INTRODUCTION

Defendant CLIENTNAME moves in limine under Federal Rules of Evidence 404(b) and 403, as well as Federal Rule of Criminal Procedure 16 and Local Rule 16-1, to exclude all "others acts" evidence from trial. The Ninth Circuit has made clear that such evidence is generally disfavored, especially in criminal cases. Moreover, the government here has not adequately provided the requisite procedural notice of intent to offer such evidence. Nor has the government has met its substantive burden of demonstrating the admissibility of such evidence under the criteria of Rules 404(b) and 403. Accordingly, Mr. CLIENTNAME respectfully submits that the Court should exclude any and all "other acts" evidence from trial.

ARGUMENT

I. EVIDENCE OF PRIOR BAD ACTS IS DISFAVORED UNDER RULE 404(B)

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). The rule goes on to state that such evidence:

> may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, *provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial,* or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id. (emphasis added). The Ninth Circuit has repeatedly explained that the limitations in Rule 404(b) are "designed to avoid a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of punishment." *United States v. Hill*, 953 F.2d 452, 457 (9th Cir. 1991) (citations and internal quotation marks omitted); *see also United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) (noting that the reluctance to sanction the use of other acts evidence "stems from the underlying premise of our criminal system, that the defendant must be tried for what he did, not for who he is"). Moreover, even if admissible under

Rule 404(b), such evidence still may be excluded as unfairly prejudicial, confusing, misleading, cumulative, delaying or a waste of time under Rule 403. *See* Fed. R. Evid. 403.

II. OTHER ACT EVIDENCE INADEQUATELY NOTICED BY GOVERNMENT

Under the terms of Rule 404(b), the government must affirmatively and specifically provide reasonable notice in advance of trial its intention to introduce any particular evidence of "other crime, wrongs, or acts." *See* Fed. R. Crim. P. 404(b)(2); *see also, e.g., United States v. Vega*, 188 F.3d 1150, 1152-53 (9th Cir. 1999) (quoting Rule 404(b)(2)). Similarly, Northern District Criminal Local Rule 16-1(c)(3) requires the government to disclose "a summary of any evidence of other crimes, wrongs or acts which the government intends to offer under Fed. R. Evid. 404(b), and which is supported by documentary evidence or witness statements in sufficient detail that the Court may rule on the admissibility of the proffered evidence." Crim. L.R. 16-1(c)(3); *see also Mayans*, 17 F.3d at 1183 (explaining that, without pretrial notice, the trial court cannot "make the focused determination of relevance mandated" by Rule 404(b)).

Failure to provide adequate notice, or obtain an excuse from the district court, categorically "renders the other acts evidence inadmissible, whether the evidence is used in the prosecution's case-in-chief or for impeachment." *Vega*, 188 F.3d at 1153. This categorical exclusion even applies to evidence intended "for possible rebuttal." *Id*. at 1154. The categorical nature of the exclusion is further explained in the rule's advisory committee notes: "Because the notice requirement serves as *condition precedent* to admissibility of 404(b) evidence, the offered evidence is *inadmissible* if the court decides that the notice requirement has not been met." Fed .R. Evid. 404(b) (adv. comm. notes–1991 amend.) (emphasis added).

Moreover, merely "providing such evidence to the defense in discovery is not enough to satisfy the notice requirements of Rule 404(b), which requires the government specifically to disclose 'the general nature of any such evidence it intends to introduce at trial.'" *United States v. Spinner*, 152 F.3d 950, 961 (D.C. Cir. 1998). Indeed, the Ninth Circuit has repeatedly held that the Government must not only provide notice, but must also identify how the noticed other acts evidence "is relevant to one or more issues in the case; specifically, it must articulate precisely

the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982) (citations omitted) (emphasis added); *see also United States v. Brooke,* 4 F.3d 1480, 1483 (9th Cir. 1993) (quoting *Mehrmanesh*). Courts have emphasized that the "incantation of the proper uses of such evidence under the rules does not magically transform inadmissible evidence into admissible evidence." *United States v. Morley*, 199 F.3d 129, 133 (3rd Cir. 1999).

