juror could find in favor of authenticity or  
17 identification." United States v. Chu Kong Yin, 935 F.2d 990,  
18 996 (9th Cir. 1991); see also United States v. Blackwood, 878  
19 F.2d 1200, 1202 (9th Cir. 1989); United States v. Black, 767 F.2d  
20 1334, 1342 (9th Cir. 1985). Once the government meets this  
21 burden, "the credibility or probative force of the evidence  
22

---

23  
24 <sup>21</sup> The government incorporates into this memorandum its  
25 extensive prior briefing, and the Court's accompanying orders, on  
26 the scope and admissibility of expert testimony, as well as the  
application of Federal Rule of Evidence 404(b) to evidence of  
other wiretaps.

27 <sup>22</sup> The government incorporates into this memorandum its  
28 prior briefing on this issue, as well as the Court's accompanying  
order.

1 offered is, ultimately, an issue for the jury." Black, 767 F.2d  
2 at 1342.

3 The authenticity of proposed exhibits may be proven by  
4 circumstantial evidence. United States v. Natale, 526 F.2d 1160,  
5 1173 (2d Cir. 1975); United States v. King, 472 F.2d 1, 9-11 (9th  
6 Cir. 1973). Moreover, the prosecution need only prove a rational  
7 basis from which the jury may conclude that the exhibits did, in  
8 fact, belong to the defendant. Federal Rule of Evidence 401(a);  
9 United States v. Blackwell, 694 F.2d 1325, 1330 (D.C. Cir. 1982);  
10 United States v. Sutton, 426 F.2d 1202 (D.C. Cir. 1969).

11 To be admitted into evidence, a physical exhibit must be in  
12 substantially the same condition as when the crime was committed.  
13 The court may admit the evidence if there is "a reasonable  
14 probability the article has not been changed in important  
15 respects." United States v. Harrington, 923 F.2d 1371, 1374 (9th  
16 Cir. 1991). This determination is to be made by the trial judge  
17 and will not be overturned except for clear abuse of discretion.  
18 Factors the court may consider in making this determination  
19 include the nature of the item, the circumstances surrounding its  
20 preservation, and the likelihood of intermeddlers having tampered  
21 with it. See United States v. Kaiser, 660 F.2d 724, 733 (9th  
22 Cir. 1981); Gallego v. United States, 276 F.2d 914, 917 (9th Cir.  
23 1960).

24 In establishing chain of custody as to an item of physical  
25 evidence, the government is not required to call all persons who  
26 may have come into contact with the piece of evidence. Reyes v.  
27 United States, 383 F.2d 734 (9th Cir. 1967); Gallego, 276 F.2d at  
28 917. Moreover, a presumption of regularity exists in the

1 handling of exhibits by public officials. Kaiser, 660 F.2d at  
2 733; United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir.  
3 1984) (en banc); Harrington, 923 F.2d 1371, 1374 (9th Cir. 1991).  
4 Therefore, to the extent that alleged or actual gaps in the chain  
5 of custody exist, such gaps go to the weight of the evidence  
6 rather than to its admissibility. Gallego, 276 F.2d at 917.

7 a. Photographs

8 Photographs may be authenticated by a witness who  
9 "identif[ies] the scene itself [in the photograph] and its  
10 coordinates in time and place." See Lucero v. Stewart, 892 F.2d  
11 52, 55 (9th Cir. 1989).

12 b. Recorded Conversations

13 Audio recordings are admissible upon a showing that "the  
14 recording is accurate, authentic and generally trustworthy."  
15 United States v. King, 587 F.2d 956, 961 (9th Cir. 1978).

16 The Ninth Circuit has held that recordings:

17 [a]re sufficiently authenticated under Federal Rule of  
18 Evidence 901(a) if 'sufficient proof has been  
19 introduced so that a reasonable juror could find in  
20 favor of authenticity or identification. [Citing  
21 cases.] This is done by proving a connection between  
22 the evidence and the party against whom the evidence is  
23 admitted, and can be done by both direct and  
24 circumstantial evidence.

25 United States v. Matta-Ballesteros, 71 F.3d 754, 768 (9th Cir.  
26 1995), modified, 98 F.3d 1100 (9th Cir. 1996) (allowing into  
27 evidence recordings of the torture of DEA Special Agent Camarena  
28 which were in the possession of a co-defendant).

Rule 901(b)(5) sets a low threshold for voice  
identifications offered to determine the admissibility of  
recorded conversations. Under this rule, audio recordings may be

1 authenticated by persons who are not parties to the recorded  
2 conversation, as long as the person can identify the voices on  
3 the recording. Fed. R. Evid. 905(b)(5); Torres, 908 F.2d at  
4 1425; United States v. Thomas, 586 F.2d 123, 133 (9th Cir. 1978).  
5 A witness's opinion testimony in this regard may be based upon  
6 his having heard the voice on another occasion under  
7 circumstances connecting it with the alleged speaker. Fed. R.  
8 Evid. 901(b)(5); Torres, 908 F.2d at 1425 ("Testimony of voice  
9 recognition constitutes sufficient authentication."); United  
10 States v. Bassey, 613 F.2d 198, 202 n.2 (9th Cir. 1979); United  
11 States v. Turner, 528 F.2d 143, 163 (9th Cir. 1975). If the  
12 identifying witness is "'minimally familiar' with the voice he  
13 identifies, Rule 901(b) is satisfied." United States v. Plunk,  
14 153 F.3d 1011, 1022-23 (9th Cir.), amended, 161 F.3d 1195 (9th  
15 Cir. 1998).

