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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. LEV ASLAN DERMEN, a/k/a Levon Termendzhyan, Defendant.	Case No. 2:18-CR-365-JNP-BCW GOVERNMENT'S RESPONSE TO DEFENDANT DERMEN'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR MISTRIAL (ECF 915) District Judge Jill N. Parrish Magistrate Judge Brooke C. Wells

Now comes the United States of America, by and through its undersigned counsel, and respectfully responds to Defendant Dermen's Supplemental Brief in Support of Motion for Mistrial, ECF 915. There is no evidence in the record to support the Defendant's conclusory allegation that the coronavirus in any way affected the jury's verdict of guilty in this case. The verdict reached by the jury after two days of deliberations was supported by the overwhelming and unrebutted evidence of guilt presented during this trial, including the testimony of five co-

conspirators and the presentation of more than 300 government exhibits. The Defendant's motion has no basis in fact or law and should be denied.

I. Factual Background

The jury in this matter returned its verdict after a seven-week trial, consisting of 17 days of trial testimony and evidence, after deliberating for roughly eight hours on Thursday, March 12 and Monday, March 16. During the course of this trial, the jury did not hesitate to communicate with the Court and the jury coordinator about their questions, comments, and concerns–including regarding health issues. Notably, on Thursday, March 12, the jury informed the Court that it would deliberate until 4:00 PM and resume deliberations at 9:00 AM on Monday, March 16, after a three-day weekend. Clearly, the members of the jury did not feel rushed to arrive at a verdict when they made this decision. They could have deliberated longer on Thursday, March 12; they could have deliberated on Friday, March 13 or even on Saturday, March 14. They elected not to. Upon returning on Monday, March 16, the members of the jury deliberated for an additional four-and-a-half hours and returned a verdict around 1:30 PM, after having lunch. Accordingly, the Court has every indication that this jury was *not* in any way rushed in its deliberations or verdict. Stated differently, it is not just that the record is devoid of any evidence to support the defense's claim that the jury was rushed but rather that all the evidence the Court does have before it indicates that this jury's verdict was the result of careful deliberations, on the jurors' own timetable, based on the overwhelming evidence of guilt.

Further, the Court's decision to allow the jury to continue deliberating was consistent with all relevant guidance based on the status of the COVID-19 pandemic *in the State of Utah*. In particular, at the time the jury returned its verdict, the United States District Court for the District of Utah had neither canceled nor continued *any* hearings based on the risk of COVID-19. As of

today, eight days after the jury returned its verdict, the Court is operating under General Order 20-009, which continues any trials scheduled in the future, but which explicitly states "[c]riminal jury trials already underway are not affected by this Order." *See* District of Utah General Order 20-009; Section III(A) *infra.* Stated differently, while the Defendant submits he is entitled to a mistrial in light of COVID-19, this Court's General Order, based on the particular facts and circumstances in the State of Utah, says otherwise.

II. Defendant's Citations Do Not Support a Mistrial in this Case

The Defendant cites only to a series of newspaper articles relating to various trial continuances or mistrials across the country. These cases are factually inapposite and are not controlling, here, where the District Court for the District of Utah was continuing to conduct criminal and civil proceedings when the jury returned its verdict.

Defendant first cites to The Day, a newspaper covering New London, Connecticut. *See* Karen Florin, Triple murder trial delayed, civil case a mistrial due to coronavirus threat, THE DAY (March 12, 2020), available at https://www.theday.com/policefirecourts/20200312/triple-murder-trialdelayed-civil-case-mistrial-due-to-coronavirus-threat. That article indicates that jury selection for a pending murder trial, scheduled to begin April 20, was delayed, and that a civil trial was declared a mistrial after one of the attorneys divulged she had a fever. *Id.*

Defendant next cites to the Bellingham Herald, a newspaper covering Whatcom County, Washington. *See* Denver Pratt, Jury trials suspended in Whatcom County courts due to coronavirus outbreak, THE BELLINGHAM HERALD (March 13, 2020), available at https://www.bellinghamherald.com/news/local/article241113626.html. Given that the original spread of this virus was focused in Washington State, it should come as no surprise that various

counties in Washington States were some of the first to suspend jury trials as a preventative measure.

