UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

23 CR 146 (DG)

- against -

RACHEL CHERWITZ and
NICOLE DAEDONE

Defendants.
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DEFENDANTS' JOINT OPPOSITION TO THE GOVERNMENT'S MEMORNADUM OF LAW IN SUPPORT OF MOTIONS *IN LIMINE*

BONJEAN LAW GROUP PLLC
Jennifer Bonjean, Esq.
Ashley Cohen, Esq.
Gabriella Orozco, Esq.
303 Van Brunt Street, 1st Fl.
Brooklyn, New York 11231
718-875-1850
Jennifer@bonjeanlaw.com
Ashley@bonjeanlaw.com
Gabriella@bonjeanlaw.com

AIDALA, BERTUNA & KAMINS, PC
Imran H. Ansari, Esq.
Aidala, Bertuna & Kamins, PC
546 Fifth Avenue, 6th Floor
New York, New York 10036
212-486-0011
iansari@aidalalaw.com

Attorneys for Defendants

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INTRODUCTION

The government's 130-page Memorandum of Law In Support of its Motions *In Limine* reveals its troubling plan to overwhelm a jury with excessive and largely irrelevant evidence that has no nexus to the charged offense of forced labor conspiracy or to the Defendants. Without an ounce of self-control, the government asks this Court for free passage to prosecute an uncharged RICO case against OneTaste, putting ideas and beliefs on trial that *it* finds deviant all while pretending that this case is about a forced labor conspiracy carried out by the Defendants. What's more, the government aims to obstruct the Defendants' ability to mount an effective defense to the charge, a charge that remains elusive. The Indictment charges a single count of forced labor conspiracy but the government's vague and rambling Motions *In Limine* make clear that the government really seeks to prosecute undefined and uncharged "bad acts" of countless individuals (still unnamed) untethered to a violation of any discrete criminal statute. The Court must put the guard rails up for the government who seem intent on turning this trial into a live version of the sensational Netflix movie about OneTaste to distract the trier of fact from the actual charged conduct in this case.

The government indicted the Defendants with one criminal act: forced labor conspiracy. It did not charge a single count of forced labor itself, much less sex trafficking or prostitution. And yet, the government devoted a staggering 130 pages to outlining its alleged evidence related to this single count of forced labor conspiracy, claiming that its goal was to provide previously lacking clarity about the theory of its case. The government did not exactly stick the landing. Its motion leaves the Defendants more in the dark than ever about what this case is about. While Defendants certainly understand that the government believes that OneTaste was a nefarious organization that embraced non-normative ideas about sexuality, used strong sales tactics, and manipulated people

to adopt beliefs and engage in practices that they now eschew, evidence of the forced labor conspiracy remains lacking. The motion fails entirely to identify evidence of the supposed "conspiracy" except to list, without identification, numerous "unindicted co-conspirators" who, if the government is to be believed, all conspired with the defendants to secure the forced labor of various also unidentified "intended victims." The motion provides a dramatic narrative, with anecdotal unsourced stories about Defendants and dozens of other unnamed individuals who apparently had some connection to OneTaste during a 13-year period, but it is devoid of facts that would put Defendants on notice of precisely what overt acts the government contends were committed by the Defendants (or their co-conspirators) in furtherance of this conspiracy.

The government's memorandum reveals its intent to constructively amend its one-count forced conspiracy indictment into a sex-trafficking charge without affording the Defendants notice and an ability to defend the charge. It has executed a classic bait and switch, charging one count all while planning to try a very different case, namely an undefined and unspecified charge of "bad acts" again OneTaste and a myriad of various individuals associated with OneTaste, including the Defendants. Pursuant to the Fifth and Sixth Amendment Clauses to the United States Constitution, the Defendants are entitled to be informed of the nature and cause of the accusation against them. The government's motion evinces a clear intent to try a very different case than the one charged. This Court must restrain this prosecution, primarily by precluding evidence that sheds no light on the questions raised by the charged offense. It must also act to allow Defendants to fairly defend this case consistent with the Sixth Amendment. This Court must be assured that the jury renders a verdict based solely on whether the Defendants committed the charged offense by proof beyond a reasonable doubt, not because it was overwhelmed with prejudicial information with no probative value.

STATEMENT OF FACTS

The government, in its motion, offered a long statement of facts intended to front the government's theory of the case in an effort to render all evidence that followed "relevant." The government seeks to present OneTaste as an organization built on coercion and control and to paint OneTaste's teachings of Orgasmic Meditation ("OM") as the method by which Ms. Daedone and Ms. Cherwitz exercised control over their employees and customers. The government is certainly entitled to its theories, each of which will remain its burden to prove at trial. But their theories will be soundly refuted where the evidence will show that Defendants never entered into an agreement with one another, or any other co-conspirator, to threaten serious harm against *anyone* to engage in any activity, whatever its nature.

In fact, OneTaste's practices reflect an entirely consensual lifestyle, albeit controversial, one that Ms. Daedone developed over years, and which pulled extensively from her experience and background in Buddhism and other spiritual and mystical methodologies. The practice of OM is intended to allow practitioners to connect more deeply with themselves and experience a heightened sense of spiritual awareness and connection with others. Thousands of people across the globe took OneTaste's courses and learned to OM. Many found deep meaning in the practice and community amongst its practitioners. Indeed, many of these people are prepared to testify that they found themselves committing to the daily practice and experiencing profound benefits from that commitment. Others who participated in OneTaste courses found it to be an interesting experience but did not practice it long term. A tiny minority of people who took OneTaste courses and practiced some of the teachings and ultimately – entirely of their own volition – stopped taking courses and left the community, have said, *in hindsight*, that the practice was damaging or unhealthy. It is the voices of this tiny minority that the government wants the jury to hear, to the

exclusion of the chorus of many more voices whose experiences differ drastically from those the government seeks to paint as "victims."

Tellingly, the government wants to withhold from the jury any evidence that will refute its narrative, including the prior inconsistent statements of its own witnesses whose words reflect not only their consent to all conduct but the fact that they enthusiastically endorsed it. As is discussed in greater detail below, the defense intends to elicit testimony regarding the particular experiences and background of each of the government's witnesses, including their sexual experiences and their claims of personal trauma because the statute under which the defendants are charged requires them to have had specific knowledge of the circumstances of each of their supposed "victims." This evidence will reveal that these witnesses encountered the full spectrum of human experience, including a vast array of sexual experiences from, for example, professional BDSM consulting, *before they came to OneTaste*. It is no wonder that the government would prefer to keep this evidence from the jury.

Orgasmic Meditation is a practice in which the defendants believed deeply, which was informed by their religious and spiritual beliefs, and whose benefits have been confirmed by scientific research. Thousands of people have acknowledged that the practice positively affected their lives. That said, the practice is not for everyone. To be sure, the nature of the practice lends itself to prurient interest and makes for good clickbait. It is perhaps not surprising that the practice of Orgasmic Meditation and the teachings of OneTaste were sensationalized in media reports. In these various stories, reporters spoke to a very small collection of anonymous, disaffected former employees and class participants, ignored facts that did not align with their narrative, and made little to no effort to substantiate their claims. Indeed, many of the media's claims now appear to have been based on fabricated material and dishonest sources. Of course, when media reports,

podcasts and infotainment "documentaries" cast aspersions without evidence, the price paid by their subjects is reputational damage and personal pain. Since 2018, untested allegations have been repeated in the media, destroying an otherwise flourishing business and the reputation of everyone involved, including co-defendants Nicole Daedone and Rachel Cherwitz. For OneTaste, the reputational and resulting economic damage was swift and devastating. But for the defendants, the damage was much more severe because the government elected to accept the sensational media reports hook, line and sinker and charge them with a serious crime.

In truth, OneTaste was an organization that centered around the concept of consent. It maintained clear policies regarding consent and taught courses about personal responsibility and the importance of making informed, autonomous decisions. OneTaste had rules that all practitioners, customers and employees were expected to follow. All practitioners of OM, all OneTaste customers, and all employees were able to decide not to participate, to simply say "no" to anything they did not want to do, say or hear. And many thousands of OneTaste customers and employees did exactly that, thousands of times over, every single day, whether by turning down a request to OM, deciding against buying an additional course, leaving a course that did not speak to them, deciding to work for or leaving their employment with OneTaste, or simply moving on from the practice of OM and from OneTaste altogether. Everyone had freedom to come and go as they pleased.

Indeed, the jury will hear from *every single witness* the government puts on the stand that they did exactly that. When they decided that they did not want to work at or be a customer of OneTaste anymore, they said "no" and they left, freely and without repercussions. More overtly, many of the "victims" created their own schedules and assignments. The government wants to prevent the jury from hearing from anyone else because they know they will be unable to convince

a jury that the defendants were conspiring to secure labor by force when they hear that the vast majority of OneTaste customers and employees, working in the same locations, at the same time and in the same roles as the supposed "victims," i.e. "reasonable [people] of the same background and in the same circumstances" were perfectly capable of saying no, and did say no all the time. *See*, 18 U.S.C. § 1589(c).

The Court should be wary of the government's attempts to cherry-pick what the jury is or is not permitted to hear in an attempt to tip the scales of justice in their favor. The "whole truth" is the government's adversary in this case. The statute requires a consideration of the reasonableness of each supposed "victim's" actions in relation to their background and circumstances. An exploration of the "background and circumstances" of each witness is therefore not only relevant but critical to the defense's case.

I. THIS COURT SHOULD DENY THE GOVERNMENT'S UNPRECEDENTED REQUEST FOR A BLANKET ORDER THAT WOULD AFFORD ITS WITNESSES A PRESUMPTIVE RIGHT TO TESTIFY UNDER A PSEUDONYM WITH NO SHOWING OF ANY BASIS IN VIOLATION OF DEFENDANTS' SIXTH AND FIRST AMENDMENT GUARANTEES.

After indicting Defendants based largely on tabloid journalism and issuing a press release[1] chock full of scandalous and salacious accusations (of which the Defendants presumed innocent), the government now wants to litigate under seal and in secret. Now that it's time to actually *prove* the allegations that they trumpeted far and wide, the government seeks to conceal the identities of their witnesses and limit cross-examination, so their names and testimony are shielded from public scrutiny. The government has lost sight of the fact that its obligations to the *Defendants* supersede any responsibility it may owe a witness to alleviate discomfort related to testifying about

[1] https://www.justice.gov/usao-edny/pr/onetaste-founder-and-former-head-sales-indicted-forced-labor-conspiracy

"sensitive" matters. That witnesses experience some distress when testifying publicly goes without saying, but it cannot be an overriding concern in a serious criminal prosecution that aims to convict and incarcerate the Defendants. The government brought this case and now must prove it *in public* as the Constitution demands.

Accordingly, this Court should deny the government's request for a blanket order that allows its witnesses to conceal their names and personal identifiers with no particularized showing of any need or threat of physical harm. This Court must also reject the government's request to limit cross examination of these witnesses – whose identities remain a mystery. At a minimum, this request is grossly premature since these witnesses have not been identified, and this Court is in no position to determine whether anonymity is justified.

Separately, this Court should unseal every document on this docket or make a ruling in connection with whether the name of one particular witness, whose identity is well known, should be redacted. The government has failed to justify the sealing of this docket, and the ongoing secrecy of this litigation cannot be squared with Defendants' (and the public's) right to a public trial.[2]

A. Applicable Law

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy *public* trial." As the United States Supreme Court declared, "no [wo]man's life, liberty, or property [should] be forfeited as criminal punishment of violations of the law until there had been a charge fairly made and fairly tried in a *public* tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida,*

[2] These issues were addressed in letters filed on August 9, 2024 [Dkt. 114] and August 27, 2024 [Dkt. No. 133] Defendants further incorporate those letters into this opposition.

309 U.S. 227, 237-37 (1940) (emphasis added). The public-trial provision reflects the tradition of our system of criminal justice that a trial is a "public event" and that "[what] transpires in the court room is public property." *Craig v. Harney,* 331 U.S. 367, 372 (1947). The public trial is rooted in the principle that justice cannot survive behind walls of silence; it has long been reflected in the "Anglo-American distrust for secret trials." *In re Oliver,* 333 U.S. 257, 268 (1948. "The requirement that a trial of criminal case be public embodies our belief that secret judicial proceedings would be a menace to liberty." *Gannett Co. v. DePasqulale,* 443 U.S. 368, 412 (1979).

The Sixth Amendment also guarantees the criminal defendant the right to confront and cross-examine her accuser *before the jury. Coy v. Iowa,* 487 U.S. 1012, 1016 (1988). A defendant is presumptively entitled to cross-examine a key government witness as to her name, address, and place of employment. *Smith v. Illinois,* 390 U.S. 129, 131-32 (1968). *See also, Alford v. United States,* 282 U.S. 687 (1931). In *Smith,* the Supreme Court found a deprivation of the defendant's confrontations rights when the trial court sustained a prosecutor's objections to revealing a witness's correct name and home address, stating:

> When the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. *Id.* at 131.

While some courts, mostly in the Eastern District of New York, have permitted victims to use pseudonyms, those circumstances are rare and only permitted after a particularized showing that anonymity is necessary for a specific reason, usually because the victim was a minor or faced threats of *physical* safety. No court has every granted a prosecutor the unfettered discretion to permit its witnesses to testify under a pseudonym based on their uneasiness in revealing their

identifying information in a public trial or because of vague concerns about criticism in the public domain.