16 The speaker's identity also can be established by  
17 circumstantial evidence. Fed. R. Evid. 901(b)(5), (6). Such  
18 evidence may include: (1) defendant's identification of himself  
19 during the conversation either by surname, first name or nickname  
20 (United States v. Vento, 533 F.2d 838, 864 (3d Cir. 1976); United  
21 States v. Turner, 528 F.2d 143, 163 (9th Cir. 1975); Palos v.  
22 United States, 416 F.2d 438, 440 (5th Cir. 1969)); (2) listing of  
23 the telephone in the defendant's name or the location of the  
24 telephone at the defendant's residence (Federal Rule of Evidence  
25 901(b)(6) (call placed to phone number assigned to defendant plus  
26 self-identification of recipient of call is sufficient to  
27 identify defendant as recipient)); (3) the speaker's revelation  
28 of information particularly known to the person he purports to be

1 (United States v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1977);  
2 United States v. Ross, 321 F.2d 61, 69 (2d Cir. 1963)); (4) the  
3 giving of directions which prove to be correct, or returning a  
4 call and referring to what was said in a previous conversation  
5 (Sawyer, 607 F.2d at 1193); or (5) visual surveillance of the  
6 defendant after the conversation doing what he said he would do  
7 (United States v. McMillan, 508 F.2d 101, 105 (8th Cir. 1974);  
8 United States v. Bonanno, 487 F.2d 654, 659 (2d Cir. 1973); see  
9 also Van Ripper v. United States, 13 F.2d 961, 968 (2d Cir. 1926)  
10 ("[T]he substance of the communication may itself be enough to  
11 make prima facie proof [of identity]").

12 Although the 34 Pellicano-Christensen recordings are  
13 exceptionally clear in sound quality, recorded conversations can  
14 serve as competent evidence even when they are partly inaudible  
15 provided that the unintelligible portions are not so substantial  
16 as to render the recording as a whole untrustworthy. United  
17 States v. Rrapi, 175 F.3d 742 (9th Cir. 1999); United States v.  
18 Carlson, 423 F.2d 431, 440 (9th Cir. 1970).

19 c. Handwriting

20 A lay witness may authenticate handwriting on a document by  
21 stating how he or she became familiar with the handwriting in  
22 question. Hall v. United Insurance Company of America, 367 F.3d  
23 1255, 1260-61 (11th Cir. 2004). In laying the requisite  
24 foundation, the witness should describe the instruments on which  
25 the witness previously had observed the handwriting, and provide  
26 information concerning the witness' relationship with the  
27 signatory. Id. at 1261. For example, co-workers possessing  
28 sufficient familiarity with a defendant's handwriting have been

1 permitted to authenticate the defendant's handwriting. See  
2 United States v. Tipton, 964 F.2d 650, 654-55 (7th Cir. 1992);  
3 United States v. Whittington, 783 F.2d 1210, 1214-15 (5th Cir.  
4 1986); United States v. Barker, 735 F.2d 1280, 1283 (11th Cir.  
5 1984).

6 2. Items Found In A Defendant's Possession

7 Documents or items found in a defendant's possession are  
8 admissible, either as adopted admissions or to show the  
9 circumstantial relationship of the defendant to the documents.  
10 United States v. Ospina, 739 F.2d 448, 451 (9th Cir. 1984). For  
11 instance, a calendar or ledger may be a party admission or  
12 co-conspirator statement, depending upon the circumstances, if  
13 the identity of the author of the ledger is reasonably certain.  
14 United States v. Smith, 893 F.2d 1573, 1576 (9th Cir. 1990).

15 3. Duplicates

16 A duplicate is admissible to the same extent as an  
17 original unless (1) a genuine question is raised as to the  
18 authenticity of the original, or (2) under the circumstances, it  
19 would be unfair to admit the duplicate instead of the original.  
20 Fed. R. Evid. 1003; United States v. Smith, 893 F.2d 1573, 1579  
21 (9th Cir. 1990); United States v. Leal, 509 F.2d 122, 125-26 (9th  
22 Cir. 1975); United States v. Pacheco-Lovio, 463 F.2d 232, 233-34  
23 (9th Cir. 1972); see also United States v. Skillman, 922 F.2d  
24 1370, 1375 (9th Cir. 1990) (photocopy bearing extraneous  
25 handwriting not connected to the defendant is admissible).