Defendant next cites to the Niagara Gazette, a newspaper in Niagara Falls, New York. *See* Rick Pfeiffer, Belstadt attorneys: Virus too disruptive for trial to proceed, NIAGARA GAZETTE (March 17, 2020), available at https://www.niagara-gazette.com/covid-19/belstadt-attorneys-virus-toodisruptive-for-trial-to-proceed/article_4e7fb726-681e-11ea-aa81-cbc428635c8c.html. There, the trial judge granted a motion for mistrial on Monday, March 16, 2020, three days into what would have been a six-week murder trial, which would have lasted into late April or early May. There, again, it is no surprise given the possible future spread of the virus that the trial judge ordered a mistrial only three days into the expected six-week trial.

Defendant next cites to Law360, an online publication. *See* Jack Queen, Coronavirus Forces Mistrial In Finjan Patent Case, LAW 360 (March 16, 2020), available at http://law360.com/articles/1253867/coronavirus-forces-mistrial-in-finjan-patentcase. There, a California District Court declared a mistrial on March 16, 2020, three days into what was expected to be a 2½ week civil patent infringement trial. The docket indicates that all counsel agreed to the mistrial. *See Finjan, Inc. v. ESET, LLC et al.*, 3:17-cv-00183, ECF 783 9 ("With the agreement of counsel, the Court deems a Mistrial based upon the current state of extraordinary circumstances due to the Coronavirus/COVID-19 Pandemic").

Defendant next cites to www.YourErie.com, a news website for Erie, Pennsylvania. *See* Samiar Nefzi, Trucilla suspends this week's trial term due to COVID-19 prevention, YOUR ERIE (March 16, 2020), available at https://www.yourerie.com/news/localnews/trucilla-suspends-this-weeks-trial-term-due-to-covid-19-prevention/ (suspending about ten cases, with the president judge noting that "he will more than likely issue an administrative order calling for

a 'mistrial without prejudice'"). According to this article, the jury trial term was suspended in Erie, Pennsylvania. The article makes no mention of provisions for ongoing criminal trials.

The Defendant also cites to an article from the Fresno Bee, a newspaper for the San Joaquin Valley of California, as support for his argument that courts have recognized the jurors will be pre-occupied and fearful regarding COVID-19. *See* Robert Rodriguez, Fresno Judge Declares Mistrial in Double Homicide Case, Amid Coronavirus Concerns, THE FRESNO BEE (March 18, 2020), available at https://www.fresnobee.com/news/local/article241305911.html ("The District Attorney's Office was worried jurors would be reluctant to come to court — or would be preoccupied about catching COVID-19, a highly contagious disease that has spread worldwide."). There, the District Attorney initially moved for a mistrial based on COVID-19, which the judge denied. The judge reconsidered his ruling after the defense attorney explained that due to his age – 70 – and health – suffering from a permanent lung condition and a survivor of a seven-way heart bypass procedure – he was part of a high-risk group that should take extra precautions. The defense attorney was urged to stay out of the courthouse by two of his doctors and appeared in court in a surgical mask and gloves. When the motion was finally granted, only jury selection was underway and the presentation of evidence had not yet begun in what was expected to be a lengthy trial, and both parties had sought a mistrial. Only then, after denying the prosecutor's motion for a mistrial, did the Court grant a mistrial on Tuesday, March 17th—after the jury in the present matter returned its verdict. Those facts are a far cry from the present matter.