Here, the Court set a discovery cut-off date of April 30, 2021, including for materials covered by Rule 16 and implementing Local Rule 16-1 (citing Rule 404(b)). *See* Minute Order (Docket #123) (filed Mar. 17, 2021); Amended Order (Docket #127) (filed Mar. 22, 2021). However, the government has not provided adequate notice regarding any evidence of other crimes, wrongs, or acts committed by Mr. CLIENTNAME that it might seek to introduce at trial. Instead, the only putative 404(b) notice provided by the government in this case has been cover letters conveying discovery between October 16, 2019, and January 7, 2020, containing the same generic statement: "The government also hereby gives notice that it may seek to introduce the other crimes, wrongs or acts committed by defendant which are referenced in the enclosed documents pursuant to Rules 404(b), 608 and/or 609 of the Federal Rules of Evidence." *See* Declaration of ATTORNEY NAME (filed concurrently with this memorandum) [hereinafter "ATTORNEY Decl."] ¶ 2 & Att. A. In doing so, the government did not even attempt to identify the particular evidence it would seek to admit under Rule 404(b), let alone the required "evidential hypothesis" for why these prior acts would be admissible under Rule 404(b). As a result of the government's utter failure to provide adequate notice under the applicable rules and orders of this Court, all other acts evidence is categorically inadmissible as a procedural matter pursuant to the authority cited above.[1]

[1] After 6:00 p.m., on Monday, May 17, one day before the filing date limine motions like this one, the government gave one additional Rule 404(b) notice regarding newly minted claims by the alleged female minor victim. These claims are addressed by separately filed memorandum.

This procedural bar is not a mere technicality. The Court has the duty to "make a focused determination of relevance mandated by" the Federal Rules of Evidence, as well as the local criminal rules, before any other acts evidence may be admitted. *Mayans*, 17 F.3d at 1183; *see also* Crim. L.R. 16-1(c)(3). The Court cannot, however, make such a determination in this case, because the government has not complied with its requirement of timely notice nor met its burden of proving that any such evidence is admissible in this case. Accordingly, the Court should preclude the government as a procedural matter from introducing at trial any "other acts" evidence.

III. EVIDENCE SUBSTANTIVELY INADMISSIBLE UNDER RULES 404(B), 403

Even where a defendant's alleged prior "other acts" are not as here procedurally barred by inadequate notice, the government still must then meet its substantive burden of demonstrating that such evidence is admissible under Federal Rules of Evidence 404(b) and 403. Prior acts that are untethered to a legitimate Rule 404(b) purpose are inadmissible at trial because they raise the forbidden inference that "the defendant is guilty because he committed another [] crime." *United States v. Luna*, 21 F.3d 874, 882 (9th Cir. 1994).

Specifically, to admit prior acts under this rule the government must clearly demonstrate why the proffered "bad" acts evidence "is relevant to one or more issues in the case; specifically, it must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." *Mehrmanesh*, 689 F.2d at 830 (emphasis added); *see also Huddleston v. United States*, 485 U.S. 681, 689 (1988) (stating that relevance is not an inherent characteristic, and that prior bad acts are not intrinsically relevant to motive, opportunity, intent, or absence of mistake); *Mayans*, 17 F.3d at 1181 (stating that reluctance to sanction use of other bad acts evidence stems from the principle that "guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing") (emphasis added); *see also Morley*, 199 F.3d at 133 (stating that "[e]vidence that is not relevant, by definition, cannot be offered for a

proper purpose, and evidence that may be relevant for some purposes may be irrelevant for the purpose for which it is offered").

In addition, the government, as the proponent of the proffered other acts evidence in this case, must demonstrate on the merits that each incident meets the requirements of a four-part test developed by the Ninth Circuit for evaluating that admissibility of such other acts evidence under Rule 404(b). Specifically, the government must show as to each proffered other act: 1) that the evidence is sufficient to support a finding that the defendant committed the other act; 2) that introduction of the other act tends to prove a material point at the trial on the charged offense; 3) that the other act is not too remote in time; and 4) that, in cases where knowledge and intent are at issue, the other act is similar to the charged offense. *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013 (9th Cir. 1995); *see also United States v. Curtin*, 489 F.3d 935, 958 (9th Cir. 2007) (en banc) (emphasizing that the government has the burden of proving the materiality of the element for which the other acts evidence is offered).