26 4. Business Records

27 Fed. R. Evid. 803(6) excepts from the hearsay rule "a  
28 memorandum, report, record, or data compilation, in any form, of

1 acts, events, conditions, opinions, or diagnoses, made at or near  
2 the time by, or from information transmitted by, a person with  
3 knowledge, if kept in the course of a regularly conducted  
4 business activity, and if it was the regular practice of that  
5 business activity to make the memorandum, report, record, or data  
6 compilation, all as shown by the testimony of the custodian or  
7 other qualified witness, unless the source of information or the  
8 method or circumstances of preparation indicate lack of  
9 trustworthiness." If evidence meets the requirements for  
10 admission under Rule 803(6), no further showing is necessary for  
11 admission under the Confrontation Clause. See Ohio v. Roberts,  
12 448 U.S. 56, 66 n.8 (1980); United States v. Ray, 930 F.2d 1368,  
13 1370 (9th Cir. 1990).

14 A document is admissible under Rule 803(6) if two  
15 foundational facts are established: (I) the document was made or  
16 transmitted by a person with knowledge at or near the time of the  
17 incident recorded, and (ii) the document was kept in the course  
18 of a regularly conducted business activity. See Ray, 930 F.2d at  
19 1370; Kennedy v. Los Angeles Police Dept., 901 F.2d 702, 717 (9th  
20 Cir. 1989), overruled on other grounds, Act Up!/Portland v.  
21 Bagley, 988 F.2d 868 (9th Cir. 1993). These foundational facts  
22 may be established either through a custodian of records or  
23 "other qualified witness." The phrase "other qualified witness"  
24 is broadly interpreted to require only that the witness  
25 understand the record keeping system. See Ray, 930 F.2d at 1370;  
26 United States v. Franco, 874 F.2d 1136, 1139-1140 (7th Cir.  
27 1989); United States v. Hathaway, 798 F.2d 902, 906 (6th Cir.  
28 1986). In determining whether the foundational facts have been

1 established, the court may consider hearsay and other evidence  
2 not admissible at trial. See Fed. R. Evid. 104(a), 1101(d)(1);  
3 Bourjaily, 483 U.S. at 178-79.

4 The government need not establish precisely when or by whom  
5 the document was prepared; all the rule requires is that the  
6 document be made "at or near the time" of the act or event it  
7 purports to record. See United States v. Huber, 772 F.2d 585,  
8 591 (9th Cir. 1985); United States v. Bassey, 613 F.2d 198, 201  
9 n.1 (9th Cir. 1979). Similarly, challenges to the accuracy or  
10 completeness of the business records ordinarily go to the weight  
11 of the evidence and not its admissibility. See, e.g., La Porta  
12 v. United States, 300 F.2d 878, 880 (9th Cir. 1962).

13 5. Self-Authenticating Records

14 In order to accelerate the pace of this trial and to avoid  
15 the need to call dozens of witnesses who would be called to  
16 testify to matters that are beyond dispute, the government  
17 intends to introduce a number of business records, including  
18 phone records, and bank records, pursuant to Federal Rule of  
19 Evidence 902(11). The Federal Rules of Evidence provide that  
20 business records may be admitted into evidence without a live  
21 witness if they are accompanied by a written declaration from a  
22 custodian of the records certifying that the records were made in  
23 accordance with the requirements of Rule 803(6) of the Federal  
24 Rules of Evidence. See Securities Exchange Commission v.  
25 Franklin, 348 F.Supp.2d 1159 (S.D. Cal. 2004); Rules 803(6) and  
26 902(11), Federal Rules of Evidence.

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

1 902 Self Authentication: Extrinsic evidence of  
2 authenticity as a condition precedent to admissibility is not  
3 required with respect to the following:

4 . . . .  
5 (11) The original or a duplicate of a domestic record of  
6 regularly conducted activity that would be admissible under Rule  
7 803(6) if accompanied by a written declaration of its custodian  
8 or other qualified person . . . certifying that the record-

9 (A) was made at or near the time of the occurrence of  
10 the matters set forth by, or from information transmitted by, a  
11 person with knowledge of those matters;

12 (B) was kept in the course of the regularly conducted  
13 activity; and

14 (C) was made by the regularly conducted activity as a  
15 regular practice.

16 A party intending to offer a record into evidence under this  
17 paragraph must provide written notice of that intention to all  
18 adverse parties, and must make the record and declaration  
19 available for inspection sufficiently in advance of their offer  
20 into evidence to provide an adverse party with a fair opportunity  
21 to challenge them. Fed. R. Evid. 902(11) (emphasis added).

22 6. Charts and Summaries

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

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

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

12 A chart or summary may be admitted as evidence where the  
13 proponent establishes that the underlying documents are  
14 voluminous, admissible and available for inspection. See United  
15 States v. Myers, 847 F.2d 1408, 1411-1412 (9th Cir. 1988); United  
16 States v. Johnson, 594 F.2d 1253, 255-1257 (9th cir. 1979).

17 While the underlying documents must be "admissible," they need  
18 not be admitted." See Myers, 847 F2d at 1412; Johnson, 594 F.2d  
19 233, 239 (7th Dir. 1983); Barsky v. United States, 339 F.2d 180  
20 (9th Cir. 1964).