Apart from Sixth Amendment Confrontation concerns, the public has a qualified "constitutional right of access to criminal trials." *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.,* 457 U.S. 596, 603 (1982). To restrict public access, the government must show that the proposed limitation is narrowly tailored to serve a compelling government interest. *Id.* Critically, public scrutiny, including by the press, plays an important role in the fair administration of justice:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply public information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Neb. Press Ass'n v. Stuart* 427 U.S. 539, 559-60 (1976).

Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and the integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability. *Id.* at 587.

B. No Authority Justifies the Grant of a Blanket Order Allowing Any and All Witnesses to Decide Whether they Prefer to Testify Under a Pseudonym Based on Nothing More than Witness Discomfort in Testifying.

Before even identifying their witnesses, the government demands that their witnesses be afforded a say in whether they may identify themselves with a fake name at trial. Notwithstanding

its lengthy string cites, the government offers *no* authority for its radical request that this Court cede control to the witnesses to decide for themselves whether they want to testify anonymously and whether they may interfere with a Defendants' Sixth Amendment right to cross-examine on rudimentary matters such as name, address, and place of employment.

Critically, the government has not yet *identified* for the defense or this Court which witnesses seek to use a pseudonym. Nor have they explained *why* confidentiality is warranted for any specific witness. Instead, the government asks this Court to transfer its authority directly to it and enter a general order allowing any government witness the right to testify under a pseudonym. The type of generalized order sought by the government finds no support in the law of this Circuit or any another and is wholly inconsistent with the Sixth Amendment. Indeed, this approach suggests that confidentiality of witnesses is presumed rather than permitted under limited exceptions. The government's refusal to make out a specific case for anonymity for *specific* witnesses is fatal to its application.

The government argues that "[c]ourts routinely permit the government to call victims and other witnesses using pseudonyms where doing so does not infringe on a defendant's Sixth Amendment rights." (Gov. MIL at 42) However, in every case cited by the government, the court found a particularized and compelling justification for the use of pseudonyms, centered primarily around a victim's *physical* safety. For example, in *United States v. Dan Zhong,* No. 16-CR-614, Dkt. 115 at 22 (E.D.N.Y 2018, the defendant, a diplomat of the People's Republic of China, was charged with, *inter alia,* forced labor and alien smuggling in connection with bringing Chinese workers to the United States to work in his construction company known as Rilan. The government sought a protective order so that the *victims* of forced labor and their family members could testify under a pseudonym, because of a "history of violent reprisals by Rilan, whose representative

sought to abduct the victims after they escaped from Rilan custody . . .” In other words, the court permitted the use of pseudonyms because the victims and their family faced serious danger of physical harm based on a history of the defendant’s company attempting to kidnap the victims.[3]

In *United State v. Almehmeti,* 284 F. Supp. 3d 477 (S.D.N.Y. 2018) and *United State v. Urena,* 8 F. Supp. 3d 568, 573 (S.D.N.Y. 2014), the courts permitted undercover police officers to testify using pseudonyms for safety reasons and so that they could continue to work as undercover police officers. In *United States v. Pepe,* 747 F. 2d 632, 656, n.33 (11th Cir. 1984), the witnesses were not required to provide their homes addresses, because they were in the witness protection program. In *United States v. Navarrao,* 737 F. 2d 625, 633-34 (7th Cir. 1984), cross-examination of the witness about his home address and place of employment was curtailed because the witness was a government informant. And finally, in *United States v. Harris,* 501 F. 2d 1, 9 (9th Cir. 1974), the court generally pointed out that a witness’s home address may be kept confidential if revealing the address would result in harassment or danger to the witness.

The government’s own authority is clear. The Sixth Amendment right to cross-examine a witness concerning basic information such as name, address, and place of employment cannot be limited without a specific showing of physical harm. Here, the government has not provided *any* evidence whatsoever that its mystery witnesses have a legitimate fear for their physical safety or that they are undercover police officers or participants in the witness protection program. As discussed below, the government’s chief complaint is that a journalist has written about this case and used words like “foolish,” “petty,” and “greedy” to reference individuals who the government

[3] Notably, the Second Circuit Court reversed the defendant’s forced-labor convictions where the District Court made a number of evidentiary errors, including permitting the government to introduce evidence of uncharged conduct that was “significantly more sensational and disturbing that the charged crimes.” *United States v. Zhong,* 26 F. 4th 536, 544 (2d Cir. 2022).

claims *might* be witnesses. Fear of exposure and revelations that may contradict a potential witness's narrative is not the type of harm that justifies contravening a Defendants' Confrontation Rights.

The government concedes that it is required to identify a need to protect the witness' full identity. But it makes no claims to do so. The government cites the Crime Victims' Rights Act, 18 U.S.C. § 3771, arguing that District Courts are required to implement procedures that protect victims from the accused and preserve the right to be treated with fairness and respect. However, it fails to point to any section of the Act that equates its protections to allowing *witnesses* to testify anonymously. Moreover, government has yet to identify anyone who would qualify as a "crime victim" pursuant to 18 U.S.C. § 3771. For the purposes of § 3771, "crime victim" means a person directly or proximately harmed as a result of the commission of a federal offense. Thus, a "crime victim" for 18 U.S.C. § 3771 purposes and/or assumes that a federal offense has been committed. The government has yet to prove the commission of a federal offense – although it seems to overlook that pesky detail. Not for nothing, Defendants are charged with a single count of forced labor conspiracy. Commission of that offense does not even result in "crime victims" as defined under 18 U.S.C. § 3771. "Intended victims" are not "alleged intended crime victims" under the statute. Regardless, 18 U.S.C. § 3771 speaks to the need to protect a victim from the defendant – not whether a witness can testify anonymously because an investigative journalist is writing critical, truthful content that upsets them and their inconsistent narratives.

The government generally refers to its witnesses as "victim-witnesses," arguing that "courts in this Circuit routinely grant motions for victim-witnesses to testify using pseudonyms in cases involving explicit subject matters or where the victims have legitimate fears of media harassment or employes consequences from trial publicity." Even if true, the government falls far

short of satisfying the standard its sets out. Once again, the government has failed to identify any individual who qualifies as a victim who seeks to use a pseudonym, and it has not identified any legitimate fear specific to any witness or so-called victim. The litany of cases cited by government merely underscore how inappropriate it would be to grant the government's request to allow all of its witnesses to testify under a pseudonym without a particularized basis.

In each of the cases cited by the government, the defendants were charged with substantive sex offenses and their victims were identifiable. In *Terranova,* there were four identified victims of sexual abuse who were *minors* at the time of their abuse. Likewise, *Maxwell, Raniere* and *Kelly* all involved sex trafficking or child exploitation offenses, involving children. To be clear, these are vastly different cases involving sex trafficking and minors and there are no sex charges in the instant case or any underaged involvement. Importantly, in each of these cases, the Court did not enter a blanket order allowing any witness who sought to testify under a pseudonym to do so. Rather, the courts in these cases considered the particularized needs that each specific victim identified when assessing whether confidentiality was justified. In the end, the government cannot point this Court to any apt precedent that supports its extreme request.

In contrast, the government here has not identified, even by a Jane Doe reference, which witnesses seeks to testify under a pseudonym and what particularized reason exists for doing so. This is a not sex trafficking case, does not involve minors, and not every witness will testify about matters that are sensitive, let alone matters so sensitive that they should be permitted to testify anonymously. Indeed, to the extent any witness will testify about the act of OMing or any sexual act, these acts were entirety consensual as the evidence will show. Although the government repeatedly claims that adult women and men, whose liberties were never restrained, were somehow coerced into certain sexual acts through vague and hazy tactics like "manipulation" and "shame,"

the evidence at trial is going to paint a very different picture, namely that intelligent women and men explored their sexuality and the meditative practice of OM of their own volition and with consent. That some individuals may feel differently in hindsight about their experiences does not make those experiences (to the extent they are even relevant) so sensitive as to allow a witness to testify anonymously. If the government wishes to provide more specificity about which witnesses seek anonymity, it should make a specific request and identify the basis for the request.

C. The Alleged Witnesses Are Not at Risk of Harassment or Reprisals by the Defendants.

The government claims that "requiring [witnesses] to provide identifying information would serve only to harass, embarrass and "humiliate or annoy" the Victim-Witnesses. The government has provided no support for the claim that there is any risk of physical harm to their witnesses by the Defendants or that they will suffer any harassment by Defendants or the press. The government points only to a website called the Frank Report which has published critical and truthful articles of the government's prosecution that includes a handful of less than flattering references to one witness, well known to this Court and the world.[4] Criticism, discussion about inconsistent narratives, and even mild name-calling by a journalist is protected speech under the First Amendment and simply not the type of "harassment" that justifies the extreme decision to allow witnesses to testify anonymously in contradiction to the guarantees of the Sixth Amendment. Moreover, the only witness who seems to have been the subject of any critical reporting by the Frank Report is the only known witness who has been the subject of numerous letters. That the

[4] The Government asserts that OneTaste retained the author of the Frank Report at one point to conduct investigative services for OneTaste and points to an email communication between the investigator and a OneTaste attorney. Even if true, it does not follow that OneTaste had a hand in any article written and published on the website which in no way threatened or harassed any individuals who are not even identified witnesses with perhaps the exception of one individual well known to everyone and who has purposefully introduced her name, her fabricated journal, and her inconsistent story into the public domain for profit.

parties are still unable to reference her by name notwithstanding that she appeared in a Netflix movie, her "private and sensitive" journals were read on screen with her blessing, and the government itself has referenced her publicly by name is bordering on the absurd.

The government vaguely references threats of "civil litigation" by OneTaste as another justification for allowing witnesses to testify anonymously but fails to provide any factual basis for this claim. OneTaste is currently involved in civil litigation that preceded the indictment in this case that is both legitimate and moving forward in a state court in California. Assistant United States attorneys from the Eastern District of New York are not the final arbiters on whether a non-party to a criminal prosecution has the right to avail itself of the civil judicial system. Regardless, the government has failed to explain how a threat of potential litigation by a non-party for harms caused by witnesses has any correlation to whether those witnesses should be permitted to testify anonymously. These potential witnesses certainly will not remain a secret to the Defendants – who have never personally sued anyone.

Lastly, Defendants refer this Court back to its letter dated which sets forth in specificity how at least one witness has publicly told her story to numerous news outlets, including through her sister in a Netflix film.

II. THE COURT MUST PERMIT DEFENDANTS TO OFFER EVIDENCE OF WITNESSES' PAST SEXUAL BEHAVIOR

The government has not charged the Defendants with any sex offenses. Yet, they are blatantly attempting to use sex in a manner that will prejudice the Defendants, while ignoring the positive teachings of the company focused on sexual wellness. To further their one-sided objective, the government moved to preclude "offering evidence of any argument about any So-Called "Victim-Witnesses'" (hereafter simply "Witnesses") involvement in sexual behavior

outside of their experiences at OneTaste, including but not limited to any argument that any prior or subsequent prostitution or other sexual behavior outside of their experiences at OneTaste is evidence that the defendants did not compel the Witnesses to perform labor of a sexual nature in this case." [Dkt. 169, pg. 48] Further, the government wishes to limit cross examination on these points. This motion reflects the government's intent to try a case entirely different than the one it has charged.

In support of this motion, the government relies heavily on Federal Rule of Evidence 412, which provides that, in a criminal proceeding involving sexual misconduct, "evidence offered to prove that a victim engaged in other sexual behavior" or "evidence offered to prove a victim's sexual predisposition" is not admissible. Fed. R. Evid. 412(a), (b). The government notes the "three narrow circumstances" where this rule does not apply, but entirely fails to examine the exception that clearly applies in this case. The rule is plain that a court may admit:

> (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights.

Fed. R. Evid. 412(b). Based on defendants' limited understanding of the government's case, it appears that neither (A) nor (B), above, will apply – although Defendants are still left to speculate given the lack of disclosures. But the government does not consider the final exception, regarding the Defendants' constitutional rights.

Here, the Defendants are charged with a forced labor conspiracy in violation of Title 18, United States Code, Sections 1589(a)-(b), 1594(b), and 3551 et seq. [Dkt. 1] Understanding the background of the forced labor statute is instructive as to its intended scope. Section 1589 was

enacted as part of the Victims of Trafficking and Violence Protection Act of 2000. Pub. L. No. 106-386, 114 Stat. 1464. Legislative history suggests that Congress passed this act to correct what it viewed as the Supreme Court's mistaken holding in *United States v. Kozminski*, 487 U.S. 931 (1988), where the Supreme Court held that the federal law prohibiting involuntary servitude, 18 U.S.C. § 1584, did not apply to "nonviolent coercion." The Kozminski case involved allegations that a dairy farmer in Michigan had employed two mentally disabled men "in squalid conditions, and in relative isolation from the rest of society," and had forced the men to work on the farm "seven days a week, often 17 hours a day, at first for $15 per week and eventually for no pay." *Id.* at 931. The Court overturned defendant's conviction, holding that the involuntary servitude statute did not apply to psychological coercion, but only to "the use or threatened use of physical or legal coercion." *Id.* at 944.

The enactment of Section 1589 expanded the coverage of federal criminal law to include situations beyond traditional violent coercion, where "traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence." H.R.Rep. No. 106-939, at 101, 2000 U.S.C.C.A.N. at 1392-93 (Conf. Rep.). Thus, Section 1589 is "intended to address serious trafficking, or cases where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence." *United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2014) (emphasis added).

