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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff,
v.
KRISTOPHER LEE DALLMANN,

DOUGLAS M. COURSON,

FELIPE GARCIA,

JARED EDWARD JAUREQUI,
a/k/a Jared Edwards, and

PETER H. HUBER,

Defendants.

Case No. 2:22-cr-30-RFB-DJA

OPPOSITION TO MOTION TO DISMISS

The Motion should be denied because defendants have shown no manifest necessity for declaring mistrial. The Court previewed the slides *before* opening and ruled that they could

properly be displayed. Accordingly, the government neither violated any Court Order nor made any improper/inappropriate reference to the slides during its opening. Indeed, one of the slides has already been admitted into evidence with an appropriate limiting instruction.

FACTS

The defendants are charged with, among other crimes, conspiracy to commit criminal copyright infringement. Duringits opening statement, the government properly stated that its evidence would show that members of the conspiracy sought to violate a known legal duty, or "recklessly disregarded the high probability that [he] was infringing plaintiffs' copyrights," *United States v. Anderson*, 741 F.3d 938, 948-49 (9th Cir. 2013) (internal quotation remarks and citations omitted). In that vein, the government displayed slides that included images of exhibits that it intended to offer at trial. These included notices of infringement sent to the defendants by HBO and the Motion Picture Association of America, as well as a short text message exchange between co-defendants.

Before showing them in opening, the government previewed these exhibits with the Court and defense counsel.. In all instances, the Court determined that the slides could properly be displayed during opening statement.

In an email to the Court (*see* Defendant's Motion, Exhibit 1), the defense objected to Government Exhibit 1 ("GX1") as hearsay and prejudicial, claiming the government intended to admit the evidence as proof Defendant Dallmann was engaging in copyright infringement. When discussing the objection with the Court, the government stated that GX1, a letter from HBO, would be offered for the effect on the listener and not for the truth of the matter. 5/29/24 Tr. at 5-6. Defendant Dallman objected. *Id.* at 7 ("Now, it might be authenticated, but is it really admissible?"). The Court stated that if the document was offered for the fact that it was in the defendant's possession, "it's not being offered for the truth, so it doesn't make it hearsay, right?"

Id. at 8. The Court offered to instruct the jury at the time of the introduction of GX1 into evidence that "notice of infringement," as the subject of the letter, did not establish copyright infringement, but that the document was offered on a more limited basis. *Id*. at 8. The defendant further objected to the general concept of the government referencing an exhibit not yet admitted but acknowledged that the Court could at its discretion permit reference to the exhibit. *Id*. at 9-10.

The government also alerted the Court it would seek to show the MPAA letter, marked as Government Exhibit 2 ("GX2"). The defense objected via email, raising the same objections it made as to GX1. *See* Defendant's Motion, Exhibit 1. The defense objected again during court proceedings, and the Court similarly responded, "If it's being offered for the same reason, which is for your client's state of mind, not for the fact that it's true, but for the fact that he received it, then it wouldn't be hearsay." *Id*. at 14. The Court repeated its view that use of the exhibit in the opening as a demonstrative was acceptable "so long as I find that there's a likelihood that the evidence would be admitted." *Id*. at 16.[1]

The government further sought to show what was labeled as Government Exhibit 1107 ("GX1107"), which were text messages between defendants Courson and Dallman, including defendant Dallman's statement concerning willfulness that they were "Moving away from the 'grey' area." Defendant Dallman argued via email and in court that the messages were not admissible as co-conspirator statements. The Court noted it had already made the finding that the

[1] The defendant did not argue against the display of portions of GX1 or GX2 on the basis that the jury was exposed to inadmissible, highly credible legal conclusions, as it does now. Motion at 5 (regarding the HBO letter, "the jury was exposed to an inadmissible, highly credible legal conclusion without qualification or limiting instructions."); 7 (regarding the MPAA letter, "Any reasonable juror would perceive this letter to have conclusively established that copyright infringement occurred.") Nor did the defendant request a limiting instruction be given at the time of the opening. *Id*. at 7 ("The jurors were not told this letter was offered solely to show notice."). The defendants'failure to mitigate prejudice that does not exist and that only they perceive does not warrant dismissal.

government would be able to present evidence of the conspiracy. *Id*. at 26-27. Defendant Dallman further objected on the basis that the texts he received through discovery "didn't look like that. They – they – and they put that together from something that's bigger than that. That's why I called it an abstract." *Id*. at 28. However, Defendant Dallman admitted that the content of the messages was neither incorrect nor a misrepresentation. *Id*. at 29-30. When pointedly asked why the format of GX1107 would be prejudicial, the defendant's response was "Because it's not proper in an opening statement." The Court permitted the demonstrative. *Id*. at 30-31.