21 Summary charts may be used by the government in opening  
22 statement. Indeed, "such charts are often employed in complex  
23 conspiracy cases to provide the jury with an outline of what the  
24 government will attempt to prove." United States v. De Peri, 778  
25 F.2d 963, 979 (3rd Cir. 1985) (approving government's use of  
26 chart); United States v. Rubino, 431 F.2d 284, 290 (6th Cir.  
27 1970) (same).  
28

1 Summary charts need not contain the defendant's version of  
2 the evidence and may be given to the jury while a government  
3 witness testifies concerning them. See United States v. Radseck,  
4 718 F.2d 233, 239 (7th Cir. 1983); Barsky, 339 F.2d at 181. In  
5 addition, summary charts are admissible under Federal Rule of  
6 Evidence 611(a), which permits a court to "exercise reasonable  
7 control over the mode and order of interrogating witnesses and  
8 presenting evidence so as to (1) make the interrogation and  
9 presentation effective for ascertainment of the truth, (2) avoid  
10 needless consumption of time, and (3) protect witnesses from  
11 harassment or undue embarrassment." United States v. Poschatta,  
12 829 F.2d 1477, 1481 (9th Cir. 1987); United States v. Gardner,  
13 611 F.2d 770, 776 (9th Cir. 1980).

14 Typically, charts used under Rule 611(a) for "pedagogical  
15 purposes," or as "testimonial aids," should "not be admitted into  
16 evidence or otherwise be used by the jury during deliberations."  
17 United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991) ("We  
18 have long held that such pedagogical devices should be used only  
19 as a testimonial aid, and should not be admitted into evidence or  
20 otherwise be used by the jury during deliberations."); see also  
21 United States v. Abbas, 504 F.2d 123 (9th Cir. 1974) (better  
22 practice is that charts used as testimonial aids not be submitted  
23 to jury). However, charts may be used under Rule 611(a) and then  
24 subsequently admitted into evidence in those instances in which  
25 the defense has had opportunity to challenge the information  
26 contained in the chart. For example, in Gardner, the district  
27 court admitted, over defense objection, a chart used by a  
28 government witness as a testimonial aid that summarized facts and

1 calculations already in evidence. Gardner, 611 F.2d at 776. The  
2 Ninth Circuit held that the use of this chart as a testimonial  
3 aid was appropriate under Rule 611(a), and that the chart was  
4 properly admitted into evidence under Rule 1006: "Having thus  
5 utilized the chart without objection with a full opportunity for  
6 the defendant to challenge the facts, figures, calculations and  
7 underlying documents upon which the chart was based, it was not  
8 reversible error to admit the chart in evidence." Id. at 776;  
9 see also United States v. Olano, 62 F.3d 1180, 1204 (9th Cir.  
10 1995); United States v. Baker, 10 F.3d 1374 (9th Cir. 1993)  
11 (charts admitted after court examined them outside presence of  
12 jury, defendants had opportunity to review charts and  
13 cross-examine witness, and court gave limiting instruction that  
14 charts were not themselves substantive evidence).

15 Summary charts of information contained in ledgers and other  
16 documents are admissible where the ledgers are available to  
17 defendant for inspection. United States v. Catabran, 836 F.2d  
18 453 (9th Cir. 1982). Similarly, a chart summarizing unavailable  
19 documents is admissible under Fed. R. Evid. 1004 if the  
20 underlying materials are "lost or destroyed" or "not obtainable."  
21 Fed. R. Evid. 1004(1) and 1004(2).

22 A summary witness may properly testify about, and use a  
23 chart to summarize, evidence that has already been admitted. As  
24 the Ninth Circuit has recognized, the court and jury are entitled  
25 to have a witness "organize and evaluate evidence which is  
26 factually complex and fragmentally revealed." United States v.  
27 Shirley, 884 F.2d 1130, 1133-34 (9th Cir. 1989) (agent's testimony  
28 regarding her review of various telephone records, rental

1 receipts, and other previously offered testimony held to be  
2 proper summary evidence, as it helped jury organize and evaluate  
3 evidence; summary charts properly admitted); United States v.  
4 Lemire, 720 F.2d 1327, 1348(D.C. Cir. 1983). A summary witness  
5 also may rely on the analysis of others as the use of others in  
6 the preparation of summary evidence goes to the weight and not  
7 the admissibility of the evidence. United States v. Soulard, 730  
8 F.2d 1292, 1299 (9th Cir. 1984); see Diamond Shamrock Corp. v.  
9 Lumbermens Mutual Casualty Co., 466 F.2d 722, 727 (7th Cir. 1972)  
10 ("It is not necessary . . . that every person who assisted in the  
11 preparation of the original records or the summaries be brought  
12 to the witness stand.").