The Defendant argues that for the safety of the jurors and to safeguard a criminal defendant's constitutional rights, the Courts have "acted responsibly in granting mistrials during this unprecedented time in history" and cites to the example of a mistrial *in Australia* in support

of this position. *See* Darren Cartwright, BRISBANE TIMES (March 16, 2020), available at https://www.brisbanetimes.com.au/national/queensland/coronavirus-leads-to-judge-only-manslaughter-trial-in-brisbane-20200316-p54ami.html. ("Requiring 14 people deliberate in a small room, a relatively small room, may not be the best conditions to secure a just outcome," after health officials describe "social distancing as good practice."). Not only is it unclear what probative value the actions of an Australian court might have in considering a jury trial in Utah, the Australian trial court did not in fact order a mistrial, but instead granted the Defendant's application for a bench trial rather than a jury trial. That same Australian judge acknowledged – on Monday, March 16, 2020, the day the jury in the present matter returned its verdict – that other Australian courts had empaneled juries *on the same day*.

In support of his request for a mistrial, the Defendant relies on a smattering of news stories regarding jury trials in other states and other countries. These news stories have little to no probative value. Each court must respond to the status of the COVID-19 pandemic in its own jurisdiction rather than based on the decisions of judges halfway around the globe. Further, in each of the cases cited by the defense, at issue were lengthy trials that had barely started, if at all. A decision to declare a mistrial or continue a jury trial in that situation makes sense given the uncertainty in how the COVID-19 pandemic will evolve. Further, many of the examples cited involved situations where specific participants in the trial articulated health concerns based on their at-risk status – such as a 70-year old defense attorney suffering from a lung condition who was ordered by two doctors to stay out of the courtroom. Here, this Utah jury deliberated for two days in a case with overwhelming evidence during a time where the District Court was operating as usual but for restrictions on entry for those showing symptoms of COVID-19 or who had

traveled to or been in contact with persons who had traveled to specific foreign countries, based on the situation of the pandemic in Utah.

III. District Courts in the Tenth Circuit did not Halt Ongoing Criminal Trials

The Court's decision not to interrupt the jury's normal course of deliberation, resulting in the jury returning its verdict around 1:30 PM on Monday, March 16, 2020, with no interference by the Court or parties, was consistent with the policies and practices of the United States District Court for the District of Utah, as well as each of the courts of the Tenth Circuit at that time. The government has reviewed the general orders issued by each of the courts of the Tenth Circuit in light of the Coronavirus/COVID-19 pandemic. As of the time the jury returned its verdict, none of these orders provided for the suspension of on-going criminal jury trials or the closure of courthouses.

A. United States District Court for the District of Utah

On March 16, 2020, the day the jury in the case at bar returned its verdict, Chief Judge Shelby issued General Order 20-009. *In the Matter of Court Proceedings and Court Operations during the Coronavirus (COVID-19) Pandemic*, General Order 20-009 (D. Ut. March 16, 2020), available at https://www.utd.uscourts.gov/sites/utd/files/General%20Order%2020-009%20Court%20Proceedings%20and%20Court%20Operations.pdf. The order continued all civil and criminal jury trials scheduled to begin between March 16 and May, 1, 2020. However the order explicitly provided that "[c]riminal jury trials already underway are not affected by this Order" and noted that "[t]he courthouse shall remain open from mission-critical functions of the judiciary . . . ." *Id.* at ¶¶ 1, 17. General Order 20-009, which remains in effect, was implemented by Chief Judge Shelby after taking into careful consideration the "unprecedented severity of the

risks presented by this national and local emergency to the public, litigants, counsel, court staff, and other agencies." *Id.* at 1.

B. United States District Court for the District of Colorado

On March 13, 2020, Chief Judge Brimmer of the United States District Court for the District of Colorado issued District Court General Order 2020-2. *Court Operations under the Exigent Circumstances Created by COVID-19*, Dist. Ct. General Order 2020-2 (D. Colo. March 13, 2020), available at http://www.cod.uscourts.gov/Portals/0/Documents/Orders/GO_2020-2_Court_Operations.pdf. Chief Judge Brimmer, similar to Chief Judge Shelby, continued "all civil, criminal petit, and grand jury selections and jury trials scheduled to commence [March 13] through April 3, 2020 before any district or magistrate judge in any courthouse in the District of Colorado." *Id.* As in the District of Utah, the order does *not* provide for the closure of courthouses nor does it apply to ongoing jury trials. District Court General Order 2020-2, which remains in effect, was implemented in light of guidance from "the Centers for Disease Control and Prevention ["CDC"], the Colorado Department of Public Health and Environment, and the Denver Department of Public Health and Environment." *Id.*