Moreover, even if the Court were to determine that the government had met its procedural disclosure obligations and that it had substantively demonstrated admissibility under Rule 404(b), the Court still must exclude such evidence under Federal Rule of Evidence 403 if its probative value is substantially outweighed by the danger of unfair prejudice, or other pertinent considerations such as wasting time. *See, e.g., Curtin*, 489 F.3d at 958 ("Because evidence of other crimes, wrongs, or acts carries with it the inherent potential to see the defendant simply as a bad person . . . a trial court must take appropriate care to see that this does not happen.").

Due to the complete failure of the government to provide the requisite notice identifying with particularity such other act evidence and its "evidential hypothesis" under Rule 404(b) prior to the deadline for limine motions, Mr. CLIENTNAME is left here to guess at what other acts evidence the government might seek to introduce at trial and for what putative purpose. Out of an abundance of caution, the following issues are briefly addressed.

Alleged Pimping in 2019. The Court has already granted the Mr. CLIENTNAME's motion to sever Counts One and Two, charging pimping of a minor in 2019, from Counts Three and Four, relating to the 2017 video that is the subject of the upcoming jury trial. *See* Minute Order (Docket #121) (filed Feb. 4, 2021). One of the arguments raised by government counsel in opposition to the severance motion was that they would in any event be seeking to introduce under Rule 404(b) the evidence of the pimping from 2019 at a severed trial on the 2017 video. *See* Opposition (Docket #112) (filed Dec. 30, 2020) at 4 & n.2. However, the Court rejected the government arguments and granted the motion to sever, noting among other things that the alleged pimping in 2019 was not in any meaningful way similar to or probative of the 2017 video. Accordingly, the Court should again reject any claim by the government that the alleged pimping is admissible under Rule 404(b) to the trial on the video and alternatively exclude such evidence as unduly prejudicial under Rule 403.[2]

Vague "Notice" of Sexual Abuse Experts. On April 30, 2021, government counsel emailed a letter to undersigned defense counsel captioned "Expert Notice Regarding Dr. Gail Goodman." *See* ATTORNEY Decl. ¶ 3 & Att. B. The letter purports to provide "a summary of the expected testimony of a Ph.D. psychologist, Dr. Gail Goodman." *Id.* Confusingly, the letter states both that the government "may offer Dr. Goodman's expert testimony in the areas identified below as relevant and appropriate to the evidence" and also that the government "will

[2] At 3:18 p.m. on Friday, May 14, 2021, (two weeks after the Court ordered discovery cut-off date of April 30, 2021), the government produced supplemental reports of interviews for the alleged female victim in Counts Three and Four, contradicting her prior interview statements and sworn grand jury testimony, to the extent that she is now claiming to have worked as a prostitute for a pimp named "Edguardo" before the video in this case was made, as well as claiming sexual contact with Mr. CLIENTNAME and requests to have her work as a prostitute for him after the video was made. The defense has not yet had an opportunity to fully digest these reports of interview, but they seem to suggest that the startling change in her account of what happened in this case was prompted by recent meetings with government counsel and multiple law enforcement officers. In response, undersigned counsel has made a follow-up discovery request to the government, and is separately moving to compel the production of the requested discovery by concurrently filed memorandum. In any event, Mr. CLIENTNAME respectfully moves to exclude under Rules 404(b), 403 and Rule 16, any and all testimony by the alleged female victim about such conduct occurring before or after the video at issue in this case was made.

not seek to introduce any of the below expert testimony unless it is relevant to helping the jury to understand the evidence presented to it." *Id.* Contrary to the requirements of Federal Rule of Criminal Procedure 16(a)(1)(G), the letter does not "describes the witness's opinions" with particularity. Instead, the letter merely identifies general categories of potential testimony –such as "[v]arious victim behaviors," "victim reactions," why victims "often refuse to disclose their abuse," "victim characteristics," "[c]ertain victim/offender dynamic," "victim characteristics and experience," "reasons why victims choose to disclose their abuse," and "memory of abuse"—without identifying any actual opinion or relevance to this case. *Id.*