Section 1589(a) & (b) provide that:

> (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means –
>
> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

> (2) by means of *serious harm or threats of serious harm to that person or another person*;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer *serious harm* or physical restraint,
>
> shall be punished as provided under subsection (d).
>
> (b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

18 U.S.C. § 1589(a) & (b) (emphasis added).

In is motions in limine, the government made clear their intentions to proceed under § 1589(a)(2) and (4), which require proof of serious harm or threats of serious harm. (*See*, Dkt. 169, PageID 2258) ("In the course of presenting its case-in-chief, the government expects to establish that the defendants and their co-conspirators . . . were each involved in the agreement to provide or obtain the labor or services of OneTaste participants by means of serious harm or threats of serious harm to those members… or by means of a scheme, plan or pattern intended to cause those members to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm"). Indeed, the government cited the serious harm statutory language 21 times in their filing.

Section 1589(c)(2) in turn defines "serious harm" as:

> any harm, whether physical *or* nonphysical, including psychological, financial, or reputational harm, ***that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances*** to perform or to continue performing labor or services in order to avoid incurring that harm.

18 U.S.C. § 1589(c) (emphasis added). The statute is clear that the harm or threat of harm is to be "considered from the vantage point of a reasonable person in the place of the victim," and "must be sufficiently serious to compel that person to remain" in her condition of servitude when she otherwise would have left. *Dann*, 652 F.3d at 1170. (emphasis added); *see also United States v. Kalu*, 791 F.3d 1194, 1212 (10th Cir. 2015).

To properly evaluate the offense charged, the jury must be provided with "all the surrounding circumstances," including the background of the victim, sexual and otherwise. The government seeks to limit this evidence to the "context of explaining their experiences at OneTaste," which necessarily falls short of the standard promulgated by 18 U.S.C. § 1589(c).

Further, Section 1589 "contains an express *scienter* requirement." *United States v. Calimlim*, 538 F.3d 706, 711 (7th Cir. 2008). There must be evidence from which the jury could find "that the employer *intended* to cause the victim to believe that she would suffer serious harm—from the vantage point of the victim—if she did not continue to work." *Dann*, 652 F.3d at 1170 (emphasis added). "The linchpin of the serious harm analysis under § 1589 is not just that serious harm was threatened but that the employer intended the victim to believe that such harm would befall her" if she left her employment. *Id.*

The government's efforts to limit the testimony here evidence its total lack of understanding of the elements of the offense that they've brought, and that they will be required to prove beyond a reasonable doubt. More concerning, perhaps, is that this request essentially asks this Court to limit the Defendants' ability to cross examine witnesses on an element of the offense. Rule 412, however, wisely makes explicit that "evidence whose exclusion would violate the defendant's constitutional rights" should be admitted. Fed.R.Evid. 412(b)(1)(C). The constitutional rights contemplated by this exception include the accused's right under the Sixth

Amendment to confront a witness. *See, e.g., Olden v. Kentucky,* 488 U.S. 227, 231, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). This includes "a meaningful opportunity to present a complete defense" at trial, *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006) (internal quotation marks omitted), and to confront witnesses, including by "impeach[ing] the credibility of a prosecution witness by cross-examination," *Davis v. Alaska,* 415 U.S. 308, 309 (1974).

The Witnesses' state of mind, prior sexual experience, knowledge, intent, and behavior are directly relevant to understanding whether any force or coercion was involved. Neither Ms. Daedone nor Ms. Cherwitz is accused of being sexual offenders, much less sexual aggressors vis-à-vis these witnesses. The defendants are not seeking to portray any witness as promiscuous. Defendants simply wish to establish the reasonableness of the witnesses' behavior and question their credibility, which is absolutely their right. By way of example, the Defendants should be permitted to seek testimony from one of the only known government witnesses (known to everyone at this point), showing that she initiated all of the sexual encounters she participated in at OneTaste and other similar encounters outside of OneTaste. They should be permitted to confront this witness with direct evidence that supports this, which is contemporaneous to the time of the alleged conspiracy. The Government cannot seek to shield this and other relevant contextual conduct from the jury because it might conflict with their prosecutorial goals and "narrative." Similarly, if a witness that he was "shocked" by discussions or suggestions about sex or sexuality at OneTaste events or programs, the jury should be informed of his professional involvement in similar activities, including if he presents himself publicly as a BDSM practitioner and consultant. An additional example: if another of the government's potential witnesses, [name redacted], took OneTaste courses because she sought help and guidance with intimate issues that traditional medicine and therapy had failed to address, the defense must be permitted to probe her prior sexual

attitudes, including her claims of past trauma, to ensure the jury understands the experiences that brought her to OneTaste and her experiences with OneTaste.

The defendants do not wish to put sex on trial. But the Government already has. They argue explicitly and implicitly that evidence of sex is evidence of criminality. At the same time, they want to deny the defendants the opportunity to provide relevant context regarding the witnesses and their states of mind and experience, particularly regarding sex. Where the Witnesses' prior experience with sex is relevant to establishing their state of mind or impeaching their testimony, such evidence should not be precluded. Contrary to the Government's argument, the past sexual conduct of particular witnesses is relevant to a forced labor conspiracy case that includes claims of attempted sexual coercion. Several of the Government's witnesses reportedly had extensive experiences with sexual practices before their involvement with OneTaste. This background is relevant for the jury to understand whether their experiences at OneTaste were genuinely traumatic or forced or if, instead, they voluntarily engaged in these activities within the context of their existing personal or professional lives.

At bottom, the government has made clear that they will open the door to discussion about the Witnesses' sexual history in their case in chief. They wish to elicit limited, cherry-picked facts to give context to the government narrative, and then intend to turn that context against the defendants. In this forced labor conspiracy case, Rule 412 furnishes no basis for precluding evidence of witnesses' prior sexual activity, since, as the government alleges, Defendants' knowledge of such activity furnished the very mechanism by which they allegedly conspired to cause serious harm to the alleged victims. Furthermore, the government has averred that it intends to solicit from witnesses certain information about prior sexual behavior which they allegedly communicated to defendants. Thus, the government opens the door to exploring such past sexual

behavior in the context of cross-examining witnesses as to the accuracy of their recollections and determining what, if any, traumatic experiences may or may not have resulted from that past behavior. This goes to the heart of the defense.

III. THE COURT SHOULD REJECT THE GOVERNMENT'S MOTION TO HANDCUFF THE DEFENDANTS' RIGHT TO CROSS EXAMINE THEIR LEAD CASE AGENT.

The government's motion argues for a categorical prohibition on "introducing evidence or making arguments….that urge jury nullification.[5]" *See,* Mot. at 53. In response, counsel respectfully asserts that they are aware of their professional obligations and will not seek to obtain a favorable verdict by means of nullification. A request for nullification is, in essence, an argument to ignore the law. *See, United States v. Edwards*, 101 F.3d 17, 19 (2d Cir. 1996) ("[W]hile jurors have the power to ignore the law in their verdicts, courts have no obligation to tell them they may do so."). Far from desiring nullification, the Defendants believe that if the jury applies the available facts to the relevant law, a not guilty verdict is the appropriate and probable outcome.

However, the government improperly equates a defendant's right to comment on the adequacy of the government's investigation, the techniques used, and the actions taken by their agents and investigators as an invitation to the jury to render a verdict based on improper legal and factual considerations. They are wrong. Although the Defendants do not intend to put the government's investigation on trial, cross-examination and comment on the utilization of certain investigative techniques, and whether key investigative agents acted improperly in gathering

[5] Ironically, it is the government who seeks jury nullification where it has charged one offense but intends to try a different one that involves presenting an onslaught of prejudicial information irrelevant to the charged crime in hopes of overpersuading the jury that Defendants require punishment even if the government fails to prove the crime charged.

evidence and building this case, is admissible. These points speak directly to the strength, reliability, and legitimacy of the government's case.

First, the Defendants intend to cross-examine case agents and government witnesses regarding the case agents' initial conclusions and labeling of witnesses as "victims." Far from being offered for the truth of the assertion, the labeling of witnesses as "victims" by members of law enforcement, which were then relayed to the witnesses, shaped the narrative and influenced the mindset of the witnesses long before they will testify. Arguably, hearing themselves described as "victims" by the case agents, impacted their perception of the events and their experiences and led them to view their own experiences through a lens crafted by the agents. This was not mere semantics; it was a calculated framing that suggests to the witness that they were harmed in some significant way, and it speaks to potential undue influence on the part of law enforcement. Jurors have the right to know whether these witnesses were prompted to see themselves as victims as part of a narrative construction rather than based on actual, unbiased recollection of events. Such statements by members of law enforcement are admissible as non-hearsay.

Statements introduced merely for the purpose of demonstrating that such statements were made are not hearsay[6]. *Denigris v. New York City Health & Hosps. Corp*., 552 Fr. App'x 3, 6 (2d. Cir. 2013). Likewise, out of court statements offered not for their truth but for their effect on the listener are not hearsay. *United States v. Dupree*, 706 F. 3d 131, 136 (2d. Cir. 2013); *United States v. Certified Env't Servs., Inc.,* 753 F. 3d 72, 89 (2d. Cir. 2014). The evidence of the labeling of witnesses as "victims" by law enforcement agents that the Defendants will seek to admit at trial are relevant and not hearsay. These statements by agents to the victims will be elicited to show

[6] The government appears to agree, utilizing identical arguments and precedent in an effort to introduce various statements allegedly made by the Defendants or other participants at OneTaste. *See*, Mot. at 89, 90.

their effect on the listener, as it will be argued that the listener adopted the agents' view of the listener as a victim. Such a conclusion is logical and reliable, as it will be shown that the listener did not ever, prior to being labeled a "victim" by the agent, identify, express, or report having been victimized while a participant in OneTaste.[7] Such an argument is further corroborated by the Defendants' proposed expert, Dr. Marty Klein, who will testify that people commonly change their narrative (or "memory") of their experiences retrospectively, particularly experiences pertaining to sexuality and sexual experiences.

In addition, the government's conduct, and actions taken by the case agents in the case, is a relevant issue for the Defendants under the Confrontation Clause. The right to cross-examine government witnesses is tantamount to testing their truthfulness and discrediting them by revealing their "possible biases, prejudices, or ulterior motives" concerning "the case at hand." *United States v. Figueroa*, 548 F.3d 222, 227 (2d Cir.2008). This relates particularly to improper, misleading, and confounding actions by Agent McGinnis who, among other things, told a key witness in an active investigation to "disband and cancel" her email account.

Evidence and argument impugning the government's investigation is relevant for several legitimate purposes. Specifically, this evidence is necessary to challenge the reliability of the investigation, for impeachment purposes, and to elicit potential bias of the investigators. *See, United States v. Konstantinovskiy*, No. 19-CR-408 (MKB), 2024 U.S. Dist. LEXIS 121396 (E.D.N.Y. July 10, 2024) (court permitted arguments challenging the reliability of the investigation and evidence of who was prosecuted for the purpose of impeachment). Here, the investigatory

[7] Former participants in OneTaste have reported that agents pressured them to testify, insisting that they were "victims" despite their insistence that they were not victimized.

conduct directly impacts the credibility and reliability of the evidence presented, as the statements made by the agents in this case improperly influenced the witnesses' testimony, making it a legitimate area of inquiry.

In addition, during the investigation, Agent McGinnis instructed a key witness to delete her email account, which contained crucial evidence, including emails that could have affected the witness's credibility. To be sure, the government denies such accusation and/or claims there are innocent explanations for such conduct. However, we do not have to take the government's word for it, and this is fair game for inquiry during cross-examination of the witness who deleted her account as well as Agent McGinnis. Additional conduct by Agent McGinnis, relating to his receipt of knowingly stolen documents, assisting a witness in withholding evidence in response to a civil subpoena, to hide evidence from a civil subpoena and other unethical conduct, is also proper cross-examination.

Precluding such evidence would violate the Defendants' right to present a complete defense. Evidentiary rules provide mechanisms for challenging the prosecution's conduct and the admissibility of evidence, which are essential to the Defendants' ability to contest the charges effectively. Fed. R. Crim. P. Rules 12, 16. By preventing the defense from questioning the Government's investigation, the Court effectively undermines these procedural safeguards and the Defendants' right to a fair trial.

Lastly, the government's motion to preclude arguments about the novelty or unusual application of the forced labor statute. While the Defendants do not intend to argue that the prosecution was "novel," commenting on the absence of certain charges or allegations is certainly proper. *See United States v. Stewart*, 03-CR-717, 2004 U.S. Dist. LEXIS 789, *3 (S.D.N.Y.,

January 26, 2004) (permitting the defense to inform the jury about the absence of insider trading charge).

IV. THE COURT SHOULD DENY THE GOVERNMENT'S MOTION TO ADMIT EVIDENCE OF ONETASTE'S TACTICS, TEACHINGS AND PRACTICES RELATING TO SEX, RECRUITMENT, AND GROOMING OF SEXUAL PARTNERS FOR THE INVESTOR, AND ALL OTHER ALLEGATIONS OF 'ENCOURAGED' SEXUAL ACTIVITY.