C. United States District Court for the District of New Mexico

On March 13, 2020, Chief Judge Johnson of the United States District Court for the District of New Mexico issued Administrative Order 20-MC-4-9. *In re: Court Operations in Light of the Coronavirus Outbreak*, Administrative Order 20-MC-2-9 (D. NM. March 13, 2020), available at https://www.nmd.uscourts.gov/content/matter-court-operations-light-coronavirus-outbreak-20-mc-04-9. Chief Judge Johnson, similar to Chief Judge Shelby, continued all future "civil and criminal jury trials scheduled to commence on or before April 10, 2020 in the District of New Mexico." *Id.* at ¶ 1. As in the District of Utah, the order does *not* apply to ongoing jury

trials. Further, the Order explicitly provides that "[t]he Clerk's Office, United States Probation, United States Pretrial Services, and all other Court services shall remain open pending further order of the Court." *Id.* at ¶ 7. Administrative Order 20-MC-4-9, which remains in effect, was implemented after careful consideration of reports from the CDC, national emergency declarations by the President of the United States and various state governors, cancellations and closures by various professional and collegiate sporting leagues and entertainment venues, and measures taken by courts across the country, including the United States Supreme Court. *Id.* at 1.

D. United States District Court for the District of Kansas

On March 16, 2020, the day the jury in the case at bar returned its verdict, Chief Judge Robinson of the United States District Court for the District of Kansas issued Administrative Order 2020-3. *In re: Criminal Hearings and Trials under the Exigent Circumstances Created by COVID-19 and Related Coronavirus Health Conditions*, Administrative Order 2020-3 (D. Kan. March 13, 2020), available at http://www.ksd.uscourts.gov/wp-content/uploads/2020/03/Administrative-Order-2020-3.pdf. Chief Judge Robinson, similar to Chief Judge Shelby, continued all future "criminal cases and matters scheduled for nonemergency hearings or trial before any district or magistrate judge in the District of Kansas . . ."[1] *Id.* at ¶ 1. As in the District of Utah, the order does *not* provide for the closure of courthouses. Administrative Order 2020-3, which remains in effect, was implemented after careful consideration of the national emergency declarations by the President of the United

[1] The government notes that there were no ongoing jury trials in the District of Kansas as of March 13, 2020, according to the Court's online schedule. Available at https://ecf.ksd.uscourts.gov/cgi-bin/CourtSched.pl. According to the schedule, the most recent jury trial scheduled in the District of Kansas was one scheduled to commence on January 7, 2019.

States, the declaration of COVID-19 as a pandemic by the World Health Organization, and recommendations from the CDC. *Id.* at 1.

E. United States District Court for the Eastern District of Oklahoma

On March 13, 2020, Chief Judge White of the United States District Court for the Eastern District of Oklahoma issued General Order 20-6. *Court Operations under the Exigent Circumstances Created by COVID-19*, General Order 20-6 (E.D. Okla. March 16, 2020), available at https://www.oked.uscourts.gov/sites/oked/files/general-ordes/GO_20-6.pdf. Chief Judge White, similar to Chief Judge Shelby, continued "all jury trials, grand jury sessions, and naturalizations scheduled to commence [March 16] through April 17, 2020, in the Ed Edmondson Federal Courthouse . . . ." *Id*. As in the District of Utah, the order does *not* provide for the closure of courthouse nor does it apply to ongoing jury trials. General Order 20-6, which remains in effect, was implemented after careful consideration of the national emergency declarations by the President of the United States and the Governor of Kansas, the declaration of COVID-19 as a pandemic by the World Health Organization, and recommendations from the CDC. *Id.*

