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7
8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 RYAN MCGOWAN, ET AL.,
15 Defendants.

CASE NO. 2:12-CR-207-TLN
GOVERNMENT'S OPPOSITION TO
DEFENDANTS' MOTIONS IN LIMINE

DATE: September 29, 2014
TIME: 9:30 A.M.
COURT: Hon. Troy L. Nunley

16
17 The United States of America hereby responds to defendants McGowan, Snellings, and Early's
18 motions in limine:

19 **I. RESPONSE TO DEFENDANT MCGOWAN'S MOTIONS IN LIMINE [DKT. 130]**

20 **A. Uncharged Acts**

21 The government does not intend to introduce evidence related to McGowan's illegal possession
22 of steroids. It will, however, introduce evidence regarding firearms possessed by McGowan. This
23 evidence will be introduced in order to establish the charges, including the allegation that he was in the
24 business of dealing in firearms. The types of firearms McGowan bought and sold and those weapons'
25 unavailability for direct purchase to the general public are relevant under Fed. R. Evid. 401 because
26 being off-roster was the primary factor that increased the value of many of the weapons. As a result, the
27 type of weapons and the regulations regarding their sale gave McGowan the opportunity and incentive
28 to profit from his firearms sales. Therefore, this evidence is admissible as direct evidence bearing on

1 guilt and it is not unfairly prejudicial.

2 Likewise, McGowan's possession of assault weapons and high capacity magazines is relevant to
3 his intent. In two UC buys, McGowan transferred high capacity magazines. As with off-roster firearms,
4 high capacity magazines and assault weapons are valuable on the secondary market and therefore are
5 relevant to show McGowan's intent (sales for profit as part of his firearms business) and his motive
6 (profit).

7 In addition, as outlined in its motions in limine, the government intends to cross-examine
8 McGowan regarding the fact of his prior convictions pursuant to Fed. R. Evid. 609, if he elects to testify.

9 **B. Other Prejudicial Facts**

10 The government does not intend to present evidence during its case-in-chief of defendant
11 McGowan's disciplinary action by the Sacramento County Sheriff's Department; that certain firearms
12 ended up in the hands of criminals or were used in crimes; that the defendant McGowan's sister and her
13 friend that may have been involved in drugs and unregistered guns; and/or a 10 second video of
14 someone firing a Bumpfire 9 mm Uzi type gun in rapid fire fashion at a shooting range. The
15 government, however, reserves its right to present some or all of the above evidence if it becomes
16 relevant pursuant to Rule 401 as a result of any evidence presented by the defendants during their case
17 or during cross-examination by the defense in the Government's case-in-chief.

18 **C. Off-Roster Firearms**

19 The government should be allowed to argue and present evidence that McGowan profited by
20 selling off-roster firearms in private party transactions. As the government will establish through
21 witnesses at trial, as a peace officer McGowan could purchase off-roster firearms for a low price and
22 resell them at a higher price because the firearms were off-roster. This is evidence both of motive, but
23 also of whether or not McGowan was running a business. Therefore, it is relevant under Fed. R. of
24 Evid. 401 and not unfairly prejudicial within the meaning of Rule 403. It is the government's theory of
25 the case that defendant McGowan had the intent to obtain monetary profit by selling off-roster firearms
26 to private party buyers at the time he made the purchase of the firearm.

1 **II. RESPONSE TO DEFENDANT SNELLINGS'S MOTIONS IN LIMINE [DKT. 124]**

2 **A. Snellings's Argument that He is an Agent of the ATF**

3 In Document 124, defendant Snellings states that he intends to testify that he is a federal firearms
4 licensee and is therefore an agent of the United States who cannot be charged with making a false
5 statement on ATF form 4473, nor can he be charged in the conspiracy as to the fraud the government.
6 Dkt. 124, p. 2. He further argues that the doctrine of estoppel is applicable to the facts of this case. *Id.*