Rules 401 through 403 of the Federal Rules of Evidence set forth the basic guidelines for admitting relevant, not unduly prejudicial, evidence. Most importantly, Rule 403 authorizes this Court to preclude relevant evidence where its probative value is substantially outweighed by its prejudicial impact or if introduction of such evidence will unduly delay trial. Fed. R. Evid. 403.

The Defendants respectfully submits that this Court's probative versus prejudicial analysis must be conducted amidst the backdrop of the overly expansive evidence that the government seeks to introduce, which amounts to an attempt to introduce evidence of alleged sex trafficking in a case that only charges *conspiracy* to commit forced labor. The government seeks permission to introduce a laundry list of bad-acts evidence, claiming that this evidence is necessary to a forced-labor conspiracy prosecution. Yet, the evidence that the government seeks to introduce does not make any material fact more or less likely. Rather, the government's parade of horribles will only inflame the jury against the Defendants by inserting sexually charged evidence into the case. While the members of the jury should be debating the Defendants' guilt based on the evidence and facts, they will instead be judging them on whether it was moral or ethical to have engaged in a consent-based, highly protocoled spiritual, meditative practice which focused on the female genitals, to have explored and discussed relationships including non-monogamous relationships, and allegations that a generally sex positive attitude equated to prostitution. The Defendants cannot possibly get a fair trial in that scenario.

As the Court is well aware, the indictment only charges the Defendants with a forced labor conspiracy in violation of Title 18, United States Code, Sections 1594(b) and 3551, alleging that that the Defendants conspired to "obtain the labor and services of a group of OneTaste members by subjecting them to economic, sexual, emotional and psychological abuse; surveillance; indoctrination; and intimidation." [Indictment ¶ 6]

18 U.S.C. § 1589, in relevant part, proscribes "knowingly obtaining the labor of another by means of force, threats, and harm, or by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person would suffer serious harm or physical restraint." The government attempts to stretch this language further than the text will bear, and then rests its arguments on this strained premise.

The government argues that the "scheme, plan, or pattern" used to obtain free labor can be more than just threats of "serious harm" or "physical restraint." Rather, it contends the scheme could involve no threats of serious harm or physical restraint at all—it could involve mere "coercive control." *See*, ECF 148-1. Under such an amorphous theory that the law does not support, where no physical restraint or affirmative threats to cause serious harm are alleged, any perceived negative treatment of an alleged victim, however attenuated from performing of labor, could be labeled *psychological coercion*.

The statute is not so broad. Its language "requires that serious harm [will] befall an employee if she did not continue to work" or a "threat that compels her to remain." *Headley v. Church of Scientology Intern.*, 687 F.3d 1173, 1180 (9th Cir. 2012)(internal quotation marks omitted). Behavior, however, morally questionable, that makes a person uncomfortable or in fear of being ostracized by their peers—but is not tied to obtaining labor—is not relevant to the forced-labor conspiracy charges. So, here, the Court should exclude bad-acts evidence particularly

revolving around sexual acts, that is unrelated to obtaining forced labor. Such evidence listed by the government does not make it more or less likely that the Defendants obtained labor by making a person believe they would suffer serious harm if they refused. Its only purpose is to attempt "dirty up" the defendants.

Once reoriented to the text, structure, history, and purpose of the statute, it becomes obvious that the government's proposed evidence is irrelevant. Before a party can introduce evidence to the jury, that evidence must be relevant. Fed. R. Evid. 402. Relevant evidence must tend to make a consequential fact "more or less probable." Fed. R. Evid. 401. And even if evidence is relevant, a court should still exclude it if its "probative value" is "substantially outweighed by a *danger* of…unfair prejudice" or "confusing the issues." Fed. R. Evid. 403.

The government claims, among other things, that the Defendants pressured the "victims" to engage in sexual behavior, such as OMing, which the "victims" would not have otherwise engaged in, to obtain their labor. When considering that the "victims" voluntarily chose to participate in an organization that, according to the government, "preached" the benefits of Orgasmic Meditation," and whose business centered around Orgasmic Meditation, the government's argument in this instance becomes satirical. However, what is crucial is that the government's motion labels Orgasmic Meditation as well as discussion and activity of a sexual nature in a tiny minority of OneTaste's programs under the sub-heading: "OneTaste's Teachings, Rituals and Practices." *See*, Mot. at 68. The government claims that the "victims" engaged in the acts prescribed in "OneTaste's teachings," and that they "OMed or performed such sex acts" out of a fear of being shamed, humiliated, or subject to workplace retaliation. Mot. at 70. Here, the claim is not that the alleged fear of shame or humiliation stemmed from a person's refusal to provide labor. Instead, as stated by the government, the shame and fear stemmed from a person's

potential refusal to follow "Teachings, Rituals and Practices" of the organization the person voluntarily chose to participate in as a consenting adult.

As properly characterized by the government, OneTaste's sincerely held beliefs, or theology, centered around Orgasmic Meditation and progressive beliefs about utilizing sexuality as part of a path towards fulfillment and enlightenment. Mot. at 70. These spiritual beliefs, while unconventional, were deeply held, and broadcast to participants and employees. Indeed, the government concedes that the Defendants "formulat[ed] and promot[ed] these teachings and practices, over the course of many years. *Id*. Any shame, embarrassment, or humiliation feared by a OneTaste participant as a result of not engaging with these sincerely held beliefs would not result from any person's refusal to perform labor. Rather, any such consequences, if at all, would be the result of deviation from the core philosophy and code of behavior of the organization. In other words, presentation of such testimony is irrelevant, extremely prejudicial, and does not make any consequential fact more or less likely to the sole charge of forced labor conspiracy.

When deciding whether a consequence or threat qualifies as a "serious harm" under the forced-labor statute, a court must separate "improper" "coercion from permissible warnings of adverse but legitimate consequences." *Headley*, 687 F.3d at 1180. So, even if the "victims" feared being shamed or embarrassed for their desire to not follow the practices of OneTaste, such a fear does not rise to the level of "serious harm" required by the statute. *Id.*; *See, also United States v. Raniere*, 384 F. Supp. 282, 313-14 (E.D.N.Y. 2019). Nor is "warning of such a consequence" considered a 'threat' under the statute. *Headley* at 1180. After all, the First Amendment guarantees the right of members of a religious or quasi-religious organization to shun those who choose to leave.

If anything, the likely feared consequence would have been to *deter* someone who was not interested in OneTaste's teachings from rejoining. Thus, these alleged instances of sexual activity do not make any consequential fact more or less likely. Instead, it will completely distract and inflame the jury and prejudice the Defendants. Indeed, the government knew about the OneTaste teachings that encouraged participants to openly explore their sexuality at the time they obtained the Indictment in this case. If they wanted to present such evidence to a trial jury, they could have, but chose not to, indict the Defendants for any substantive crimes relating to that conduct. As such, presentation of such evidence in this case is irrelevant and overly prejudicial.

A. The Court Should Deny the Government's Motion to Admit Evidence that is not Relevant or is Overly Prejudicial.

Rule 401 of the Federal Rules of Evidence states that "relevant evidence" is evidence that "has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Rule 403 authorizes this Court to preclude relevant evidence where its probative value is substantially outweighed by its prejudicial impact. Fed. R. Evid. 403. The Defendants respectfully submits that this Court's probative versus prejudicial analysis must be conducted amidst the incredible amount of wholly irrelevant, prejudicial, and ridiculous assertions contained in their statement of facts, with a significant portion of the allegations brazenly submitted without any request or support for its admissibility. There is no probative value to any of this. It is all attempts to equate the honest evaluation of a persons' sexuality with bad conduct. The following, which the government expects to introduce at trial, is wildly prejudicial, irrelevant, and inadmissible.

- Testimony that Daedone, prior to the Relevant Time Period, worked as a prostitute. *See*, Mot. at 35.

- Unsubstantiated records of complaints by non-government witnesses about Cherwitz's "abuse" and aggression. Mot. at 16.
- Webchat wherein non-testifying witness states that Cherwitz told non-testifying witness that Cherwitz believes a government witness and her boyfriend should not live together so that they can individually increase their sales. *See*, Mot. at 82.
- Alleged responses by Defendants to sexual assault allegations made by non-testifying witnesses. Mot. at 81.
- Fictitious testimony that the government bizarrely claims Cherwitz forcibly OM'd with Jane Doe 2. Mot. at 31.
- Testimony that Cherwitz told OneTaste staff members that they could no longer do "something" they used to do because it could be considered prostitution. Mot. at 24.
- Testimony related to predatory sales techniques. Mot. at 17, 19.
- Testimony that Defendants encouraged participants to "accept money to engage in sexual relationships with 'sugar daddies' or to participate in sham marriages with individuals seeking United States citizenship." Mot. at 20.
- Testimony that Cherwitz instructed a participant to make a pornographic video with her boyfriend. Mot. at 29
- Testimony related to BDSM-style acts or the branding of initials. Mot. at 72.
- Testimony related to the Defendant's drawing on their own prior experiences with sexual abuse. Mot. at 69.

This Court should prohibit any testimony or evidence about the above allegations because they are not relevant to the charges against the Defendants, contain inadmissible hearsay, depict prior bad acts, and are wildly prejudicial. Whether they are true or false, these have nothing to do

with the single charge of forced labor conspiracy. They in no way make it more or less likely that the Defendants conspired to obtain labor. Any relevance they may contain is outweighed by the extreme prejudice they cause.

These allegations, and others, which are littered throughout the government's motion without any support for their admissibility, are not relevant to any factual question the jury will decide. To be relevant, evidence must make some fact, consequential to deciding the case, more or less likely. Fed. R. Evid. 401. The Defendants are not charged with any sexual offenses. Rather, they are charged with conspiring to commit forced labor, a violation of 18 U.S.C. §§ 371 and 1589. Even if they were relevant, the Court should exclude these allegations because they are far too prejudicial or elicit propensity evidence without a clear exception. Rule 403 permits a court to exclude even relevant evidence when the mere "danger of unfair prejudice" "substantially outweighs" the evidence's "probative value." Fed. R. Evid. 403. This type of evidence creates a situation in which a jury could base its verdict on emotion as opposed to the relevant evidence in the case.

V. THE COURT SHOULD DENY THE GOVERNMENT'S MOTION TO ADMIT THE STATEMENTS OF DEFENDANTS, THEIR ALLEGED AGENTS, AND ALLEGED CO-CONSPIRATORS AS THEY HAVE FAILED TO MAKE A PRIMA FACIE SHOWING THAT SAID STATEMENTS ARE ADMISSABLE.

The Court should deny the government's attempt to improperly cage the Defendants' ability to defend themselves against the sole forced labor conspiracy count in the indictment and cut off the government's attempt to hamper their constitutional rights. As it relates to the government's attempt to convince this Court that statements should be admitted pursuant to various exceptions embodied in Fed. R. Evid. 801(d)(2), their motion should be denied as grossly premature. It is outrageous that the government is seeking to preclude arguments and evidence on

such an expansive array of theories, points, and issues, before a single witness, witness statement, or exhibit has been adequately identified, while asking this Court to admit purported statements pursuant to Rule 801.

This request is even more objectionable when considered in contemplation of the barebones indictment in this case that does not come close to providing enough information for the Court to meaningfully consider the issues in the government's application. Without any 18 U.S.C. § 3500 material, any identified witnesses or exhibits, or even a clear explanation of the government's theories on these charges, the Defendants would be denied their Sixth Amendment rights by any ruling that so broadly excludes wide categories of evidence and argument. The government has yet to make the necessary disclosures to give the Defendants – and the Court – insight as to what they are discussing in their motion, and grossly fails to offer any detail with specificity as to the precise evidence at issue. Simply stated, the motion should be denied *ab initio* as premature.

The government's motion to admit the prior statements of the Defendants, their alleged "agents," and their alleged "co-conspirators" should be denied as it is infirm and deficient on its face. *See,* Mot. at 77. At the outset, it should be noted that the government's motion in this regard fails to adequately inform the Defendants, and therefore also the Court at this time, as to the identities of any purported agents or co-conspirators, nor does the government adequately identify the substance and nature of the statements they seek to admit with specificity, nor how these statements are made in the course and in furtherance of a "conspiracy" to commit "forced labor." This motion exemplifies the vagueness that has characterized the government's case since the filing of the barebones indictment. While the government may not yet know their case, the Defendants should certainly not be prejudiced by the request to admit statements, under the hearsay

exceptions and rules cited, that they have not yet been able to consider, and counter in response to the instant motion.

The government's exhibits that they do submit to the Court arguably do not fall into the exception(s) they seek to admit them through. Further, they lack relevance to the crime charged. For example, Ex. B, D, and E do not have relevance to the charge of forced labor conspiracy, and/or are taken out of context and cherry picked by the government. The specific statements that the government proffers in these exhibits have nothing to do with the charge of conspiracy to commit forced labor, do not purport to show any criminal conduct whatsoever, and certainly none that correlate to the charge of forced labor conspiracy, and therefore those statements have no relevance whatsoever to the matter at issue and should be precluded. The government is simply attempting to place the Defendants in a bad light and paint them as distasteful individuals. For the reasons set forth below, the government's motion should be denied.

A. The Government's Motion to Admit Statements of The Defendants as Party-Admissions Should Be Denied.

In their motion, the government states that they intend to introduce "numerous statements" of the Defendants in its case-in-chief in the form of email, text/chat messages, video/audio recordings, and business/financial records. Citing to Fed. R. Evid. 801(d)(2)(A), the government argues that these statements are admissible as statements offered against an opposing party. However, Defendants oppose this motion to the extent that the government seeks to offer unspecified statements made by the Defendants at this time in their case-in-chief, as the Defendants – and the Court – are unable to adequately assess the admissibility of those statements.