F. United States District Court for the Northern District of Oklahoma

On March 17, 2020, the day *after* the jury in the case at bar returned its verdict, the District Judges of the United States District Court for the Northern District of Oklahoma issued General Order 20-6. *Court Operations under the Exigent Circumstances Created by the Novel Coronavirus and Associated Disease (COVID-19)*, General Order 20-6 (E.D. Okla. March 16, 2020), available at https://www.oknd.uscourts.gov/docs/3859e437-951f-4322-8d2a-b1f0ae250e5d/20go05.pdf. The Northern District of Oklahoma continued "[a]ll civil and criminal matters scheduled for an in-Court appearance before any district or magistrate

judge . . . ." *Id.* at ¶ 1. The government notes that based on a review of the Court's CM/ECF system, there was no ongoing trial in the Northern District of Oklahoma as of March 17, 2020. The most recent trial in the Northern District of Oklahoma, a criminal bench trial in the matter of *United States v. Burtrum*, No. 4:19-cr-247-GKF, concluded the previous day, on March 16, 2020.

G. United States District Court for the Western District of Oklahoma

On March 13, 2020, Chief Judge DeGiusti of the United States District Court for the Western District of Oklahoma issued General Order 20-6. *In re Effect of Coronavirus Disease on Court Operations*, G.O. 20-6 (W.D. Okla. March 13, 2020), available at http://www.okwd.uscourts.gov/wp-content/uploads/court_operations_general_order.pdf. At that time, Chief Judge DeGiusti, in light of "careful[] monitoring [of] the evolving circumstances presented by the outbreak of Coronavirus Disease 2019 (COVID-19)[,]" determined that "[c]onditions in the Western District of Oklahoma do not at this time warrant curtailing Court operations." *Id*. On March 17, 2020, the day *after* the jury in the case at bar returned its verdict, Chief Judge DeGiusti issued a new General Order providing that, "[i]n light of current efforts to slow transmission of the coronavirus . . . [c]ivil and criminal jury trials on the April 2020 docket are continued." *In re Service of Process by the United States Marshals Service and Suspension of Grand Jury Sessions and Jury Trials*, G.O. 20-8 (W.D. Okla. March 17, 2020), available at http://www.okwd.uscourts.gov/wp-content/uploads/General_Order_20-8.pdf.

H. United States District Court for the District of Wyoming

On March 20, 2020, four days *after* the jury in the case at bar returned its verdict, Chief Judge Skavdahl of the United States District Court for the District of Wyoming issued General Order 20-2. *In re Vacating of Civil Trials Prior to June 1, 2020 Due to Public Safety Concerns*

Caused by the Coronavirus (COVID-19), General Order No. 20-02 (D. Wy. March 20, 2020), available at https://www.wyd.uscourts.gov/sites/wyd/files/general-ordes/General%20Order%2020-02.pdf. In the order, Chief Judge Skavdahl found that "[a]fter carefully considering . . . the potential impact and risks created by the COVID-19 virus to the health and safety of the public, litigants, jurors and courthouse personnel, the Court finds that all ***civil*** trials scheduled prior to June 1, 2020 must be vacated . . . ." *Id.* at 1 (emphasis added). To this date, the District of Wyoming has not issued any orders continuing any criminal matters nor has it closed courthouses.

I. United States Court of Appeals for the Tenth Circuit

On March 16, 2020, at 9:56 PM, approximately eight-and-a-half hours *after* the jury in the case at bar returned its verdict, Chief Judge Tymkovich of the United States Court of Appeals for the Tenth Circuit issued General Order 95-1. *In re Restrictions on Public Access to the Byron White United States Courthouse and Temporary Suspension of Paper Copy Requirements*, No. 95-1 (10th Cir. March 16, 2020), available at https://www.ca10.uscourts.gov/sites/default/files/clerk/RestrictionsOnPublicAccess_March162020%20%28002%29.pdf. In the order, Chief Judge Tymkovich ordered that "[d]ue to the Coronavirus/COVID-19 pandemic, the Byron White United States Courthouse is closed to the public effective March 17, 2020." *Id.* at 1.