13 B. ADMISSIBILITY OF WITNESS TESTIMONY

14 1. Direct And Adopted Admissions By Party Opponent

15 A statement is not hearsay, but rather constitutes an  
16 admission by a party opponent, if the statement is offered  
17 against a party and is the party's own statement in either an  
18 individual or representative capacity. Fed. R. Evid.  
19 801(d)(2)(A); Burreson, 643 F.2d at 1349. Similarly, a statement  
20 made by a party-opponent and offered against that party is not  
21 hearsay if it is a "statement of which the party has manifested  
22 an adoption or belief in its truth." Fed. R. Evid. 801(d)(2)(A).  
23 With respect to adoptive admissions, the Court must find  
24 sufficient foundational facts that a jury could reasonably  
25 conclude that the defendant actually heard; understood and  
26 acceded to the statement(s). Ospina, 739 F.2d at 451 (writings  
27 in residence of defendant and acted upon by defendant are  
28 adoptive admissions and therefore non-hearsay); United States v.

1 Valles-Vallencia, 811 F. 2d 1232, 1237 (9th Cir. 1987)

2 (handwriting on ledgers are adoptive admissions).

3 When the government admits a portion of a defendant's prior  
4 statement under Rule 801(d)(2)(A), the defendant may not put in  
5 additional out-of-court statements by him because such statements  
6 are hearsay when offered by the defendant. Fed. R. Evid.

7 801(d)(2); United States v. Nakai, 413 F.3d 1019, 1022 (9th Cir.  
8 2005) (recognizing that exculpatory out-of-court statements that  
9 a defendant makes to a witness constitute inadmissible hearsay)

10 (citing Williamson v. United States, 512 U.S. 594, 598-601

11 (1994)); United States v. Ortega, 203 F.3d 675, 681-82 (9th Cir.

12 2000) (defendant prohibited from eliciting his own exculpatory  
13 statements during cross examination of government agent because

14 to permit otherwise would be to put such statements "before the  
15 jury without subjecting [defendant] to cross-examination,

16 precisely what the hearsay rule forbids."); United States v.

17 Fernandez, 839 F.2d at 639, 640 (9th Cir. 1988) (same).

18 The only potential limitation of this principle is the "rule  
19 of completeness" set forth in Federal Rule of Evidence 106, which  
20 has been applied by some courts to require that all of a

21 defendant's prior statements be admitted where it is necessary to  
22 place an admitted statement in context or to avoid misleading the

23 trier of fact. It is entirely proper, however, to admit segments  
24 of a statement without including everything, and adverse parties

25 are not entitled to offer additional statements just because they

26 are there and the proponent has not offered them. United States

27 v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996); United States v.

28 Marin, 669 F.2d 73, 84 (2d Cir. 1982). Furthermore, Rule 106

1 does not render admissible evidence which is otherwise  
2 inadmissible under the hearsay rules. See Collicott, 92 F.3d at  
3 983 (hearsay not admitted regardless of Rule 106).

4 2. Opinion Testimony of Non-Experts

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

7 If the witness is not testifying as an expert, the witness'  
8 testimony in the form of opinions or inferences is limited to  
9 those opinions or inferences which are (a) rationally based on  
10 the perception of the witness, (b) helpful to a clear  
11 understanding of the witness' testimony or the determination of a  
12 fact in issue, and © not based on scientific, technical or other  
13 specialized knowledge within the scope of Rule 702.

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

26

27

28

1           3.    Hearsay

2               a.    Definition

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

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

9           Statements offered for the effect they have on the hearer  
10 (e.g., to show a party's knowledge) are not hearsay. United  
11 States v. Castro, 887 F.2d 998, 1000 (9th Cir. 1987); Orsini v.  
12 O/S Seabrooke O.N., 247 F.3d 953, 960 n.4 (9th Cir. 2001). A  
13 witness also may testify to what he or she understood a declarant  
14 to mean with respect to a statement made by the declarant to the  
15 witness. United States v. Brooks, 473 F.2d 817, 818 (9th Cir.  
16 1973) (per curiam).

17               c.    State of Mind Exception

18           Federal Rule of Evidence 803(3) provides that the hearsay  
19 rule does not exclude a "statement of the declarant's then  
20 existing state of mind." Fed. R. Evid. 803(3). The three  
21 factors bearing on the foundational inquiry on admissibility  
22 under Federal Rule of Evidence 803(3) are contemporaneousness,  
23 chance for reflection, and relevance. United States v. Miller,  
24 874 F.2d 1255, 1264 (9th Cir. 1989) (upholding exclusion of  
25 defendant's statement about his state of mind two hours prior to  
26 the statement because of chance for reflection and opportunity to  
27 fabricate).  
28

1           d.    Prior Inconsistent Statements

2           Prior inconsistent statements of a non-defendant witness are  
3 admissible for impeachment purposes under Federal Rule of  
4 Evidence 613. See Fed. R. Evid. 613(a), (b). In addition, such  
5 statements are admissible as substantive evidence offered for the  
6 truth of the matter asserted provided that the foundational  
7 requirements set forth in Federal Rule of Evidence 801(d)(1) are  
8 satisfied. United States v. Armijo, 5 F.3d 1229, 1232 (9th Cir.  
9 1993). Under Rule 801(d)(1), a statement is not hearsay if  
10 "[t]he declarant testifies at the trial or hearing and is subject  
11 to cross-examination concerning the statement, and the statement  
12 is inconsistent with the declarant's testimony, and was given  
13 under oath subject to the penalty of perjury at a trial, hearing,  
14 or other proceeding, or in a deposition." Fed. R. Evid.  
15 801(d)(1).