The Defendants do not dispute that the *relevant* prior statements that they made are presumptively admissible, if *properly* offered pursuant to the Federal Rules of Evidence, and if

offered pursuant to Rule 801(d)(2)(A). However, at the same time, and despite what the government may seek to preclude, the Federal Rules of Evidence permit the Defendants to offer their own (or that of alleged co-conspirators) out-of-court statements as an exception to the hearsay rule so long as they are not offered for the truth of the matter asserted. *See*, Fed. R. Evid. 801(c). These statements may be relevant non-hearsay regarding the Defendants' state of mind. *See*, e.g., Fed. R. Evid. 803(3). *Smith v. Duncan*, 411 F.3d 340, 346 n.4 (2d Cir. 2005) ("[T]he mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind . . . of the declarant."); *Cameron v. C'mty Aid for Retarded Children*, 335 F. 3d 60, 65 n.2 (2d Cir. 2003) (finding that, because a declarant's statements were "not used to prove the truth of the matter asserted, but to establish [declarant's] state of mind, they are not hearsay"). A defendant is also permitted to offer his or her own statements if they fall under one of the exceptions to the hearsay rule. Moreover, the government's introduction of selected statements by a witness may in fairness require the introduction of the remainder of the statement. *See*, Fed. R. Evid. 106.

B. The Government's Motion Should be Denied as it Has Failed to Adequately Demonstrate the Admissibility of Statements by Individuals Who They Purport to be Defendants' Agents.

In their motion, the government states that they intend to introduce statements made over an expansive course of 14 years (2006-2018) by those who they allege to be "agents" or "employees" of the Defendants pursuant to Fed. R. Evid. 801(d)(2)(D). For a statement to fall within the hearsay carveout of Rule 801(d)(2)(D), a party must establish "(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency." *Leser v. U.S. Bank Nat'l Ass'n*, 09-CV-2362, 2012 U.S. Dist. LEXIS 182975, 2012 WL 6738402, at *4 (E.D.N.Y. Dec. 29, 2012) (Matsumoto, J.) (quoting *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 537 (2d Cir.1992)).

Statements of a party's independent contractors typically do *not* come within Rule 801(d)(2)(D). *See*, *Dora Homes, Inc. v Epperson*, 344 F Supp 2d 875, 884-885 (EDNY 2004); *Natl. Liab. & Fire Ins. Co. v Rick's Mar. Corp*., 2018 US Dist LEXIS 179976, at *6-7 EDNY Oct. 19, 2018, No. 15-CV-6352(DRH); *Marcic v Reinauer Transp. Cos*., 397 F3d 120, 128-129 (2d Cir 2005).

However, the government fails to identify which individuals they contend to be the agents and/or employees of these individual Defendants, let alone satisfy the other prongs for admission. In fact, the government fails to identify the bases upon which they allege certain unnamed individuals fall into the category of agents and/or employees of the individual Defendants.[8] The government has offered no specific detail regarding what statements (other than those contained within irrelevant and prejudicial exhibits), and by which purported employees and/or agents that it intends to introduce, let alone established that such statements were made within the scope of an employee or agency relationship with the Defendants such that they fall within the hearsay exception under Rule 801(d)(2)(D). OneTaste is not a corporate defendant in this matter, and the government conflates the individual Defendants in this case with the corporation, to the extent that the government fails to enunciate a sufficient nexus of agency between the Defendants and the unnamed individuals. Although in certain circumstances the statements are admissible under Rule 801(d)(2)(D), the government in their motion fails to make a sufficient showing that would allow the Court to grant its motion, and as such, it should be denied.

[8] In its motion, the government repeatedly utilizes the word "employees" as uniformly applied to employees, independent contractors, "participants", individuals who served on certain teams, general "subordinates." It is important that a distinction is made between all these categories of individuals and that each statement is assessed by the Court separately when deciding on whether the specific individual making the statement can be considered an agent or not. Further, OneTaste's filings with the grand jury and their content have no relevance to the analysis at issue and the Government provided no legal support as to why they should be considered in this evaluation. If anything, OneTaste explicitly states that the company relied on independent contractors and differentiated them from participants. The fact that OneTaste uses the expression "core to its business model" has no legal relevance in the government's application here.

As such, the government's motion should therefore be denied as premature and without merit. If the government – and they may not be able to – provides sufficient information regarding the statements it intends to offer at trial, the Court should then, and only then, determine on a statement-by-statement basis which, if any, are admissible pursuant to Rule 801(d)(2)(D).

C. The Government's Motion Should be Denied as it Has Failed to Adequately Demonstrate the Admissibility of Statements by Individuals Who They Purport to be Co-Conspirators.

The government also seeks admission of statements made by alleged members of a conspiracy in furtherance of that conspiracy. When viewed *in toto*, the government's evidence fails to establish the necessary elements to entitle it to evoke this hearsay exception pursuant to Rule 801(d)(2)(E). It is well-established law that "[b]efore admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E)," a court must be satisfied that the offering party has established, by a preponderance of the evidence, that: (1) there was a conspiracy involving the declarant and the non-offering party; and (2) the statement was made "during the course and in furtherance of the conspiracy." *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). In making these preliminary factual determinations under Federal Rule of Evidence 104(a), the Court may consider the hearsay statements themselves. *Bourjaily,* 483 U.S. at 177-78. However, these hearsay statements are presumptively unreliable, *id.* at 179, and, for such statements to be admissible, there must be some independent corroborating evidence of the Defendant's participation in the conspiracy. *See*, *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir.) ("Since *Bourjaily*, all circuits addressing the issue have explicitly held absent some independent, corroborating evidence of defendant's knowledge of and participation in the conspiracy, the out-of-court statements remain inadmissible.") (citing cases), cert. denied, 130 L. Ed. 2d 91, 115 S. Ct.

152 (1994); *United States v. Bentvena*, 319 F.2d 916, 948-49 (2d Cir.), cert. denied, 375 U.S. 940 (1963); *United States v Tellier*, 83 F3d 578, 580 (2d Cir 1996) (holding that "[b]ecause there was no independent corroborative evidence of [defendant's] participation in that conspiracy, the proffered hearsay statement was inadmissible.").

The government has provided no such evidence, so its motion should be denied as premature and without merit. Certainly, at this pre-trial stage the government has not proven by a preponderance of the evidence that a conspiracy existed, that the declarants were members of the conspiracy, and that the statements were made during and in furtherance of the conspiracy. *See*, *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012); *United States v. Oluwaseun Adelekan*, 567 F. Supp. 3d 459 (S.D.N.Y. 2021); *United States v. Mohamed*, No. 18-cr-603 (ARR), 2020 U.S. Dist. LEXIS 61152 (E.D.N.Y. Apr. 7, 2020); FRE Rule 801(d)(2)(E). Indeed, the government fails to even specify who the alleged co-conspirators are. Nor has the government provided any substantive information regarding the statements it intends to introduce. Instead, the government asks the Court to take its word that statements by unspecified witnesses were made in furtherance of a conspiracy that included the Defendants. There is simply no basis for the government's blanket request for permission to introduce statements pursuant to Rule 801(d)(2)(E). Courts have held that blanket or categorical rulings on the admissibility of co-conspirator statements are inappropriate without a particularized review of each statement and its context. *United States v. Lingat*, No. 21-cr-573 (MKV), 2024 U.S. Dist. LEXIS 42301 (S.D.N.Y. Mar. 11, 2024), *United States v. Ilori*, No. 21-cr-00746 (MKV), 2022 U.S. Dist. LEXIS 118185 (S.D.N.Y. July 5, 2022), *United States v. Carter*, No. 21-CR-681-01-02-03 (NSR), 2024 U.S. Dist. LEXIS 8464 (S.D.N.Y. Jan. 17, 2024). The Court should require the government to establish the foundation for each statement individually before admitting them into evidence. Should the government be able to

provide information regarding the statements it intends to offer at trial, the Court can determine on a witness-by-witness and statement-by-statement basis which, if any, are admissible pursuant to Rule 801(d)(2)(E). *See*, *United States v. Russo*, 302 F.3d 37, 44 (2d Cir. 2002) ("Where evidence is offered against a defendant consisting of a declaration by an alleged co-conspirator in furtherance of some criminal act, . . . the court in each instance must find the existence [between the defendant and the declarant] of a specific criminal conspiracy [to do that criminal act.]" (internal quotations omitted) (emphasis added)).

Furthermore, the government has not disclosed the identities of all alleged co-conspirators, which impedes the defense's ability to investigate and challenge the reliability of the statements. This lack of disclosure is a violation of the Defendants' right to a fair trial and to effectively cross-examine witnesses. *See*, *United States v. Mohamed*, No. 18-cr-603 (ARR), 2020 U.S. Dist. LEXIS 61152 (E.D.N.Y. Apr. 7, 2020); *United States v. Ray*, No. 20-cr-110 (LJL), 2022 U.S. Dist. LEXIS 21467 (S.D.N.Y. Feb. 7, 2022), *United States v. Valdez*, No. 1:18-CR-138 JLS(MJR), 2020 U.S. Dist. LEXIS 229498 (W.D.N.Y. Oct. 9, 2020).

Finally, some of the alleged statements may not have been made in furtherance of any conspiracy but rather were casual conversations or statements made after the purported objectives of the purported conspiracy had been achieved – and there is none – which would render them inadmissible under Rule 801(d)(2)(E). *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012); *United States v. Ferguson*, 653 F.3d 61 (2d Cir. 2011); *United States v. Best*, No. 3:20-cr-28 (VAB), 2022 U.S. Dist. LEXIS 158847 (D. Conn. Sep. 2, 2022). "Idle chatter among conspirators does not satisfy the 'in furtherance' requirement of Rule 801(d)(2)(E)." *United States v Gigante*, 166 F3d 75, 82 (2d Cir 1999). The Court should scrutinize the context and content of each statement to ensure it meets the strict criteria for admissibility under the Federal Rules. Further, the government

must demonstrate that the declarant and the defendant against whom the statements are offered are members of a conspiracy in furtherance of which the statements are made, and that this conspiracy is "'factually intertwined' with the offenses being tried." *United States v. Grossman*, 843 F.2d 78, 83 (2d Cir. 1988). However, the out-of-court statement may not be admitted if the statements themselves are the only evidence of the Defendant's participation in a conspiracy. *See*, *United States v. Padilla*, 203 F.3d 156, 161 (2d Cir. 2000) (citing Tellier, 83 F.3d at 580). Statements admitted under Rule 801(d)(2)(E) must constitute more than "merely narrative" descriptions by one co-conspirator of the acts of another. *See*, *United States v. Beech-Nut Nutrition Corp*., 871 F.2d 1181, 1199 (2d Cir.), cert. denied, 493 U.S. 933, 100 S. Ct. 324, 107 L. Ed. 2d 314 (1989); *United States v. Paone*, 782 F.2d 386, 390 (2d Cir.) (Mere "idle chatter" does not satisfy the rule), cert. denied, 479 U.S. 882, 107 S. Ct. 269, 93 L. Ed. 2d 246 (1986). Retrospective statements are not admissible unless they "serve some current purpose in the conspiracy, such as to [promote [] cohesiveness,' or to provide reassurance to a coconspirator." *United States v. Thai*, 29 F.3d 785, 813-14 (2d Cir. 1994) (quoting *United States v. Simmons*, 923 F.2d 934, 945 (2d Cir.), cert. denied, 500 U.S. 919, 114 L. Ed. 2d 104, 111 S. Ct. 2018 (1991)). "Entirely retrospective" statements, however, are not admissible. *United States v. Lieberman*, 637 F.2d 95, 102-03 (2d Cir. 1980).

D. Additional Portions of Defendants' Statements are Admissible.

The government seeks to preclude additional portions of the Defendants' statements if offered by the Defendants. However, as stated *supra*, the Defendants may offer their own (or that of alleged co-conspirators) out-of-court statements as an exception to the hearsay rule so long as they are not offered for the truth of the matter asserted. See, Fed. R. Evid. 801(c). Further, Fed. R. Evid. 106, pertaining to the remainder of, or related, statements, allows for the introduction of the appropriate additional portions of statements to provide context and avoid misleading the jury.

Where exculpatory statements are necessary to explain or provide context to seemingly inculpatory statements introduced by the government, the Defendants should have an opportunity to supplement the evidentiary record consonant with the Federal Rules of Evidence.

For the foregoing reasons, the government's motion should be denied.

VI. THE COURT SHOULD DENY THE GOVERNMENT'S MOTION TO ADMIT "INSTRUCTIONS" OR "COMMANDS" AS NON-HEARSAY.

The government moves to admit "testimony and documents containing various commands, threats, directives and requests the defendants and their co-conspirators issued to the OneTaste participants and others, including those regarding OneTaste's sales practices; OneTaste's ideology and code of conduct; and the performance of labor and services by the OneTaste participants." *See,* Mot. at 89. As discussed in the prior section (the arguments of which are incorporated to the extent they are likewise applicable) the government's motion should be denied as premature as it does not provide enough information for the Court to meaningfully consider the issues in the government's application, and further, from the scant information that is provided, fails to sufficiently entitle the government to the relief it seeks on the merits. Critically, the Defendants should certainly not be prejudiced by the request to admit statements, with the hearsay exception, that they have not yet been able to consider, and counter in response to the instant motion.