In its opening, the government then showed the jury portions from GX1, GX2, and GX1107. The government did *not* display portions from Government Exhibit 126 (PayPal excerpts), *see* Motion at 7-8, or from Government Exhibit 62A or Government Exhibit 182 (Google searches), *see* Motion at 8-9. As the defense was aware, the Court, after a colloquy with the government, excluded from the opening use of the demonstratives from Government Exhibits 126, 62A, and 182, see, e.g., 5/29/24 Tr. at 17-21 (GX126), which was why the government did not reference or display the exhibits during its opening statement.[2]

On May 30, 2024, during the testimony of Special Agent Cox, the Court inquired whether a set of documents would come in by stipulation. The government replied "We mentioned stipulation, and there was no objection." The Court responded: "Yeah. So they'll come in by stipulation." 5/30/24 Tr. at 72-73. The government then moved for the admission of, inter alia, GX1. The defense did not object, and the Court stated, "And those documents will be admitted

[2] It is baffling that the defense appears to argue that the government would, after an extended colloquy with the Court about whether portions of the exhibits could be displayed, willfully violate the Court's instructions not to introduce portions from GXs 126, 62A, or 182. To reiterate, the government did not violate any such instruction, and the defense should withdraw this erroneous assertion from its Motion.

by stipulation and may be published to the jury." *Id*. at 74. During that admission, the defendant declined to ask for any limiting instruction.

ARGUMENT

I. DEFENDANTS FAIL TO SHOW ANY MANIFEST NECESSITY FOR MISTRIAL AS THERE WAS NOTHING INAPPROPRIATE ABOUT THE GOVERNMENT'S OPENING STATEMENT.

"It has been widely held that '[c]ourts have the power to declare a mistrial whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated….[t]he power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.'" (internal quotations and punctuation omitted) *United States v. Escalante*, 637 F.2d 1197, 1202 (9th Cir. 1980). "A trial judge properly exercises his discretion in declaring a mistrial when the jury cannot reach an impartial verdict, or a verdict of conviction could be reached but would almost certainly be reversed on appeal because of a procedural error at trial." *Id*. (citing *Illinois v. Somerville*, 410 U.S. 458, 464 (1973)). The burden lies with the defendant to establish an abuse of discretion. *Tisnado v. United States*, 547 F.2d 452, 460 (9th Cir. 1976). "A mistrial is required if 'the misconduct (prejudiced) the defendant to the extent he (did) not receive a fair trial." *United States v. Berry*, 627 F.2d 193, 197 (9th Cir. 1980) (quoting *United States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1974)).

No manifest necessity exists here nor can it. The government shared with defense counsel -- and cleared with the Court -- the three demonstratives it displayed briefly during its opening statement: GX1 (HBO), GX2 (MPAA), and GX1107 (texts), all of which are directly relevant to the willfulness element the government is required to prove. The demonstratives were shown to

the defense and defense objections were litigated before the Court prior to opening statements and the Court ruled they could be shown.

GX1 and GX2

GX1 and GX2 are admissible under the Confrontation Clause and do not constitute hearsay. "The Confrontation Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004), *citing Tennessee v. Street*, 471 U.S. 409, 414 (1986); *see also*, Fed. R. Evid. Rule 801(c) (defining hearsay as an out-of-court statement offered in evidence to prove the truth of the matter asserted). In fact, the effect-on-the-listener exception is well established in this Circuit. *See, e.g., Los Angeles News Serv. v. CBS Broad., Inc.,* 305 F.3d 924, 935 (9th Cir.), opinion amended on denial of reh'g, 313 F.3d 1093 (9th Cir. 2002), *citing United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir. 1992). Similarly, courts have found that questions and commands are not hearsay. *See, e.g.*, *United States v. Thomas*, 451 F.3d 543, 547-48 (8th Cir. 2006) ("Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay."); *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999) (finding that statements offered as evidence of commands or rules directed to a witness, rather than for the truth of the matter asserted, are not hearsay).

The defendant objected to the GX1 demonstrative on the basis that it was hearsay, and the court properly denied that objection. 5/29/24 AM Tr. at 8. The defendant offers no additional basis to support its hearsay objection to GX1 or GX2. The government displayed GX1, the HBO letter, and GX2, the MPAA letter, to show that it would demonstrate that defendant Dallman had notice that victims, or victim representatives, believed he was reproducing content without authorization and commanded him to stop. *Id.* at 6. Neither exhibit will be offered for the truth of the matter asserted therein, that is, that Dallmann or his co-conspirators were violating copyright laws.

Instead, both are offered as a command and to show the effect on the listener. *Id*. Other courts have considered similar factual situations and admitted proffered evidence—including cease-and-desist letters—as non-hearsay. *See, e.g., United States v. Godfrey,* 787 F.3d 72, 76-77 (1st Cir. 2015) (upholding the District Court's decision admitting thirty-two emails from complaining customers addressed to defendants and six cease-and-desist letters—informing the defendants that they lacked a required license to engage in loan services—as the exhibits as they were not offered to prove the truth of the contents); *United States v. Edmondson*, 850 F. App'x 748, 752, 754-55 (11th Cir. 2021) (unpublished) (upholding district court's decision admitting letters sent by the IRS to the defendants warning them "of the frivolous nature of their returns" and the "potential criminal penalties" because they were offered for their effect on the defendants and to show they knowingly and intentionally filed false returns and did not have a good-faith belief the returns were legitimate).