IV. There is no Evidence that this Jury was Pressured or Otherwise Unconstitutionally Influenced by COVID-19

The Defendant has not identified a single fact to support his assertion that this jury was experiencing the kind of undue pressure that would deprive the Defendant of a fair and impartial jury. This jury repeatedly demonstrated that it knew how to communicate – a juror had previously sent a note, multiple members of the jury have communicated to court staff about a

number of matters including health concerns, family commitments, and personal knowledge of companies discussed in the courtroom, and the jury routinely told the court throughout the course of the trial when the courtroom technology was malfunctioning. There is every reason to believe that had COVID-19 or the facilities provided for deliberations posed a concern to the jury, this jury would have notified the court, the court staff, or the jury coordinator. Indeed, as the government wrote in its original response, ECF 902, the jury voluntarily elected to adjourn deliberations on Thursday at 4:00 PM and resume on Monday at 9:00 AM. Each of the 12 jurors arrived timely on Monday, March 16 at 9:00 AM, in apparently good health, and ready to continue deliberations in this matter. These are not the actions of a jury so pressured by the COVID-19 pandemic that they are unable to fairly and impartially deliberate. The jury's return of a unanimous verdict after eight hours of deliberation, over two days, is not proof of a "rushed" or "panicked" jury, but is a result of the overwhelming and largely unrebutted evidence of guilt in this case. It is well established that "[a]bsent evidence to the contrary, we presume that jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court." *United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992).

The Defendant next argues that the possible impact of COVID-19 on the jury's deliberations should have been addressed through jury *voir dire*. Notably, not only did the Defendant fail to request that the Court *voir dire* the jury regarding any impact of the COVID-19 pandemic on their deliberations, the Defendant affirmatively stated that "[a] third individual voir dire of the jurors also will not suffice. . . . this Court cannot effectively individually voir dire each juror about the rapidly deteriorating events that have transpired concerning COVID-19, and [if] it has affected his or her ability to deliberate fully and carefully [and to] consider the evidence free of the concerns for their own health and safety or of their families." *See* ECF 899

at 3 (Defendant's Motion for Mistrial). At the return of the verdict, the jury was polled as to the guilty verdict, and the Defendant made no request for the Court to *voir dire* the jury regarding COVID-19. Now, having affirmatively stated in his first motion that a *voir dire* would not be appropriate, and having failed to move for a *voir dire* of the jury at the return of the verdict, the Defendant complains that the Court did not engage in a *voir dire* and instead addressed the impact of COVID-19 on the Defendant's demand for a jury forfeiture trial.

However, even if the Defendant had requested that the Court *voir dire* the jury, under Supreme Court and Tenth Circuit case law, such a *voir dire* would have been entirely inappropriate in light of the complete lack of evidence that COVID-19 was impacting the deliberations of the jury and pursuant to Rule 606(b) and the case law interpreting that rule.

The Defendant cites no case law or statute to support his motion, and the Tenth Circuit case law does not support any inquiry into the jury's verdict based on the facts in the record. The Tenth Circuit has explained that "[a]lthough the ordinary course is to require a hearing or inquiry into nonfrivolous allegations of juror misconduct, *such an inquiry is not warranted when only 'thin allegations of jury misconduct' are present*." *Easter*, 981 F.2d at 1553 (citing *United States v. Ramsey*, 726 F.2d 601, 604 (10th Cir.1984) (emphasis added); citing and quoting *United States v. Cattle King Packing Co*., 793 F.2d 232, 243 (10th Cir.), cert. denied, 479 U.S. 985, 107 S.Ct. 573, 93 L.Ed.2d 577 (1986)). Here, the Defendant's allegations that the jury could not fairly and impartially deliberate is not only sheer speculation but is affirmatively contrary to the evidence before the Court about this jury and its deliberations–despite the many inquiries by the jury to the Court and jury coordinator on other matters, no juror raised any issue regarding COVID-19, and further, the jury opted to voluntarily end deliberations on Thursday, March 12 around 4:00 PM before resuming around 9:00 AM on Monday, March 16 and rendered a verdict

after lunch that day. In light of this, any inquiry into whether or not COVID-19 impacted the jury's deliberations would not have been warranted under the facts of the case or the governing law.