If anything, the statements that the government do offer as "example[s]" of what they seek to admit highlight the weakness of its case, and more so, the absurdity of it. The government states that they seek the admission of "records and statements regarding the defendants' and their co-conspirators' directions to the OneTaste participants to engage in various aggressive sales practices." To wit, the government seeks the admission of "sales team group chat messages," as

annexed to their motion as Ex. F.[9] The government points to the following statements: "SELL AWAY BABY SELL AWAY"; "GET THOSE SG's [sales goals]"; and to "Get [a sales target's] deposit RIGHT FUCKING NOW." Ex. F. They also cite to when an individual on the sales team was on the phone with a potential customer who was interested in purchasing a OneTaste program but only had $500 that Defendant Cherwitz directed the sales member to "Get the deposit RIGHT FUCKING NOW . . . GET IT FOR $500." The government also states that these purported "commands" were given to the sales team from early morning to late at night. Unlawful activity? No. Standard operating procedure for most if not all corporations operating in capitalist countries? Yes! It is laughable that the government relies on these statements, that are just as likely to be said on the trading floor on Wall Street, any financial or corporate institution seeking to boost sales, a directive from a law firm partner to an associate to hit a quota of billable hours, a hot dog vendor on the street to an employee to sell more hot dogs, a coach on the football field to his players, on a telethon floor with a monetary goal to meet, the analogies to routine business practices in any given field, company, capitalist venture, from large to small, are endless. Importantly, none of this is criminal behavior, but rather routinely accepted business practices in a capitalist society. The government may not like the goods and services that OneTaste was selling, but they are in abject error for trying to deem their business practices criminal.

As such, it is imperative that government identify what statements they seek to admit under this exception, and demonstrate that they are in fact "commands, threats, directives and requests"[10]

[9] As group chat statements do not necessarily have the same direct communicative effect on an individual as other methods of communication, arguably it should not be afforded the same exemption from the hearsay rule.

[10] Without clear definitions of terms such as "commands," "instructions," "threats," and "directives," there is a palpable risk of mischaracterization and confusion to the jury. These terms carry distinct meanings, especially in a business context. For instance, "commands" may imply mandatory compliance, while "instructions" may serve as guidance without consequences for non-compliance. "Directives" may suggest a course of action without strict enforcement, while "threats" imply the potential infliction of adverse and potentially unlawful consequences. The

that are admissible, not only under the hearsay exception, but also for relevance. Assuming the government seeks to admit these statements as evidence of a purported conspiracy to commit forced labor, which is the only real relevant reason to do so, then they categorically fail. In fact, in a case that the government itself cites, *United States v Dawkins*, 999 F3d 767, 789 (2d Cir 2021), the court held that the district court did not abuse its discretion in excluding the statement on *relevancy* grounds. Verily, it is grossly prejudicial to the Defendants to allow the government to incredulously claim to the jury that these statements are in furtherance of a conspiracy to commit forced labor when they evince no criminality whatsoever. Perhaps, the trier-of-fact will make that determination, but certainly the Court can be the gatekeeper to prevent the government from dubiously offering statements such as those in Ex. F as falling within an exception to the hearsay rule as "commands, threats, directives and requests" as it is understood in the applicable rule and case law.

In fact, it should be noted that the cases cited by the government are in no way analogous to the case at hand. Particularly, they relate to clear criminal enterprises and conduct, such as the mafia, drug runners, and kidnappers, and the statements in consideration are clearly in relation to that criminal conduct. The nature and character of the "commands, threats, directives and requests" in those cases leave no question as to their intended purpose to further criminality. Arguably, the examples cited by the government in the instant case aren't really "commands, threats, directives and requests" as envisioned by the exception, but routine comments that would be typical in the

defense requests that the Court compel the government to clearly identify the statements they seek to admit, and their purported definition, to ensure proper characterization, and informed objections to their admissibility thereafter.

sales or business world, and in many ways, are simply motivational statements to pump up a sales team to meet their goals.[11] It could be construed as inspirational and encouraging.

For the foregoing reasons, the government's motion should be denied

VII. MOTION TO EXCLUDE RECORDED STATEMENTS AS UNRELIABLE AND INADMISSIBLE HEARSAY.

The government seeks to introduce prior recorded statements from multiple alleged victims and witnesses, including handwritten and typed journals, "Fear Inventories," text messages, and other documents, purportedly to demonstrate the mental states and experiences of individuals performing labor for OneTaste. However, the government has only provided partial statements and references to documents and has failed to present a comprehensive list of the specific statements or documents they wish to introduce. For example, despite claiming that they are seeking to introduce recorded statements—in various forms— from "multiple victims and witnesses," the government provides only three examples of what they intend to introduce. *See*, Mot. at 92. Further, despite their conclusory statements, they give no explanation as to how the proffered evidence is probative of the participants' "fears of serious harm." *Id*. This selective and incomplete disclosure is fundamentally unfair and undermines the Defendants' ability to properly challenge the admissibility of this material. For example, the government claims the journal entries of Jane Doe 1, where she details her fear of going into debt, are relevant to the instant charges.

[11] The government mischaracterizes certain statements as "commands" when they are not. Many statements are simply motivational phrases common in the sales environment and do not evince any unlawful retribution for non-compliance. Phrases like "Sell away, baby!" are standard motivational language in the sales industry and should not be conflated with coercive or unlawful directives. Simply put, it's absurd to do so. The language cited is typical of motivational speech in sales-driven industries and does not constitute "commands, threats, directives and requests" of an unlawful nature, or in furtherance of unlawful conduct, or are they in any way relevant to the forced labor conspiracy count charged. The government cannot show that failure to comply with such statements resulted in unlawful punitive measures, adverse consequences, let alone serious harm.

This is misleading, as a more comprehensive reading of the journals reveals her fear of being in debt to her boyfriend. Such an example highlights the impossibility of evaluating the government's selective, and often misleading, claims in their motion.

As such, the blanket admissibility of these statements under Rule 807 cannot be justified at this time. The residual hearsay exception is only available when sufficient guarantees of trustworthiness support the statements and are more probative on the point for which they are offered than other evidence reasonably available. Fed. R. Evid. 807. However, without access to the full context and content of these documents, it is impossible to evaluate whether they meet these criteria for this exception, or any other exceptions to the hearsay rule. Until the government provides full copies of the journals, diaries, and other relevant documents, along with the necessary context for proper examination, this branch of their motion should be denied. Only after the defense has had the opportunity to review and analyze the veracity of these materials should the Court consider their admissibility. To do otherwise would unfairly limit the Defendants' ability to contest potentially unreliable evidence, compromising their right to a fair trial.

Accordingly, the Court should deny the government's motion to admit this evidence and order the government to resubmit with greater specificity.

Regarding the three examples of written statements the government intends to introduce, all are inadmissible. First, the government seeks to introduce handwritten and typed journal entries of Jane Doe 1. The first excerpt provided details of Jane Doe 1's personal thoughts regarding debt and her own self-worth, which are inadmissible in this case and have no relevance to the instant charges. The additional sections highlighted by the government contain written entries that the government admits were created *after* the witness left OneTaste. They are neither present-sense impressions nor excited utterances. In addition, they contain little relevance to the instant charges,

or any actions allegedly taken by the Defendants. Instead, the writings contain amorphous descriptions filled with poetic flourishes, such as "My reflection is broken and jagged staring back at me," "Giant hands have grabbed each side of my mind," and "As I sit here I look down at the shards, scattered around my feet in a dark room. Thousands and thousands of them." None of this will be helpful to what the jury will be deciding and will only service to distract or garner sympathy for the witness. Therefore, these journals should be excluded in that they contain inadmissible hearsay pursuant to Federal Rule of Evidence 801 and unfairly prejudicial to the Defendants under Federal Rule of Evidence 403. In addition, evidence will be presented at trial showing that these journals were fabricated, and not written at the time or by the individual that the government alleges. Indeed, Defendants may seek to introduce the fabricated writings for impeachment purposes, but the government may not introduce them substantively or even to corroborate the witness's testimony.

The writings of Jane Doe 5 and Jane Doe 4 should be precluded on similar grounds. Jane Doe 4's writings were similarly written *after* she left OneTaste, so they are not present sense impressions or excited utterances. Also, despite the government's contention, the writings are not admissible under the "state of mind exception" simply because she intended to show them to another former OneTaste participant at a later time. Mot. at 101; Fed R. Evid. 803(3). The contents of the journals are textbook hearsay—a collection of out-of-court statements that the government intends to introduce to prove the truth of the matters asserted in it. Fed. R. Evid. 802.

Courts have precluded such journals as inadmissible hearsay. *See*, *Collins v. Kibort*, 143 F.3d 331, 338 (7th Cir. 1998) (district court erred in admitting Title VII plaintiff's diary into evidence because it was "inadmissible hearsay"); *Clark v. City of Los Angeles*, 650 F.2d 1033, 1038 (9th Cir. 1981) (district court erred in admitting plaintiff's diary into evidence because it

"contained much hearsay and opinion statements" and did not have the required "circumstantial guarantees of trustworthiness equivalent to the specifically enumerated exceptions."); *Commodari v. Long Island Univ.*, No. CV-99-2581, 2002 U.S. Dist. LEXIS 26225, at *48 (E.D.N.Y. Mar. 25, 2002) (finding statement in journal "plainly hearsay" under Rule 801 and therefore inadmissible at trial); *Reilly v. Revlon, Inc., Slip* Copy, 2009 WL 2900252 at *2 (S.D.N.Y. Sept. 9, 2009) (McMahon, J.) (plaintiff's diary inadmissible hearsay and unfairly prejudicial). Here, the journals are inadmissible without any exception.

In addition to being inadmissible hearsay, the journals should also be excluded as unduly prejudicial, pursuant to FRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Here, the risk that the journals would unfairly prejudice the Defendants *far* outweighs its probative value of its entry. The entry contains many lines that would invite the jury to decide the case based on sympathy and emotion rather than the facts. *See*, *United States v. Taveras*, 424 F. Supp. 2d 446, 454 (E.D.N.Y. 2006) (evidence is unfairly prejudicial is it has "an undue tendency to suggest decision on an improper basis, commonly…an emotional one."). Therefore, exclusion of the journals is mandated under FRE 801 and within the Court's broad discretion to exclude under FRE 403.

VIII. DEFENDANTS SHOULD BE PERMITTED TO OFFER RELEVANT EVIDENCE TO PROVE THAT THEY DID NOT CONSPIRE TO COMMIT FORCED LABOR.

The government moved to preclude the Defendants from offering any evidence from OneTaste customers, employees, and/or contractors who were not subject to alleged forced labor and/or had positive experiences with OneTaste, suggesting that evidence of people's positive experiences with the company constitutes impermissible "good acts" evidence. *See,* Mot. at 102. This represents the vast majority of individuals who participated in OneTaste. Countless people

who participated in OneTaste, whether as a customer, employee or contractor, had no fear they would suffer "serious harm" were they to not do what was asked of them. Instead, the government only wants the jury to hear evidence from their selectively chosen group of witnesses. However, testimony from additional course participants, event attendees, consultants or employees of OneTaste is necessary and admissible to establish (1) the totality of the surrounding circumstances and conduct of the Defendants and government witnesses, (2) the intent of the Defendants, and (3) whether the fears of the government witnesses were legitimate and "reasonable."

As the Government aptly put it, the principle regarding the inadmissibility of evidence establishing "each day a defendant didn't rob a bank" is "rather elementary." *Id.* at 103. Of course, the principle regarding relevant evidence being admissible is likewise rather elementary. *See* Fed. R. Evid. 402. As is the principle that a criminal defendant must possess the requisite *mens rea* to be found guilty. The government claims that evidence relating to "individuals who were not allegedly directed to [perform the forced labor]" should be precluded, as such evidence has "no bearing" on whether the Defendants' conspired to obtain the labor from others. *Id*. In this case - unlike a bank robbery- such evidence is highly relevant and admissible.

Contrary to the Government's argument that "evidence and argument" of those who had "positive experiences with OneTaste" is wholly irrelevant to any issue in dispute at trial, such evidence is directly relevant to the ***critical*** issue in dispute at trial: whether Defendants had the intent to agree to participate in a scheme to obtain forced labor. Indeed, the government's 130-page motion is littered with alleged "tactics" that the government claims the Defendants used, not just with the participants who will testify for the government, but in relation to all of OneTaste's course participants and customer base. Any contention that the introduction of such evidence would be irrelevant is confounding. The government appears to agree, arguing that allegations

contained within their statement of facts, although uncharged, are necessary to "provide background" for the alleged events and to show "the circumstances surrounding the events or to furnish an explanation of the understanding or intent with which the certain acts were performed." *Id.* at 62, citing *United States v. Coonan*, 938 F.2d 1553, 1561 (2d. Cir. 1991). For example, the government argues that predatory sales tactics were used against certain witnesses who were targeted because of their past trauma, in order to obtain their labor. *Id.* at 9, 17. However, evidence will also show that OneTaste used similar sales tactics as a matter of course, in order to sell courses and maintain profitability, and that countless OneTaste participants reported suffering trauma earlier in their lives. The government claims that, in order to obtain their labor, certain "victims" were instructed by the Defendants to OM, or encouraged to engage in other sexual activity, yet other participants at OneTaste will testify to having similar experiences, and that they expected and requested to receive suggestions and guidance on such matters, particularly because OneTaste was centered around orgasmic meditation and espoused sexual empowerment and positivity. *Id.* at 26.