Defendant now raises a newly-proffered argument asserting that GX1 and GX2 are prejudicial because they contain a legal conclusion. This newly-raised argument is also meritless as the Government has repeatedly asserted the statement is not being admitted for the truth of the matter asserted. Further, only the subject line of the memo was shown to the jury during opening statement, not the entirety of the letter itself.

Further, for GX1, the defendant appears to have abandoned its objection entirely by stipulating to GX1's substantive admission. Additionally, during the colloquy before the opening statement and during the opening statement, Defendant never requested that the Court instruct the jury that GX1 and GX2 were to be considered only for the purpose of notice to the defendant.

GX1107

Likewise, the GX1107 text excerpt is admissible in part to demonstrate the scheme's willfulness and as statements of co-conspirators in furtherance of the conspiracy. The Court heard

the defendant's objection and noted it had previously found sufficient evidence of a conspiracy to permit the displaying of the demonstrative. 5/29/24 AM Tr. at 26-27. To the extent that the defendant continues to assert the demonstrative was inappropriate because it was an "abstract," the defendant offers no additional evidence to its response to the Court's challenge on May 29, 2024 that the defendant proffer how the demonstrative was misleading or prejudicial:

> THE COURT: Okay. Let's distinguish between how it's presented and the actual content of the messages. Are you saying the content of these messages is incorrect or a misrepresentation?
> MR. TATE: No.
> THE COURT: Okay. What you're saying is how they're presented, right, is inconsistent with how they were received?
> MR. TATE: Yes.
> THE COURT: Okay. And what about the presentation makes them prejudicial in any way to your client? I mean, this is the way that a chat or a text message might appear. And, in fact, the reason why I didn't allow the other messages is because they didn't appear in a way that people might generally understand how a search occurred. This seems to look more consistent with what a text message would look like in the context of it being sent. You're not disputing the content. So why would this be prejudicial to your client?
> MR. TATE: Because it's not proper in an opening statement.
> THE COURT: Okay. All right. Thank you.
>
> 5/29/24 Tr. at 29-30.

Nothing concerning portions of GX1, GX2, or GX1007 otherwise contain any of the prejudice remotely necessary to grant a motion to dismiss. *See United States v. English*, 92 F.3d 909, 912-13 (9th Cir. 1996) (affirming denial of mistrial after testimony about emotional impact of financial losses that caused wife's suicide); *United States v. Lazarus*, 425 F.2d 638, 641 (9th Cir. 1970) (reference to the Mafia not grounds for a mistrial); *Cavness v. United States*, 187 F.2d 719, 722 (9th Cir. 1951) (affirming denial of mistrial where witness gave unresponsive testimony that the defendant was "hopped up," stating "we are not persuaded that the objectionable statement was of such nature as to preclude impartial consideration of the case by the jury."); *Hazeltine v. Johnson*, 92 F.2d 866, 870 (9th Cir. 1937) ("There is no occasion to order a reversal here on the

unsupported assumption that the jury were by this passing reference rendered incapable of fairly considering the relevant facts or of reaching an impartial verdict"). Furthermore, vague references that the jury may not understand may not prejudice the defendant at all. *See United States v. Washington*, 462 F.3d 1124, 1136 (9th Cir. 2006) (upholding denial of mistrial where government referred to suppression motion in passing"). The brief references to documents in opening that will be admitted later at trial (if unlike GX1 they have not already been admitted) are simply not prejudicial to the extent that it may taint the jury or affect its verdict.

II. THE COURT HAS PROVIDED APPROPRIATE LIMITING INSTRUCTIONS

"Ordinarily, cautionary instructions are sufficient to cure the effects of improper comments." *United States v. Davis*, 932 F.2d 752, 761-62 (9th Cir. 1991). "Declaring a mistrial is appropriate only where a cautionary instruction is unlikely to cure the prejudicial effect of an error." *United States v. Charmley,* 764 F.2d 675, 677 (9th Cir.1985). Cautionary instructions are authoritative and the jury is presumed to have followed them. *See United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998) (noting polling of jurors to see if they heard improper answer and if they could disregard the evidence); *United States v. Laykin*, 886 F.2d 1534, 1544 (9th Cir. 1989) (noting presumption); *United States v. Johnson*, 618 F.2d 60, 62 (9th Cir. 1980). Swift corrective action by giving a curative instruction crafted by the defense may cure any potential impropriety. *See United States v. Younger*, 398 F.3d 1179, 1192 (9th Cir. 2005) (noting district court "gave the jury the curative instruction defense counsel requested.").

Notably, the defendant did not ask for a curative instruction prior to, or during, opening and later stipulated to the admission of GX1 during trial without a curative instruction. The reference to the documents in opening does not now require one, but the limiting instructions subsequently provided by the court (and agreed to by the defense) cures any potential risk that the jury would misuse the demonstrative exhibits against Mr. Dallmann.

CONCLUSION

Based on the foregoing, the United States requests that the Court deny the defendant's motion to dismiss and related request for a mistrial.

Respectfully submitted this 4th day of June, 2024.

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