7 In support of this argument, defendant Snellings cites to *United States v. Tallmadge*, 829 F.2d
8 767, 774 (9th Cir. 1987). In *Tallmadge*, the court found that entrapment by estoppel defense applies
9 when an authorized government official tells the defendant that certain conduct is legal and the
10 defendant believes the official. *Id.* at 773. The facts in *Tallmadge* is inapposite to the case at bar. In
11 *Tallmadge*, the court found that the facts were undisputed that the defendant reasonable relied on
12 information provided to him by a federally licensed firearms dealer acting in the scope of ascertaining
13 and providing information as a part of his affirmative duty imposed by Congress of a prospective buyer
14 of a firearm as to whether he has a criminal record that would make it unlawful for him to purchase a
15 firearm. *Id.* at 774. In FN1, the court found that there was nothing in the record that would support a
16 finding of deliberate violation of the law. Instead the district court expressly found that Tallmadge did
17 not believe he was violating the law.

18 In the case at bar, defendant Snellings, a federal firearms licensee, is charged with engaging in a
19 conspiracy to circumvent federal firearms laws with his codefendants. He cannot find support in the
20 *Tallmadge* case because he is not the purchaser of a firearm relying on information given to him by a
21 federal agent acting within the scope of his official duties. The facts of this case, as found by the Grand
22 Jury, was sufficient to sustain the finding of probable cause that defendant Snellings was involved in a
23 conspiracy with others to violate federal firearms laws. To establish entrapment as a matter of law, a
24 defendant must point to undisputed evidence making it patently clear that an otherwise innocent person
25 was induced to commit the illegal act by trickery, persuasion, or fraud of a government agent. *United*
26 *States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986). The government intends to show in this case that a
27 peace officer admitted to a straw purchase of off-roster firearms for defendant Snellings and defendant
28 Early. This peace officer admitted at the time he signed form 4473, he was not truthful when he stated

1 that he was the actual purchaser of the firearm because the firearm was intended to be sold to defendant
2 Early through defendant Snellings, acting as a federal firearms licensee, at the time of purchase.
3 Additionally, e-mails between defendant Early and the peace officer clearly evidence defendant Early's
4 request to the peace officer to purchase the off-roster firearm from defendant Snellings as a means of
5 circumventing federal firearms laws. Certainly, whether defendant Snellings is guilty of violating
6 federal firearms laws by involving himself in a conspiracy to circumvent those laws is a factual question
7 for the jury. The government incorporates by reference, as though fully set forth herein, its previous in
8 limine motion seeking an order to preclude the defendant from asserting the public authority and
9 equitable estoppel defense. *See* Dkt. 123.

10 The facts presented in the case at bar is more akin to those presented in *United States v. Brebner*,
11 951 F.2d 1017 (9th Cir. 1991). *Brebner's* facts are closely on point with the case at bar, and therefore, it
12 is the controlling authority. In *Brebner*, the defendant argued that he was misled by government agents
13 and officials into believing that he could lawfully purchase firearms. *Id.* at 1020. Brebner proffered the
14 testimony of Helmet Tacke, another federally licensed firearms dealer involved in a sale of firearms to
15 Brebner. According to an affidavit filed by the defense in support of the proffer, Tacke "also admitted
16 that he (*id.* at 1023) made no explanation to [Brebner] as to the law nor make an[y] inquiries as to the
17 answers provided under [the BATF form]." *Id.* at 1024. Tacke's actual testimony at trial, however, was
18 that he could not remember any conversation with Brebner regarding his answers to questions appearing
19 on the form. *Id.*

20 The entrapment by estoppel defense applies when an authorized government official tells the
21 defendant that certain conduct is legal and the defendant believes the official. *United States v.*
22 *Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987). "[T]he defendant must show [1] that he relied on the
23 false information and [2] that his reliance was reasonable." *Id.* at 774 (citing *United States v. Timmons*,
24 464 F.2d 385, 387 (9th Cir. 1972)) a defendant's reliance is reasonable if "a person sincerely desirous of
25 obeying the law would have accepted information as true, and would not have been put on notice to
26 make further inquiries." *Id.* (quoting *United States v. Lansing*, 424 F.2d to 25, 227 (9th Cir. 1970)).

27 In the case at bar, defendant Snellings was in fact the federal firearms licensee. The facts will
28 show that he was at the center of the conspiracy to violate federal firearms laws. His attempt to hide

1 behind the ruling in *Tallmadge* is simply unsupported by the court's ruling in that case.