The presentation of this evidence, among other things, is necessary to provide a full picture of the Defendants' conduct and the overall experiences of OneTaste participants, particularly to rebut the government's assertion that such pervasive tactics were used as a means to target a specific subset of individuals associated with OneTaste. *Id.* at 2.

Courts have repeatedly observed that in cases where a "critical element" at trial is the "mental state of the defendant," the defendant "is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent." *United States v. Sternstein*, 596 F.2d 528, 530 (2d Cir. 1979) (introduction of tax records that showed no error held to be relevant to prove that false records were the result of innocent mistakes) (citing *United States v. Brown*, 411 F.2d

1134, 1137 (10th Cir. 1969); *Black v. United States*, 309 F.2d 331, 337 (8th Cir. 1962)). As detailed above, the Defendants' intent is directly at issue in this case. Where intent may only be inferentially proven, "no events or actions which bear even remotely on its probability should be withdrawn from the jury unless the tangential and confusing elements interjected by such evidence clearly outweigh any relevancy it might have." *United States v. Brandt*, 196 F.2d 653, 657 (2d Cir. 1952). Similarly, intent to conspire with another to commit a crime often requires a jury to infer intent from circumstantial evidence. *See, United States v. Anderson*, 747 F.3d 51 at 61-62 (2d Cir. 2014) (In conspiracy prosecutions "most evidence of intent is circumstantial.").

Additionally, while Rule 404(b) prohibits the introduction of other acts "to prove a person's character," such acts are admissible to prove a defendant's intent. Indeed, it is "well settled that evidence of prior acts may be admitted to show a defendant's . . . intent." *United States v. Ozsusamlar*, 428 F. Supp. 2d 161, 165-66 (S.D.N.Y. 2006) (citing *United States v. Bok*, 156 F.3d 157, 165-66 (2d Cir. 1998)). For example, evidence from others who worked alongside the "victims" and who will testify that the Defendants did not force anyone to do anything, that employees and/or participants were free to leave at any time, that specific acts were only suggested and never mandated, that refunds were given to those who left, and that participation in OneTaste related to sincere beliefs and practices borne out of OneTaste's philosophy, is relevant to rebut the government's allegation that the Defendants intended to target specific individuals and to obtain their labor. Such an argument is permitted under the rules because it is logically independent of the so-called "conformity with character" inference that is prohibited by Rule 404. Indeed, such evidence is probative of innocence, and therefore relevant.

Nicole Daedone's and Rachel Cherwitz's actions, when presented as part of a broader framework and in relation to a breadth of participants, highlights their overall intention and belief

in OneTaste's mission, and is a portrayal of their true intent and state of mind, necessary to counter the government's claim that their intent was to join a conspiracy aimed at obtaining forced labor. The Defendants must be permitted to present such evidence, which would allow the jury to assess their intent within the full context of OneTaste's course participants, event attendees, consultants, licensees and employees. To deny this would undermine the very foundation of a fair defense in a conspiracy case, where intent is paramount.

Further, 18 U.S.C. § 1589, in relevant part, proscribes knowingly obtaining the labor of another by means of force, threats, and harm, or knowingly benefitting or receiving a thing of value from "participation in a venture which has engaged in the providing or obtaining of labor or services," or reckless disregard thereof. The statute defines "serious harm" objectively, not subjectively. 18 U.S.C. § 1589(c)(2). Specifically, "serious harm" is defined as harm that is "sufficiently serious, under all the surrounding circumstances, to compel a **reasonable person of the same background and in the same circumstances** to perform or to continue performing labor of services in order to avoid incurring that harm." 18 U.S.C. § 1589(c)(2) (emphasis added). To understand what a reasonable person would have experienced, the Court must admit not only the testimony of the government's "victims," but also the testimony of the many former OneTaste employees who worked and lived alongside them, and who will rebut much of their testimony, and who will testify that nobody was ever forced to do anything at OneTaste, and that employees were free to leave OneTaste—and, in fact, did leave—anytime they wanted. The government, in support of their motion to preclude such evidence, cites only cases involving specific intent crimes, where courts focused on the "good act" evidence in relation to whether the defendant committed a specific intentional act. That is not the case here, as an element of the statute necessitates consideration of the objective reasonable person standard of the "victim." Therefore, evidence

tending to establish, or negate that element, is relevant. *See*, FRE 401("relevant evidence" is evidence that "has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action").

As we previously argued, the statute at the center of this case makes testimony from former employees particularly relevant. Section 1589 requires the jury to determine whether the "harm" feared by the government's witnesses was "sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor of services in order to avoid incurring that harm." 18 U.S.C. § 1589(c)(2); Indictment, ¶ 12(a); ECF No. 171. The best evidence for what a "reasonable person of the same background and in the same circumstances" would feel is what other employees experienced when they were working at the same exact time and exact same places as the government's witnesses. To this end, the government's attempt to preclude the Defendants from introducing testimony detailing the experiences of other participants, which the government somehow deems as irrelevant "good act" evidence, is misplaced, and would prevent the Defendants from adequately defending against the instant charges, as this evidence is directly relevant to contextualize the "harm" that the government's witnesses will allege they feared, and is critical to the defense that nobody was forced to do anything at OneTaste.

IX. SCIENTIFIC AND OTHER EVIDENCE OF HEALTH BENEFITS OF ORGASMIC MEDITATION IS RELEVANT AND ADMISSIBLE.

Rule 401 of the Federal Rules of Evidence states that "relevant evidence" is evidence that "has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." One of the more unusual requests by the government is to preclude any evidence or argument regarding the purported health benefits of

OneTaste's core practice—Orgasmic Meditation ("OM"). The government argues that evidence or expert testimony claiming that OM provided health benefits to participants is irrelevant to the issues at trial, as the charges center on coercion and exploitation, not the legitimacy or efficacy of the practice. *See* Mot. at 104.

The Government emphasizes that any such evidence would distract from the central question of whether participants were coerced into labor and services under the threat of serious harm. This is confusing. OMing, and particularly, the Defendants' instructions to various alleged "victims" to engage in the practice of OM, appears central to the Government's case. (The labor and services also consisted of work of a sexual nature, including…to include orgasmic meditation and other sex acts; As just one of many examples, on one occasion, Co-Conspirator 4, a senior member of OneTaste's sales team, instructed Jane Doe 10 to engage in OM with him; Cherwitz instructed other OneTaste participants….to fill in on courses involving OMing; directing them to OM; teaching….OM was no different than meditating or drinking tea; On one occasion, Cherwitz announced that everyone in a OneTaste communal home was going to participate in an OM demonstration; Participants were expected to OM or would be shamed. *See*, Mot. at 26, 33, 34.) Indeed, the government argues that being directed to OM was one way in which the Defendants "regulated the OneTaste participant's sexual activities, and was a tactic used by the Defendants to obtain labor." *Id*. at 26.

Because the government has decided to, implicitly or explicitly, argue that being directed to OM is coercive, unwanted, and akin to being forced to engage in an unwanted sex act, the Defendants must be able to provide context and details surrounding their core practice. OM is crucial to participation in OneTaste. It is a part of the core beliefs and is the purpose of the business of OneTaste and is supported by research and scientific studies demonstrating its benefits. The

relevance of such evidence is vital to the context and understanding of the participants' experiences, as well as the *mens rea* of the Defendants who are accused of instructing others to OM. Relevance is a "very low standard," and "unless an exception applies, all relevant evidence is admissible," FRE Rule 402; *United States v. White*, 692 F.3d 235, 246 (2d Cir. 2012). The overwhelming evidence of the health benefits of OM is crucial to demonstrate the voluntary nature of the participants' involvement and to counter the government's claims of coercion and exploitation. By showing that both the Defendants as well as the participants believed in and experienced health benefits from OM, the defense can argue that their participation was consensual and motivated by personal health interests rather than being a result of coercion. Furthermore, the government has affirmatively put its relevance at issue by claiming that OM is both a tactic and a method used to coerce, as well as one of the types of 'labor' that participants were forced to engage in.

Indeed, the Defendants have provided Rule 16 notice disclosure, indicating an intent to offer expert testimony about the scientifically researched benefits of OM. The defense expects that their expert witness will review the body of scientific research that has examined the practices, effects, and outcomes of OM, in which studies have assessed the experiences of persons engaging in OM, measured the psychological, physiological, and neurological effects of OM, assessed the impact of OM on personal and relational well-being, and examined the experiences of OM practitioners within the context of meditation and the brain.

Additionally, excluding such evidence would unfairly prejudice the Defendants by preventing a full and fair presentation of the context in which the alleged conduct occurred. This argument aligns with the principles outlined in FRE Rule 412, which allows for the admission of evidence whose exclusion would violate the Defendants' constitutional rights. The exclusion of

evidence regarding the health benefits of OM would hinder their ability to present a complete defense and challenge the government's narrative effectively.

Therefore, medical evidence, expert evidence, lay evidence, and other evidence of the health benefits of OM is directly relevant to the issues at trial, as it provides essential context for understanding the participants' actions, motivations, and intent, and its exclusion would unfairly prejudice the Defendants' ability to present a complete defense.

X. THE COURT SHOULD DENY THE GOVERNMENT'S MOTION TO LIMIT THE SCOPE OF CROSS-EXAMINATION TO PRECLUDE IMPROPER QUESTIONING.

Once again, the government prematurely, and baselessly, seeks to hinder the basic defense of this action. In essence, the government is essentially recognizing valid defenses while at the same time asking the Court to preclude those valid defenses before trial. The constitutional right to cross-examine and impeach the credibility of witnesses is fundamental in a criminal trial. It is black letter law that when a government witness in a criminal case is being cross-examined by the defendant, the trial court should allow wide latitude, *United States v. Pedroza*, 750 F.2d 187, 195 (2d Cir. 1984), and the court's discretion "'cannot be expanded to justify a curtailment [of cross-examination that] keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.'" *Id.* at 196 (quoting *Gordon v. United States*, 344 U.S. 414, 423 (1953))[12];

[12] The Supreme Court in *Gordon* stated: "We are well aware of the necessity that appellate courts give the trial judge wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character. *Michelson v. United States*, 335 U.S. 469. But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights and the judgment must be [r]eversed." *Gordon v United States*, 344 US 414, 422-423 (1953).

United States v. Kohan, 806 F.2d 18 (2d Cir. 1986). *See also*, *United States v Motovich*, 2024 US Dist LEXIS 116769, at *32-34 (EDNY July 2, 2024, No. 21-CR-497 (WFK).

The government again puts the cart before the horse and improperly asks the Court to make preclusive determinations as to cross-examination before the start of trial, before the admission of evidence, and before any direct testimony has been elicited. The Court should not engage in that determination at this premature stage. Trial is dynamic, and of course the cross-examination is determined as the case unfolds and evidence and testimony is given. In any event, and critically, the Defendants' constitutional right to cross-examine and impeach the credibility of the witnesses against it is not limited to inquiring only about those acts that the government itself identifies. Nor does the government cite any authority justifying such a broad-sweeping and constitutionally unsound position. Moreover, defense counsel "may explore certain areas of inquiry in a criminal trial without full knowledge of the answer to anticipated questions," although "he must, when confronted with a demand for an offer of proof, provide some good faith basis for questioning that alleges adverse facts." *Kohan*, 806 F.2d at 23 (citation omitted).[13]

It is also well-settled that the trial "court is 'accorded broad discretion in controlling the scope and extent of cross-examination.'" *United States v. Wilkerson*, 361 F.3d 717, 734 (2d Cir.) (quoting *United States v. Fabian*, 312 F.3d 550, 558 (2d Cir. 2002)), cert. denied, 543 U.S. 908, 125 S. Ct. 225, 160 L. Ed. 2d 185 (2004). Although "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness," Fed.

[13] Incidentally, the government requests that the Defendants be precluded from inquiry into prior arrests, including for example, Jane Doe 9's driving without a valid license. Placing aside the arrest(s), the conduct itself, and similar acts, may go to the credibility of a witness. For example, in *Edwards v. City of New York*, No. 08-2199, 2011 U.S. Dist. LEXIS 75300, 2011 WL 2748665, at *4 (E.D.N.Y. July 13, 2011), the Court allowed a defendant to cross-examine the plaintiff regarding the fact that he operated his car sale and repair shop without the requisite permit or license because that fact "goes to the issue of his truthfulness" under Rule 608(b). *See also*, *Jean-Laurent v Hennessy*, 840 F Supp 2d 529, 553 (EDNY 2011)

R. Evid. 611(b), "[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." *Id.* "It is, of course, unrealistic to expect that direct examination and cross-examination will be perfectly congruent . . . The latter need only be reasonably related to the former, and matching the two requires the district court to make a series of judgment calls." *Macaulay v. Anas,* 321 F.3d 45, 53 (1st Cir. 2003).

Furthermore, the government also seeks to preclude defense counsel from using reports which a witness has not adopted or approved as evidence of a witness's prior statement. The defense understands, and will follow, the proper method for impeaching witnesses pursuant to the Federal Rules of Evidence, yet it goes without saying that Defendants certainly reserve all rights to properly cross-examine the government's witnesses in any regard, despite the government's objections to the contrary, and as the evidence and testimony permit. *See*, *e.g.,* Fed. R. Evid. 613.