16           e.    Prior Consistent Statements

17           Under Federal Rule of Evidence 801(d)(1)(B), an out-of-court  
18 statement is not hearsay if the declarant testifies at the trial  
19 and is subject to cross-examination concerning the statement, and  
20 the statement is "consistent with the declarant's testimony and  
21 is offered to rebut an express or implied charge against the  
22 declarant of recent fabrication or improper influence or motive."  
23 Rule 801(d)(1)(B); see United States v. Bao, 189 F.3d 860, 864  
24 (9th Cir. 1999); United States v. Frederick, 78 F.3d 1370, 1377  
25 (9th Cir. 1996); United States v. Stuart, 718 F.2d 931, 934 (9th  
26 Cir. 1983). However, "[p]rior consistent statements may not be  
27 admitted to counter all forms of impeachment or to bolster the  
28 witness merely because [the witness] has been discredited . . . .

1 The Rule speaks of a party rebutting an alleged motive, not  
2 bolstering the veracity of the story told." Tome v. United  
3 States, 513 U.S. 150, 157-58 (1995). For example, in Tome, the  
4 Supreme Court held "that prior consistent statements made after  
5 the date of the alleged motivation to lie are inadmissible."  
6 Frederick, 78 F.3d at 1377; see Tome, 513 U.S. at 167.

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

#### 18 4. Hostile Witnesses

19 The government may seek permission to use leading questions  
20 in addressing certain witnesses who have close ties to, or who  
21 otherwise are aligned with, the defendants.<sup>23</sup> Under Federal Rule  
22 of Evidence 611(c), "when a party calls a hostile witness, an  
23 adverse party, or a witness identified with an adverse party,  
24 interrogation may be by leading questions." Although prior to  
25 Rule 611(c)'s adoption, a party wishing to ask leading questions

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26 <sup>23</sup> The government anticipates that there will be a need  
27 for select witnesses to be so designated. The government will  
28 advise the Court prior to the testimony of any such witness that  
a hostile witness designation is being sought.

1 on direct examination had to show "actual hostility" by the  
2 witness or that the witness was an adverse party, Rule 611(c)  
3 "significantly enlarged the class of witnesses presumed hostile,  
4 and therefore subject to interrogation by leading questions  
5 without further showing of actual hostility." Haney v. Mizell  
6 Memorial Hosp., 744 F.2d 1467, 1477-78 (11th Cir. 1984) (internal  
7 quotation marks omitted). A trial court has broad discretion in  
8 determining whether a particular witness should be deemed a  
9 hostile witness for purposes of this rule. See United States v.  
10 Goode, 814 F.2d 1353, 1355 (9th Cir. 1987).

11 5. Witness Invocation Of The Fifth Amendment Right Against  
12 Self Incrimination

13 The Fifth Amendment provides that "[n]o person . . . shall  
14 be compelled in any criminal case to be a witness against  
15 himself." U.S. CONST. Amend. V. The Fifth Amendment protects a  
16 defendant from making statements that are: (1) compelled; (2)  
17 testimonial; and (3) self-incriminating. The Supreme Court has  
18 held that compelled testimony, such as sworn trial testimony, is  
19 self-incriminating if reasonable cause exists to believe that the  
20 testimony either would support a conviction or would provide a  
21 link in the chain of evidence leading to a conviction. United  
22 States v. Hoffman, 341 U.S. 479, 486 (1951). If, however, the  
23 threat of future prosecution is "remote, unlikely or speculative,  
24 the privilege does not apply." United States v. Antelope, 395  
25 F.3d 1128, 1134 (9th Cir. 2005) (citing Brown v. Walker, 161 U.S.  
26 591, 596-97 (1896) for proposition that Fifth Amendment  
27 protection does not properly extend to offenses for which the  
28 statute of limitations has run); see also United States v.

1 Vavages, 151 F.3d 1185, 1192 (1998) (noting that "fear of perjury  
2 can typically form a valid basis for invoking the Fifth Amendment  
3 only where the risk of prosecution is for perjury of the witness'  
4 past testimony" and finding "a witness may not claim the  
5 privilege of the Fifth Amendment out of fear that he will be  
6 prosecuted for perjury for what he is about to say. The shield  
7 against self-incrimination in such a situation is to testify  
8 truthfully, not to refuse to testify on the basis that the  
9 witness may be prosecuted for a lie not yet told.").

10 Non-defendant witnesses cannot avoid testifying at trial  
11 through a blanket invocation of the Fifth Amendment privilege  
12 against self-incrimination. Antelope, 395 F.3d at 1134.  
13 Instead, in instances in which the witness has provided the  
14 government with advance notice of the intent to invoke the Fifth  
15 Amendment privilege against self-incrimination, the witness  
16 should be questioned on the stand, but outside the presence of  
17 the jury, to determine whether the invocation is appropriate.  
18 Vavages, 151 F.3d at 1192. Moreover, in the event that a  
19 non-defendant witness properly invokes the Fifth Amendment, the  
20 government can compel the witness to testify through the issuance  
21 of use immunity to that witness. U.S. v. Doe, 125 F.3d 1249,  
22 1252, 1254 (9th Cir. 1997).