Further, Rule 606(b)(1) directly prohibits testimony from a juror relating to a juror's mental processes:

(b) During an Inquiry into the Validity of a Verdict or Indictment.

> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Fed. R. Evid. 606(b)(1). After return of a verdict, Rule 606(b)(2) directs that a juror may only testify about (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form. Therefore, any *voir dire* into the impact of COVID-19 on the deliberations of the jury in this case would be permissible only if COVID-19 was considered "extraneous prejudicial information" or "an outside influence." Extraneous prejudicial information relates to the subject matter of the case or communications about the case and so that exception is inapplicable. *See United States v. Cornelius*, 696 F.3d 1307, 1325-1326 (10th Cir. 2012) ("The general rule, then, is that courts may properly inquire only into external influences on the jury, such as if a juror improperly read a newspaper in the jury room or was involved in bribery. In contrast, a hearing is inappropriate when the alleged influence has to do with a juror's internal state of mind[,]" holding it would be inappropriate to hold a hearing after juror sent letter to prosecutors offering to sit down to discuss "rid[ding] this cancer in our society"

because it was within the realm of a juror's mental processes" and it "is something internal into which the court may not inquire") (citations omitted).

Thus, such an inquiry could only be possibly permissible via Rule 606(b)(2)(B), which allows inquiry into whether any "outside influence was improperly brought to bear on any juror[.]" This argument, however, is directly foreclosed by Supreme Court precedent. In *Tanner v. United States*, the Supreme Court addressed whether juror intoxication qualified as an "outside influence" for purposes of Rule 606(b). The Court found that it did not, and in so doing, offered that obviously a *virus* also would not constitute an outside influence:

> [P]etitioners argue that substance abuse constitutes an improper "outside influence" about which jurors may testify under Rule 606(b). In our view the language of the Rule cannot easily be stretched to cover this circumstance. However severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror *seems no more an "outside influence" than a virus*, poorly prepared food, or a lack of sleep.

Tanner v. United States, 483 U.S. 107, 122 (1987) (emphasis added). While the Supreme Court was likely not contemplating the effect of a spreading pandemic when it issued *Tanner* in 1987, it nonetheless clearly articulated that the effect of health on a jury does not constitute an "outside influence" pursuant to Rule 606(b). The *Tanner* Court also rejected Petitioner's Sixth Amendment challenge, holding that "Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during voir dire. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel." *Tanner v. United States*, 483 U.S. 107, 127 (1987).

The Tenth Circuit has clearly directed that district courts should approach such an inquiry with grave reluctance:

> Generally speaking, "district courts should be reluctant 'to haul jurors in after

> they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.' " *United States v. Vitale*, 459 F.3d 190, 197 (2d Cir. 2006) (citation omitted); *see also Easter*, 981 F.2d at 1552 (holding that evidentiary hearings are not warranted "when only 'thin allegations of jury misconduct' are present" (citation omitted)). An evidentiary hearing "is not mandated every time there is an allegation of jury misconduct or bias. Rather, in determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *United States v. Smith*, 424 F.3d 992, 1012 (9th Cir. 2005) (quotation marks, citation omitted). For instance, a hearing is not necessary "where the court knows the exact scope and nature of the bias allegation." *Id.* (internal quotation marks, citation omitted). Among other things, the district court should consider what information it might gain from an evidentiary hearing in light of Fed. R. of Evid. 606(b). *See Tanner v. United States*, 483 U.S. 107, 127–28, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (holding that refusal to hold an evidentiary hearing, given the restrictions of Rule 606(b), does not violate a defendant's Sixth Amendment right to trial by an impartial jury).

United States v. Cornelius, 696 F.3d 1307, 1324–25 (10th Cir. 2012). Accordingly, there is no basis under the facts or the law to inquire into whether the COVID-19 pandemic impacted the jury's verdict.