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The government's letter goes on to state:

> The scope of Dr. Goodman's testimony, if any, will necessarily depend on the evidence, including any cross-examination.
>
> In addition to these areas, we reserve the right to elicit testimony regarding other matters that may be raised during cross-examination by the defendant, based on the testimony elicited from the defendant's experts, if any, or other witnesses, or the evidence introduced by the defendant. To the extent the court allows the defendant the same right, we reserve the right to elicit any additional testimony that this expert is qualified to provide should the need arise based on further developments in preparing for and during the trial.
>
> Separately, the government intends to offer lay testimony by Special Agent Meredith Sparano Stanger.
>
> The government reserves the right to supplement this notice with additional witnesses or additional information as necessary.

Id. Suffice to say the government's supposed "notice" provides no real notice at all of any actual expert opinions on these topics that the government may seek to introduce to the jury, let alone their relevance to this case, particularly to the extent that they may relate to any uncharged "other acts." Accordingly, all such expert testimony should be excluded from trial.

Evidence of Alleged Posting of 2017 Video on Social Media. According to the June 16, 2020, grand jury testimony of the case agent, the female alleged victim depicted in the 2017 video claimed that she saw the video "on a social media platform" and that "it was a family

member of Mr. CLIENTNAME's that posted it." *See* ATTORNEY Decl. ¶ 4. However, when the female alleged victim herself testified before the grand jury on July 28, 2020, she made no such claim. *See id.* In any event, Mr. CLIENTNAME is not charged in this case with distribution of child pornography or any conduct related to the supposed posting of the 2017 video on social media. Accordingly, such testimony would constitute "other acts" evidence precluded by Rules 404(b) and 403, as a procedural matter by the government's failure to timely notice its intention to introduce it and identify the relevant "evidential hypothesis," and as a substantive matter by, among other things, the total absence of any allegation that Mr. CLIENTNAME himself posted the video on social media or caused someone else to do so. Accordingly, all evidence of any alleged posting of the 2017 video on social media should be excluded from trial.

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Evidence of Alleged Possession of a Gun in September 2019. According to police reports provided by the government in discovery, when Richmond police officers arrested Mr. CLIENTNAME on September 24, 2019, they allegedly discovered a loaded firearm in a fanny pack underneath the driver's seat of Mr. CLIENTNAME's car. *See* ATTORNEY Decl. ¶ 5. Mr. CLIENTNAME was not a prohibited possessor at the time, nor is he charged in this case with any firearms-related charges. Allowing evidence of Mr. CLIENTNAME's alleged possession of the gun—testimonial or otherwise—would constitute "other acts" evidence precluded by Rules 404(b) and 403, both procedurally due to the government's failure to provide timely notice and substantively due to its utter lack of relevance to the child pornography charges. There is no apparent relevance or probative value this alleged firearm would have with regard to the instant charges of production/possession of child pornography. Considering the visceral reaction that many people have towards guns, allowing any evidence of this alleged firearm possession would be unduly prejudicial and would needlessly inject into the case an air of violence that does not exist otherwise. *See United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992) ("Rightly or wrongly, many people view weapons, especially guns, with fear and distrust.") Not only that, but it would also confuse the jury as to why they are hearing about a firearm in a child pornography

case, and would invite the jury to punish Mr. CLIENTNAME for possession of the uncharged firearm rather than the actual charges in the case. Accordingly, all evidence of the gun allegedly found in Mr. CLIENTNAME's car at the time of his arrest should be excluded from trial.

Finally, to the extent that undersigned defense counsel has failed to correctly guess the government's full unstated intentions, the right to oppose any additional "other acts" evidence that it would seek to introduce at trial is respectfully reserved.

CONCLUSION

For the aforementioned reasons, the Court should exclude from trial all "other acts" evidence under Rules 404(b) and 403, as well as Rule 16 and Local Rule 16-1.