#### 23 6. Privilege Waiver Issues

24 It is well established that the attorney-client privilege  
25 can be waived when a party places privileged matters in  
26 controversy. See, e.g., United States v. Amlani, 169 F.3d 1189,  
27 1194-95 (9th Cir. 1999) (finding that defendant waived privilege  
28 by affirmatively raising issue in attorney-disparagement claim

1 and as enforcement of the privilege would deny the opposing party  
2 access to information vital to the defense of the claim).

3 7. Cross-Examination of Defendant

4 A defendant who testifies at trial waives his right against  
5 self-incrimination and subjects himself to cross-examination  
6 concerning all matters reasonably related to the subject matter  
7 of his testimony. The scope of a defendant's waiver is  
8 co-extensive with the scope of relevant cross-examination.

9 United States v. Cuzzo, 962 F.2d 945, 948 (9th Cir. 1992);

10 United States v. Black, 767 F.2d 1334, 1341 (9th Cir. 1985)

11 ("What the defendant actually discusses on direct does not  
12 determine the extent of permissible cross-examination or his  
13 waiver. Rather, the inquiry is whether 'the government's  
14 questions are reasonably related' to the subjects covered by the  
15 defendant's testimony").

16 While Federal Rule of Evidence 404(b) "restricts the use of  
17 evidence solely for purposes of demonstrating a criminal  
18 proclivity, [i]t does not proscribe the use of other act evidence  
19 as an impeachment tool during cross-examination." United States  
20 v. Gay, 967 F.2d 322, 328 (9th Cir. 1992). Furthermore, Federal  
21 Rule of Evidence 609(a)(2) provides that a defendant's  
22 credibility may be impeached by any prior felony or misdemeanor  
23 conviction that has as an element an act of dishonesty. Under  
24 Federal Rule of Evidence 609(a)(1), a defendant's credibility can  
25 be impeached by evidence of prior felony convictions provided  
26 that the probative value of the conviction outweighs the  
27 prejudicial effect.

1 Within the past five years, defendant Pellicano has been  
2 convicted of 78 felonies. Specifically, in 2003, defendant  
3 Pellicano was convicted of one count of possessing a plastic  
4 explosive that lacked the requisite detection agent and one count  
5 of possession of an unregistered firearm in the matter of United  
6 States v. Pellicano, No. CR 02-1278-DT. Earlier this year,  
7 defendant Pellicano was convicted of nineteen counts of honest  
8 services wire fraud, nineteen counts of unauthorized computer  
9 access of U.S. Agency Information, thirteen counts of computer  
10 fraud, twelve counts of identity theft, nine counts of  
11 wiretapping, one count of conspiracy to commit wiretapping, one  
12 count of possession of a wiretapping device, one count of RICO,  
13 one count of RICO Conspiracy.

14 Of the seventy-six convictions sustained this year, all but  
15 the wiretapping-related convictions were founded upon offenses  
16 that had as an element an act of dishonesty and thus, would be  
17 automatically admissible for impeachment purposes under Rule  
18 609(a)(2). As for the eleven wiretapping-related convictions,  
19 each would be squarely admissible under Rule 609(b) in this case.  
20 Although not as directly probative as to the credibility of  
21 defendant's likely trial testimony, defendants 2003 explosives  
22 convictions also would be admissible under Rule 609(b). Finally,  
23 the fact that the convictions are not yet final does not preclude  
24 their use for impeachment purposes. Fed. R. Evid. 609(e); United  
25 States v. Smith, 623 F.2d 627, 630-31 (9th Cir. 1980).

1           8.    Cross Examination - General Witnesses<sup>24</sup>

2           Under Federal Rules of Evidence 608 and 609, the credibility  
3 of a witness may be supported or attacked by evidence in the form  
4 of: (1) prior fraud convictions; (2) prior felony convictions  
5 sustained within the past ten years; and (3) opinion or  
6 reputation testimony provided that the testimony refers only to  
7 the witness' character for truthfulness or untruthfulness. Fed.  
8 R. Evid. 608. Moreover, reputation or opinion evidence relating  
9 to truthfulness may only be admitted if the witness' character  
10 for truthfulness has been attacked. Fed. R. Evid. 608(a).  
11 Similarly, specific instances of conduct of a witness may, in the  
12 court's discretion, be inquired into on cross-examination of the  
13 witness only if the conduct concerns his character for  
14 truthfulness or untruthfulness. Such conduct, however, may not  
15 be proved by extrinsic evidence. Fed. R. Evid. 608(b).