2 **B. Snellings's Request that the Government Make an Offer of Proof as to Whether or**
3 **Not He Committed the Crime of Conspiracy**

4 In Document 124, defendant Snellings seeks an order of the court requiring the government to
5 make an offer of proof to support charging him with a violation of 18 U.S.C. Section 371-conspiracy
6 against the United States. *See* Dkt. 124, p. 5. Simply stated, there is no statutory or case authority
7 requiring the government to make an offer of proof or to prove its case at a pretrial hearing. It is
8 undisputed that the indictment in this case was returned by the Grand Jury and that the defendant has
9 been arraigned on that indictment. Jury trial in this matter has been set for September 29, 2014. The
10 government is prepared to prove the charges against the defendant at the appropriate time.

11 **III. RESPONSE TO DEFENDANT EARLY'S MOTIONS IN LIMINE**

12 **A. Rule 29 [Dkt. 125]**

13 If the defendant elects to make a Rule 29 motion for acquittal at the close of the government's
14 case, the Court should consider the evidence introduced during the government's case, including
15 testimony, stipulations and exhibits introduced during direct and cross-examination. Fed. R. Crim. P.
16 Rule 29. In considering a Rule 29 motion, the evidence adduced at trial is viewed in the light most
17 favorable to the prosecution, and an acquittal should not be ordered where any rational trier of fact could
18 find each essential element of the crime beyond a reasonable doubt. *United States v. Mosley*, 465 F.3d
19 412, 415 (9th Cir. 2006) citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v.*
20 *Merriweather*, 777 F.2d 503, 507 (9th Cir. 1985).

21 **B. Witness Exclusion [Dkt. 126]**

22 The United States does not object to excluding witnesses from the courtroom prior to their
23 testimony, excepting case agents and other necessary government personnel, or any witness permitted to
24 be present by the court, such as an expert witness.

25 The government therefore has no objection to a witness exclusion order and asks that ATF
26 Special Agent Sara Lewis and Sacramento Sherriff's Department Detective Tom Koontz be designated
27 as the government's case agents and be permitted to remain in court to assist the government during the
28 trial. Fed. R. Evid. 615; *United States v. Valencia-Riascos*, 696 F.3d 938, 941 (9th Cir. 2012) (finding

1 no abuse of discretion in permitting investigating officer to remain in court during a trial and citing
2 cases).

3 **C. State Search Warrant Evidence [Dkt. 127]**

4 The United States does not intend to offer any evidence relating to the state case *People v.*
5 *Early*, Case Number 12F-06812, during its case-in-chief. The government does reserve its right to
6 present relevant evidence of the facts of that case pursuant to Rule 401 should it become necessary
7 during the course of the trial.

8 **D. Firearms Used in Other Crimes [Dkt. 128]**

9 Early has moved to exclude evidence of crimes committed using the firearms illegally
10 transferred in this case. The government agrees that the harms caused by the illegal transfer of these
11 firearms are an appropriate matter for sentencing and not for the jury. It does not intend to introduce at
12 trial evidence related to crimes committed using the illegally transferred firearms, provided that the
13 defense does not first raise the issue by improperly and incorrectly arguing that the transfer of these
14 firearms did not cause any harm.

15 **E. Legal Status of Firearms [Dkt. 129]**

16 Early argues that the legal status of the firearms is prejudicial. This argument misstates the legal
17 standard. Under Rule 403, evidence is only excluded if “its probative value is substantially outweighed
18 by the danger of unfair prejudice.” Fed. R. Evid. 403. Here, Early has not alleged unfair prejudice.
19 Moreover, contrary to Early’s claims, information regarding the legal status of the firearms at issue is
20 highly probative in this case because the legal status of the firearms influences the potential profit to be
21 made from the firearms. Therefore, the government recommends that the Court reserve ruling on this
22 issue and address this objection if it is raised with regard to specific firearms during the trial.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the government respectfully requests that the Court grant or deny each
3 of the defendants' motions in limine as stated above.

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5 Dated: September 15, 2014

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6
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