Additionally, precluding cross-examination on certain topics without a clear and substantial reason can be an abuse of discretion. *United States v. Sampson*, 898 F.3d 287 (2d Cir. 2018). In *Sampson*, the Second Circuit noted that while the trial court has broad discretion, it must not impose unreasonable limits that prevent effective cross-examination. This principle supports the defense's position that any limitations on cross-examination should be carefully considered and justified to ensure a fair trial.

Lastly, although Defendants recognize the limitations of questioning a witness as to statements contained in a third-party document such as an FBI FD-302 Form ("302"), there are certainly proper means to question a witness about their prior statements, and the Defendants should not be precluded from doing so in any way at this premature stage before trial. Defendants may use the 302 material to inform a cross-examination and provide a good faith basis for a line of questioning. For example, hypothetically, if a 302 reflects that a witness said an event happened

in California; and during trial, on direct examination, the witness says that the event happened in New York; and during cross-examination, the following question is asked of the witness: "On October 24, 2024, did you tell Agent Doe that this event happened in California?" That is a proper question. Or "On direct you testified "X". Isn't it true that you previously told FBI agents "Y"?; or "Do you recall being interviewed by the FBI on X date? Didn't you tell the FBI agents "Y"? Those are proper questions, and the Defendants should not be curtailed at this stage from using 302 material in that manner, or other ways that may arise at trial for the Court's consideration at that time.

Furthermore, if a witness' testimony is inconsistent with the contents of a 302, counsel may seek to question the author of that writing. A 302 can also be used to refresh a witness' recollection. Fed. R. Evid. 612. And, counsel may directly impeach a witness with a 302 if the witness has subscribed to or adopted the statements contained in a 302. As such, the government should not be able to deny the Defendants' constitutional right to confront witnesses, and cross-examine them on their inconsistent statements, and as such, a blanket ruling is not appropriate.

XI. THE GOVERNMENT SHOULD FOLLOW THE RULES OF EVIDENCE WHEN AUTHENTICATING DOCUMENTS JUST AS THE DEFENSE WILL BE EXPECTED TO DO.

The government seeks yet another blanket order from this Court allowing it to authenticate materials produced by OneTaste simply because those records were produced pursuant to subpoenas by OneTaste. Since Defendants remain in the dark about what documents the government seeks to introduce and "authenticate," it cannot offer a fulsome response to this argument and reserves its right to object on any basis. Generally speaking, the government must follow the rules of evidence when introducing evidence at trial. The Rules of Evidence do not permit a party to authenticate a document or any other material simply by stating it was produced

pursuant to a subpoena, particularly documents that are not kept in the regular course of business or documents that are not routinely used by a company and do not bear an indicia of authenticity. Moreover, the government has no basis to seek a shortcut for authenticating documents where it has the ability to call witnesses to authenticate any materials it seeks to introduce at trial.

The government points this court to a District Court decision out of Utah in support of its contention that compliance with a subpoena in a criminal case "implicitly avers that the matter produced is the evidence requested." *United States v. King,* 2023 U.S. Dist. LEXIS 15533 (D. Utah Jan. 27, 2023). The government overstates the holding of this random District Court decision out of Utah.

In *King,* the defendant objected to the introduction of Verizon and Kik documents (records kept in the regular course of business) on authenticity grounds because Verizon and Kik had not retained the records in their own computer systems. The District Court overruled the objection, finding that the government had properly authenticated the documents because the documents were produced in response to a subpoena previously issued to Verizon and Kik. The court pointed out that the government also presented *additional* authentication evidence. Verizon's custodian of records testified that the records retained by the government were similar in appearance to records routinely produced by Verizon and that any records provided by the company in response to a subpoena would have reflected accurate records at the time of the production. *Id.* at *5. Moreover, Kik provided subscriber information from its databases which matched information contained on the subpoena response, and the Kik logo was affixed to the documents.

Defendants reserve the right to object to the authenticity of any document the government intends to produce at trial. Moreover, Defendants do not agree that the *any* document can be authenticated simply because it was produced pursuant to a subpoena. In the *King* case, the

documents originated with large telecommunications companies and were prepared in an automated fashion, kept in the normal course of business, and routinely produced. They bore the indicia of authenticity based, in part, on the fact that they looked like other documents those corporations produced in response to subpoenas every day. Whether the *King* court would have reached the same conclusion if a unique document was produced pursuant to a subpoena by one individual with, for example, multiple convictions for computer fraud is an entirely different question. Either way, the government cannot authenticate hundreds of thousands of pages of paper allegedly produced by OneTaste simply by pointing to a subpoena that sought categories of information, particularly where the government knows that OneTaste servers were not secure. The government has admitted in their own motions that they are aware documents from OneTaste servers were stolen by a former employee who hacked into the server long after he was fired. In addition, because of breeches and other good and valid reasons, OneTaste declined to authenticate the produced documents.

The government also conflates the question of authentication with whether materials are admissible under the business records exception to the hearsay rule. Again, Defendants cannot fully respond to the government's motion without the government specifically identifying which documents it intends to produce. Defendants may readily agree that the documents are authentic, but that decision cannot be made in the dark and a preemptive order from this Court declaring that all materials allegedly produced by OneTaste pursuant to subpoena are authentic would be improper.

The government also seeks a blanket order allowing it to introduce "recordings and records downloaded from OneTaste's servers" without identifying what those "recordings and records" are or explaining how those "recordings and records" were downloaded and by whom. Defendants

cannot be expected to litigate this issue without understanding what the evidence is and how it was obtained. Footnote 51 in the government's motion would suggest that it seeks to admit records and recordings that were stolen from OneTaste servers. Audaciously, it also seeks to preclude the defense from even inquiring about how certain documents came into their possession. The Defendants object to all requests for blanket orders from this Court and reserves their right to object to any exhibit or piece of evidence proffered by the government when the government decides to identify that evidence. If a video can be authenticated, the government should authenticate it appropriately and in accordance with the Rules of Evidence – just as the defense will be expected to do.

As to the government's request to introduce business records pursuant to Fed. R. Evid. 902(4), 902(11) and (13), the government does not need advance permission to present evidence in accordance with the rules. Defendants reserve the right to object to the introduction of any record or document on any basis, including authenticity.

XII. DEFENDANTS WILL COMPLY WITH RULE 16(B)(1)(A) WHEN THEY ARE IN A POSITION TO KNOW WHAT DOCUMENTS THEY INTEND TO PRODUCE IN THEIR CASE IN CHIEF WHICH CANNOT OCCUR UNTIL THE GOVERNMENT IDENTIFIES ITS WITNESS STATEMENTS AND THIS COURT ENTERS A RULING ABOUT WHETHER THE GOVERNMENT WILL BE PERMITTED TO TRY ONETASTE FOR UNCHARGED BAD ACTS OR WHETHER IT WILL BE LIMITED TO TRYING THE CASE IT ACTUALLY CHARGED.

The government wants its cake and to eat it too. It continues to keep the Defendants in the dark about: (1) who their witnesses are; (2) whether their witnesses are "intended victims" "unindicted co-conspirators," or something else (3) the substance of their witnesses' testimony; and (4) what documents they intend to produce in support of their sprawling and uncontained case.

Meanwhile, it demands to know what exhibits Defendants intend to offer into evidence to defend their amorphous case.

Defendants do not quarrel with the substance of Rule 16(b), but it is simply impossible to identify exhibits without knowing who the government's witnesses are and without knowing what they will testify to. Equally pertinent, the Defendants should know whether this Court intends to allow the government to turn this case into a circus, putting OneTaste on trial for its beliefs and teachings rather than containing the government to proving the charged offense. As the government argues, a "case-in-chief" is defined as the part of the trial where a party presents evidence to support its "defense," and "Defendant's cross-examination of witnesses, and the evidence introduced during that cross-examination certainly may be used to support her defense. . ." But it should be obvious that Defendants cannot produce exhibits they intend to use during cross-examination with witnesses without knowing who those witnesses are.

The government seeks reciprocal discovery but has adamantly refused to identify witnesses or any evidence *specific* to the charged offense. The government bears the burden of proof and without advance notice of the evidence that the government intends to offer to *prove* its case, Defendants cannot be expected to identify defense exhibits. The government has produced loads of material that originated with OneTaste and likely is already in possession of reciprocal discovery. But if the government seeks specific material that may be used to refute evidence of overt acts in furtherance of a conspiracy to commit forced labor, it is going to have to identify witnesses and their statements and their own supporting documents. Otherwise, the best Defendants can do at the moment is designate all material produced by the government as evidence that may be used in their case in chief.

XIII. NO PLEADINGS SHOULD BE SEALED IN THIS CASE, INCLUDING THE GOVERNMENT'S MOTIONS *IN LIMINE*.

The government continues to abuse sealing provisions, leaving their unsupported, wide-spread allegations of misconduct against Defendants available for the public to read while asking this Court to conceal the identities of Defendants' accusers and their proffered narratives that may or may not support the government's allegations. This one-sided and highly prejudice approach to sealing is not the norm, even in cases that may have sexual overtones. This is not a child pornography case, a child exploitation case, nor is it a sex trafficking case. This Court must put an end to this pattern of litigating in secrecy that flies in the face of important constitutional principles.

Contrary to the government's assumption, there is no presumption in favor of sealing and the government has failed to make the necessary showing to overcome the strong presumption in favor of disclosure. As addressed in Defendants' response to Argument I, criminal trials are public trials. The public has a qualified "constitutional right of access to criminal trials." *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.,* 457 U.S. 596, 603 (1982). *See also, United States v. Pugh,* 2016 U.S. Dist. LEXIS 194544, *4 (E.D.N.Y. 2016). As the United States Supreme Court has stated repeatedly, public trials reflect the tradition of our system of criminal justice that a trial is a "public event" and that "[what] transpires in the court room is public property." *Craig v. Harney,* 331 U.S. 367, 372 (1947). This tradition exists because of our deeply rooted belief that secret judicial proceedings "would be a menace to liberty." *Gannett Co. v. DePasqulale,* 443 U.S. 368, 412 (1979).

It is well-settled that public access plays a positive role in the functioning of criminal proceedings. *Hartford Courant Co., LLC v. Carroll,* 986 F. 3d 211, 221 (2d Cir. 2021). Publicity serves to advance several purposes of the trial and the judicial process. *Richmond Newspapers,*

Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J. concurring). Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence. *Id. See also, Estes v. Texas,* 381 U.S. 532, 538-39 (1962). For a civilization founded upon principles of ordered liberty to survive, there must be a system of justice that *demonstrates* the fairness of the law to our citizens. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. at 594. (emphasis added) One major function of the trial, hedged with procedural protections and conduct with conspicuous respect for the rule of law, is to make that demonstration. *Id.* at 595.

> Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. *Id.*

When deciding issues of sealing, this Court must start with these fundamental principles rooted in the First and Sixth Amendments. As the United States Supreme Court has repeatedly acknowledged, secrecy in proceedings undermines faith in our judicial process. In these modern times, trust in our justice system has been seriously compromised, making transparency critical to rebuilding confidence in our citizenry that our system of justice is fair, and that the government is not afforded special treatment.

Of course, the presumption of access is not absolute, but it places a heavy burden on those who seek to limit public access. *Pugh,* 2016 U.S. Dist. LEXIS 194544, *4. "Where, [a party] attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest and is narrowly tailored to serve that interest." *Id.* "Documents may be sealed if specific, on the record findings are

made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch v. Pyramid Co. of Onondaga,* 435 F. 3d 110, 120 (2d Cir. 2006). A party seeking to seal documents must explain why doing so is necessary, cite relevant authority, and must provide proposed redactions. "In considering whether sealing is appropriate, an important consideration is, of course, whether the information sought to be kept confidential is already public." *United v. Avenatti,* 2020 WL 70952, *6 (S.D.N.Y. 2020).

The government's motion *in limine* does not contain sensitive information. It does not even identify any witness by name. These are not cooperating witnesses who fear for their lives and no potential witness has identified any specific conduct by the Defendants that shows a need for secrecy. As best as undersigned counsel can tell, the government's witnesses (whoever they are) simply do not like the public nature of these proceedings. Instead of attempting to placate their witnesses, the Prosecution Team should explain to them why criminal proceedings are public and why the government may not trample the Defendants' constitutional rights simply because certain witnesses do not want their names publicized. This Court should not sanction a presumption in favor of sealing.

CONCLUSION

For the foregoing reasons, the governments motions *in limine* must be denied. Defendants reserve their right to renew their objections to any of the government’s motions where Defendants do not know who the government’s witnesses are and have no idea what their testimony will be. Defendants have been asked to litigate motions *in limine* about evidence that is still unknown to them. The devil is always in the detail, and Defendants will renew their objections as information is disclosed that puts the foregoing issues into better focus.

Respectfully Submitted,

/s/JENNIFER BONJEAN

BONJEAN LAW GROUP
303 Van Brunt Street, 1st Fl.
Brooklyn, New York 11231
718-875-1850
Jennifer@bonjeanlaw.com

Attorney for Defendant Daedone

/s/ IMRAN H. ANSARI

AIDALA, BERTUNA & KAMINS, PC
546 Fifth Avenue, 6th Floor
New York, New York 10036
212-486-0011
iansari@aidalalaw.com