16           9.    Defendant's Character Witnesses

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

24           Rule 404(a) of the Federal Rules of Evidence governs the  
25 admissibility of character evidence. Rule 404(a) permits a

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27           <sup>24</sup> The government previously has briefed issues relating  
28 to the impeachment of potential witnesses Lisa Bonder Kerkorian  
and Stanley Ornellas.

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

11 Moreover, the form of the proffered character evidence must  
12 be proper. Federal Rule of Evidence 405(a) sets forth the sole  
13 methods by which character evidence may be introduced. It  
14 specifically states that where evidence of a character trait is  
15 admissible, proof may be made in two ways: (1) by testimony as to  
16 reputation; and (2) by testimony as to opinion. Thus, defendant  
17 may not introduce specific instances of his good conduct through  
18 the testimony of others. Michelson, 335 U.S. at 477 ("The  
19 witness may not testify about defendant's specific acts or  
20 courses of conduct or his possession of a particular disposition  
21 or of benign mental and moral traits.").

22 On cross-examination of a defendant's character witness,  
23 however, the government may inquire into specific instances of a  
24 defendant's past conduct relevant to the character trait at  
25 issue. See Fed. R. Evid. 405(a). In particular, a defendant's  
26 character witnesses may be cross-examined about their knowledge  
27 of the defendant's past crimes, wrongful acts, and arrests. See  
28 Michelson, 335 U.S. at 481. The only prerequisite is that there

1 must be a good-faith basis that the incidents inquired about are  
2 relevant to the character trait at issue. See United States v.  
3 McCullom, 664 F.2d 56, 58 (5th Cir. 1981).

4 10. Defendant's Testimony Regarding Character/Impeachment  
5 By Contradiction

6 Unlike character witnesses, who must restrict their  
7 testimony to opinion or appraisal of a defendant's reputation, a  
8 defendant-witness may cite specific instances of conduct as proof  
9 that he possessed a relevant character trait. United States v.  
10 Giese, 597 F.2d 1170, 1190 (9th Cir. 1979). However, "[o]nce a  
11 witness (especially a defendant-witness) testifies as to any  
12 specific fact on direct testimony, the trial judge has broad  
13 discretion to admit extrinsic evidence tending to contradict the  
14 specific statement, even if such statement concerns a collateral  
15 matter in the case." Id. at 1190 (citation omitted). Thus, if  
16 defendant testifies to specific instances of conduct supportive  
17 of good character, he opens the door to rebuttal evidence on all  
18 reasonably related matters, be they "collateral" or not. United  
19 States v. Castillo, 181 F.3d 1129 (9th Cir. 1999); Giese, 597  
20 F.2d at 1190.

21 C. MISCELLANEOUS

22 1. Judicial Notice

23 Federal Rule of Evidence 201 provides that, if requested by  
24 a party and supplied with the necessary information, a court must  
25 take judicial notice of facts that are not subject to reasonable  
26 dispute in that they are either (1) generally known within the  
27 territorial jurisdiction of the trial court or (2) capable of  
28 accurate and ready determination by resort to sources whose

1 accuracy cannot reasonably be questioned. Judicial notice may be  
2 taken at any stage of the proceedings. For example, the Ninth  
3 Circuit has ruled that materials from proceedings in another  
4 tribunal are appropriate for judicial notice under Federal Rule  
5 of Evidence 201. Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th  
6 Cir. 2003) (The court shall instruct the jury that it may, but is  
7 not required to, accept as conclusive any fact judicially  
8 noticed). Fed. R. Evid. 201).

9 2. Reciprocal Discovery

10 The government has requested reciprocal discovery and the  
11 Court has ordered all parties to produce all Rule 16 materials in  
12 their possession. Virtually no reciprocal discovery has been  
13 provided. To the extent that there exists reciprocal discovery  
14 to which the government is entitled under Rules 16(b) and 26.2 of  
15 the Federal Rules of Criminal Procedure and which the defense has  
16 not produced prior to trial, the government reserves the right to  
17 seek to have such documents precluded should a defendant attempt  
18 to introduce or use them at trial. See United States v. Young,  
19 248 F.3d 260, 269-70 (4th Cir. 2001) (upholding exclusion under  
20 Rule 16 of audiotape evidence defendant did not produce in  
21 pretrial discovery where defendant sought to introduce audiotape  
22 on cross-examination of government witness not for impeachment  
23 purposes, but as substantive "evidence in chief" that someone  
24 else committed the crime).

25 3. Waiver of Rule 12(b) Motions

26 Federal Rule of Criminal Procedure 12(b)(3) requires that  
27 defenses and objections based on defects in the institution of  
28 the prosecution, defenses and objections based on defects in the


1 indictment or information, motions to suppress evidence, and  
2 requests for discovery under Rule 16 be raised prior to trial. A  
3 defendant's failure to raise any such motions prior to trial  
4 constitutes waiver, and the Court should not allow any such  
5 motions to be brought after jeopardy has attached. Fed. R. Crim.  
6 Pro. 12(e); United States v. Quintero-Barraza, 78 F.3d 1344, 1348  
7 (9th Cir. 1996); United States v. Miller, 984 F.2d 1028 (9th Cir.  
8 1993).

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10  
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