The Defendant also argues that the dismissal of two jurors for flu-like symptoms should have resulted in a mistrial. There is no basis in the facts or the law for such a position. Indeed, trial courts routinely empanel alternates in trials of any length, precisely so that jurors may be excused if they experience a medical and family emergency, and the trial can proceed with an alternate without declaring a mistrial. Such a process is necessary for the orderly and efficient administration of justice and is why alternate jurors are seated in nearly every trial. Further, while the defense may try to link these two dismissals to the COVID-19 pandemic, such a conclusion is again contrary to the evidence. The information provided to the parties was that one of the jurors had pneumonia while the other had the flu. There was no report whatsoever that either juror was sick with COVID-19.

Finally, while the Defendant has complained that the jury did not send any notes during deliberations, there is no basis in the case law or facts to find that failure to submit a jury note evidences a rushed jury that wasn't fairly deliberating. There is simply no such thing as a due process right to a jury note. It is significantly more likely that the lack of a jury note was due not to rushed or panic-stricken deliberations but to the overwhelming evidence in this case. At this trial, not one, not two, but *four* convicted co-conspirators – Jacob Kingston, Isaiah Kingston, Joshua Wallace, and Katirina Pattison – testified to conspiring directly with the Defendant to fraudulently claim biofuel tax credits and launder the proceeds. Another convicted co-conspirator, Deryl Leon, testified that not once but twice the Defendant confronted him about how someone was talking to the authorities and then, after Mr. Leon satisfied the Defendant that neither he nor his wife were talking to the authorities, the Defendant had his son provide Mr. Leon with a burner phone so that he could communicate more freely with the Defendant and Jacob Kingston.

The government presented entirely unrebutted evidence that at least $72 million of fraudulent proceeds was traced to domestic accounts held for the benefit of the Defendant or to a Turkish bank account in the Defendant's own name. *See* Ex. 2-1. The Defendant failed to rebut this evidence in any way and advanced no explanation through cross-examination, the defense case-in-chief, or closing argument as to why the Defendant received $72 million of fraud proceeds. In addition to the compelling financial tracing and the testimony of co-conspirators, the government presented extensive text message evidence between the Defendant and Jacob Kingston with clear references to "the boys" (Ex. 6-62.18), coded references to the false tax claims ("We are the best" Ex. 6-62.18 p. 6), and routine exchanges of burner phone numbers (e.g. Ex. 6-62.17). The government presented compelling evidence that Jacob Kingston was

unable to access the fraudulent proceeds in Turkey (Ex 6-47.1 (email from Umut Uygun stating "he created a fund with his, yours and Levon's money"))), while the Defendant received, in U.S. bank accounts he controlled, approximately $33 million of the funds transferred by Washakie to Turkey and Luxembourg (Ex. 2-3). The government also introduced contemporaneous, seized text messages showing Jacob Kingston and Isaiah Kingston discussing the Defendant's role regarding the two $82 million checks ("I talked to Levon. I am going down tomorrow to discuss plan." Ex. 7-1 at p. 23). These were corroborated by hundreds of pages of travel records which substantiated Jacob Kingston's testimony regarding his frequent international travel with the Defendant and his almost 80 trips to Los Angeles to meet with his co-conspirator, the Defendant. This is but a small selection of the overwhelming evidence of guilt presented through the testimony and over 306 government exhibits introduced during the trial.

Accordingly, the jury's return of a unanimous verdict after eight hours of deliberation, over two days, is not proof of a "rushed" or "panicked" jury, but is a result of the overwhelming and largely unrebutted evidence of guilt in this case.

V. Conclusion

For the foregoing reasons, the United States respectfully submits this Courts should deny the Defendant's Motion for Mistrial, because it has no basis in fact or law. *See* ECF 899 (Defendant's Motion for Mistrial); ECF 915 (Defendant's Supplemental Brief).

Respectfully submitted this 24th of March 2020.

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Certificate of Service

I certify that on the 24th of March 2020, I caused a copy of the foregoing to be filed through the CM/ECF electronic filing system, thereby providing notice to all parties of record in this case.

/s/ Leslie A. Goemaat
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